
# SUPREME COURT OF THE STATE OF NEW YORK

## APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

### DECISIONS FILED

### MAY 3, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MAY 3, 2024

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

**715.1/22**
**CA 21-01060**
PRESENT: WHALEN, P.J., SMITH, CURRAN, AND BANNISTER, JJ.

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CANTON-POTSDAM HOSPITAL, ET AL.,
PLAINTIFFS-APPELLANTS,

V ORDER

S.A.F.E., LLC, ET AL., DEFENDANTS-RESPONDENTS.
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CANTON-POTSDAM HOSPITAL, ET AL.,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

GINA EMERSON AND ED ALBERTS,
THIRD-PARTY DEFENDANTS-APPELLANTS.

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BARCLAY DAMON LLP, ALBANY (DAVID M. COST OF COUNSEL), FOR PLAINTIFFS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

EPSTEIN BECKER & GREEN, P.C., NEW YORK CITY (JOHN HOUSTON POPE OF COUNSEL), MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, PURCHASE (THOMAS H. KUKOWSKI OF COUNSEL), AND MELVIN & MELVIN, PLLC, SYRACUSE (ROGER W. BRADLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY DEFENDANTS-APPELLANTS.

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Appeals from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered December 24, 2020. The order, inter alia, denied the motion of plaintiffs seeking, among other things, to vacate in part an order entered September 23, 2019.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 2, 2024,

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**795**

**KA 21-00042**

PRESENT: WHALEN, P.J., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADAM LAFFERTY, DEFENDANT-APPELLANT.

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ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

ADAM LAFFERTY, DEFENDANT-APPELLANT PRO SE.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (CATHERINE A. MENIKOTZ OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered March 3, 2020. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the third degree (Penal Law § 140.20).

Initially we note that, although the People assert that defendant's plea is illegal and must be vacated, once a court has accepted a guilty plea and the defendant has begun to serve the resulting sentence, this Court has "no statutory or 'inherent' authority to vacate the judgment at the People's request, except in certain limited circumstances," none of which are present here (*People v Moquin*, 77 NY2d 449, 451 [1991], *rearg denied* 78 NY2d 952 [1991]). Next, as defendant contends in his main brief and as the People correctly concede, defendant's waiver of the right to appeal is not valid inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Harlee*, 187 AD3d 1586, 1587 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]).

Defendant contends in his main and pro se supplemental briefs that he was deprived of effective assistance of counsel because defense counsel allowed him to waive his right to a hearing pursuant to *People v Outley* (80 NY2d 702, 713 [1993]) prior to County Court's

imposition of an enhanced sentence even though the court had not warned defendant of the consequences of violating the conditions of the plea agreement. Even assuming, arguendo, that defendant's contention survives his guilty plea (*see People v McFarley*, 144 AD3d 1521, 1522 [4th Dept 2016]), we conclude that, inasmuch as defendant's contention involves matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Roach*, 213 AD3d 1274, 1274 [4th Dept 2023]; *People v Espinal*, 178 AD3d 517, 517 [1st Dept 2019], *lv denied* 34 NY3d 1158 [2020]; *People v Black*, 161 AD3d 997, 997-998 [2d Dept 2018], *lv denied* 32 NY3d 935 [2018]). Defendant's contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel at the time of the grand jury proceedings does not survive his guilty plea inasmuch as defendant failed to demonstrate that his "acceptance of the plea was infected by any ineffective assistance of counsel" (*People v Petgen*, 55 NY2d 529, 534-535 [1982], *rearg denied* 57 NY2d 674 [1982]).

Defendant's contention in his main and pro se supplemental briefs with respect to his request for substitution of counsel "is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea" (*People v Phillips*, 56 AD3d 1163, 1164 [4th Dept 2008], *lv denied* 12 NY3d 761 [2009]; *see People v Williams*, 6 AD3d 746, 747 [3d Dept 2004], *lv denied* 3 NY3d 650 [2004]). Moreover, defendant abandoned that request when he "decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Hobart*, 286 AD2d 916, 916 [4th Dept 2001], *lv denied* 97 NY2d 683 [2001]; *see People v Munzert*, 92 AD3d 1291, 1292 [4th Dept 2012]).

By pleading guilty, defendant forfeited his contention in his main and pro se supplemental briefs that he was denied the right to testify before the grand jury (*see People v Winchester*, 38 AD3d 1336, 1337 [4th Dept 2007], *lv denied* 9 NY3d 853 [2007]; *People v Vincent*, 305 AD2d 1108, 1109 [4th Dept 2003], *lv denied* 100 NY2d 588 [2003]). Defendant's sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**858**

**KA 22-00437**

PRESENT: SMITH, J.P., BANNISTER, OGDEN, GREENWOOD, AND DELCONTE, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD HUNT, DEFENDANT-APPELLANT.

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ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered February 22, 2022. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child (three counts) and sexual abuse in the third degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of sexual abuse in the third degree and endangering the welfare of a child under counts 4, 5, 7, and 8 of the indictment and dismissing those counts without prejudice to the People to re-present any appropriate charges under those counts of the indictment to another grand jury, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts each of endangering the welfare of a child (Penal Law § 260.10 [1]) and sexual abuse in the third degree (§ 130.55). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence on the basis that the victim's testimony was lacking in detail (*see People v Beard*, 100 AD3d 1508, 1509 [4th Dept 2012]; *see generally People v Gray*, 86 NY2d 10, 19 [1995]). In any event, that contention lacks merit because the conviction is supported by legally sufficient evidence (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends that County Court's verdict sheet annotations were improper. We reject that contention (*see People v Lewis*, 23 NY3d 179, 187 [2014]).

Additionally, defendant contends that the court erred in denying his pretrial motion to dismiss insofar as it sought to dismiss counts 4, 5, 7, and 8 of the indictment on the ground that those counts were facially defective and that the court erred in denying his motion for a trial order of dismissal insofar as it sought to dismiss counts 4, 5, 7, and 8 on the ground that the trial testimony failed to provide any distinguishing facts about the alleged incidents, rendering those counts duplicitous. Counts 4 and 5 both allege that defendant committed sexual abuse in the third degree (Penal Law § 130.55) "on or about and between the month of November 2019 and January 12, 2020." Counts 7 and 8 both allege that defendant committed the offense of endangering the welfare of a child (§ 260.10 [1]) through sexual contact, "on or about and between the month of November 2019 and January 12, 2020." The People represented that counts 7 and 8 were for single acts, not for a course of conduct.

An indictment must provide a defendant with fair notice of the nature of the charges against them, including the time, manner, and location of the alleged conduct, in order to allow the defendant to prepare an adequate defense (*see People v Morris*, 61 NY2d 290, 293 [1984]; *People v Iannone*, 45 NY2d 589, 594 [1978]; *People v Kulzer*, 155 AD2d 882, 882 [4th Dept 1989], *lv denied* 75 NY2d 869 [1990]). With respect to time frame, " '[t]he indictment must set forth a time interval that reasonably serves the function of protecting defendant's constitutional right to be informed of the nature and cause of the accusation' " (*People v Aaron V.*, 48 AD3d 1200, 1201 [4th Dept 2008], *lv denied* 10 NY3d 955 [2008]; *see* CPL 200.50 [6]). However, CPL 200.50 (6) "neither requires the exact date and time, nor does it restrict the length of the designated period of time which may be stated" (*People v Keindl*, 68 NY2d 410, 417 [1986], *rearg denied* 69 NY2d 823 [1987]). Here, we conclude that the indictment provided defendant with fair notice of the nature of the charges against him (*see Aaron V.*, 48 AD3d at 1201; *see also People v Snyder*, 103 AD3d 1143, 1145-1146 [4th Dept 2013]), and thus the court did not err in denying defendant's pretrial motion to dismiss with respect to those counts of the indictment.

We agree with defendant, however, that the trial testimony rendered counts 4, 5, 7, and 8 duplicitous. " 'Even if a count facially charges one criminal act, that count is duplicitous if the evidence makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict' " (*People v Dukes*, 122 AD3d 1370, 1371 [4th Dept 2014], *lv denied* 26 NY3d 928 [2015]; *see People v Wade*, 118 AD3d 1370, 1371 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]; *People v Casiano*, 117 AD3d 1507, 1509-1510 [4th Dept 2014]; *People v Bracewell*, 34 AD3d 1197, 1198 [4th Dept 2006]). A duplicitous count "may undermine the requirement of jury unanimity," inasmuch as some jurors may find that defendant committed one criminal act under the count, while other jurors may find that defendant committed some other criminal act under the same count (*People v Alonzo*, 16 NY3d 267, 269 [2011]).

At trial, the victim was unable to identify the number of times defendant touched her during the relevant time period. She testified that he touched her breasts "[a]t least two" times. The victim also testified that defendant put his fingers inside her vagina "[p]robably at least three" times and licked her vagina "[a]t least three times." She further testified that when he touched her vagina, he would also touch her breasts, but she could not "remember the specifics" of each occurrence. Under the circumstances presented here, we conclude, with respect to counts 4, 5, 7, and 8, that "it is impossible to determine whether the jury reached a unanimous verdict on those counts . . . [and] impossible to determine whether defendant was convicted of an act for which he was not indicted" (*Dukes*, 122 AD3d at 1372). We therefore modify the judgment accordingly, and we grant the People leave to re-present appropriate charges under counts 4, 5, 7, and 8, if any, to another grand jury (*see id.*).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**939**

**CAF 19-02129**

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

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IN THE MATTER OF DANYEL J. AND JOHN J.
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JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ALAN J., RESPONDENT,
AND LEEANN B., RESPONDENT-APPELLANT.

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

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

MELISSA L. KOFFS, CHAUMONT, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Jefferson County (Daniel R. King, A.J.), entered October 1, 2019, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondents with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject children.

We reject the mother's contention that the record does not establish a knowing, voluntary, and intelligent waiver of her right to counsel. "New York State law recognizes that '[p]ersons involved in certain family court proceedings may face the infringement of fundamental interests and rights, including the loss of a child's society . . . , and therefore have a constitutional right to counsel in such proceedings' " (*Matter of DiNunzio v Zylinski*, 175 AD3d 1079, 1081 [4th Dept 2019], quoting Family Ct Act § 261). Parties entitled to counsel include, as pertinent here, "the parent . . . in any proceeding under . . . social services law [§ 384-b]" (§ 262 [a] [vi]). "When determining whether a party may properly waive the right to counsel in favor of proceeding pro se, the trial court, [i]f a timely and unequivocal request has been asserted, . . . is obligated to conduct a searching inquiry to ensure that the party's waiver is knowing, intelligent, and voluntary" (*DiNunzio*, 175 AD3d at 1081 [internal quotation marks omitted]; *see Matter of Kathleen K. [Steven*

*K.]*, 17 NY3d 380, 385 [2011]). Here, when considering the totality of the record, it is clear that the mother "was aware of the dangers and disadvantages of proceeding without counsel," and nevertheless made a knowing, intelligent, and voluntary waiver of that right (*DiNunzio*, 175 AD3d at 1083 [internal quotation marks omitted]; *see Matter of Brown v Brown*, 127 AD3d 1180, 1181 [2d Dept 2015]; *Matter of Jazmone S.*, 307 AD2d 320, 321-322 [2d Dept 2003], *lv dismissed* 100 NY2d 615 [2003], *lv dismissed* 1 NY3d 584 [2004]).

Contrary to the mother's contention, we conclude that petitioner established by clear and convincing evidence that it made the requisite diligent efforts, i.e., "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child[ren]" (Social Services Law § 384-b [7] [f]; *see Matter of Ayden D. [John D.]*, 202 AD3d 1455, 1456 [4th Dept 2022]).

We likewise reject the mother's contention that petitioner failed to establish by clear and convincing evidence that she permanently neglected the children. Permanent neglect "may be found only after it is established that the parent has failed substantially and continuously or repeatedly to maintain contact with or plan for the future of the child[ren] although physically and financially able to do so" (*Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). Here, the mother often left visits early when she grew frustrated with the children's behavior, and spent much of her time at visits focusing on the neglect proceedings rather than spending time building her relationship with the children. Thus, we conclude that Family Court properly found that the mother failed to maintain substantial contact with the children (*see Matter of Cheyenne C. [James M.]*, 185 AD3d 1517, 1519-1520 [4th Dept 2020], *lv denied* 35 NY3d 917 [2020]). Similarly, we conclude that the court properly found that the mother had failed "to plan for the future of the child[ren]" by taking "such steps as may be necessary to provide an adequate, stable home and parental care for the child[ren]" (*id.* at 1519 [internal quotation marks omitted]; *see* Social Services Law § 384-b [7] [c]). Despite the fact that the children were removed due, in part, to concerns over domestic violence, the mother refused to acknowledge the history of domestic violence between her and respondent father, and failed to "take meaningful steps to correct the conditions that led to the child[ren]'s removal" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016] [internal quotation marks omitted]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**944**

**CA 22-01680**

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

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SANDRA GARCIA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BLACK SEA PROPERTIES, LLC, PEP BOYS-MANNY, MOE & JACK OF DELAWARE, INC., DEFENDANTS.

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PEP BOYS-MANNY, MOE & JACK OF DELAWARE, INC., THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT,

V

FACILITYSOURCE, LLC, THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT, AND RED ROSE LANDSCAPING, LLC, THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

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COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (KELLY J. PARE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT-RESPONDENT.

CLYDE & CO US LLP, NEW YORK CITY (KEVIN C. MCCAFFREY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT-APPELLANT.

RUPP PFALZGRAF LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

LAW OFFICES OF ROBERT D. BERKUN, LLC, AMHERST (KENETH P.L. LOWE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal and cross-appeals from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered October 4, 2022. The order, among other things, granted in part the motion of third-party defendant Red Rose Landscaping, LLC for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of third-party defendant FacilitySource, LLC, in part and dismissing the causes of action against it for contribution, common-law indemnification, and the failure to procure insurance and the cross-claims against it for contribution and common-law indemnification; and denying third-party defendant Red Rose Landscaping, LLC's motion in its entirety and reinstating FacilitySource, LLC's cross-claim against it for failure to procure insurance, and as modified the order is affirmed without costs.

Memorandum: This personal injury action arose when plaintiff slipped and fell in the parking lot on property owned by defendant Black Sea Properties, LLC (Black Sea) and leased by defendant-third-party plaintiff Pep Boys–Manny, Moe & Jack of Delaware, Inc. (Pep Boys). Pep Boys contracted with third-party defendant FacilitySource, LLC (FacilitySource) to manage the subject property. Included in the scope of FacilitySource's responsibilities was snow and ice removal. In order to fulfill its snow and ice removal obligations, FacilitySource entered into a Service Provider Agreement (SPA) with third-party defendant Red Rose Landscaping, LLC (Red Rose).

Plaintiff commenced this action against Black Sea and Pep Boys, alleging that they had failed to maintain the subject premises in a reasonably safe condition. Pep Boys answered and commenced a third-party action against FacilitySource and Red Rose, asserting causes of action for contribution, common-law indemnification, and contractual indemnification, as well as a cause of action against FacilitySource for failing to procure insurance naming Pep Boys as an additional insured. Red Rose answered and asserted a cross-claim against FacilitySource for indemnification and contribution. FacilitySource answered and asserted its own cross-claims against Red Rose for common-law indemnification and contribution, contractual indemnification, and failure to procure insurance naming FacilitySource as an additional insured.

Red Rose moved for summary judgment seeking dismissal of all claims and cross-claims against it. FacilitySource moved for summary judgment dismissing the amended third-party complaint and cross-claims against it, and for summary judgment on FacilitySource's cross-claims against Red Rose for contractual indemnification and failing to procure insurance. Pep Boys cross-moved for, inter alia, summary judgment on the amended third-party complaint and dismissing the amended complaint against it.

Supreme Court granted Red Rose's motion for summary judgment in part by dismissing the cross-claim against it alleging that it had failed to procure insurance coverage. The order otherwise denied the motions and cross-motions. FacilitySource appeals, and Pep Boys and Red Rose cross-appeal.

In its cross-appeal, Red Rose contends that it established its entitlement to summary judgment by demonstrating that plaintiff was unable to identify the cause of her fall without engaging in improper speculation and, therefore, all claims and cross-claims against it must be dismissed. We reject that contention. "To establish a prima facie case of negligence based wholly on circumstantial evidence, '[i]t is enough that [plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred' " (*Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 744 [1986], quoting *Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7 [1938]). Here, although Red Rose submitted the deposition testimony of plaintiff, wherein she testified that she did not see what caused her fall, she also testified that there was a "lot of water and slush and ice on the ground where [she] was walking"

and affirmed that she felt her "foot slip out from under [her]." Additionally, after she fell, her clothes were "soaking wet," and there was a "little bit" of slush on her jacket. Thus, Red Rose failed to meet its initial burden of establishing that plaintiff "was unable to specify what caused her to fall 'without engaging in speculation' " (*Smart v Zambito*, 85 AD3d 1721, 1721 [4th Dept 2011]; *cf. McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077 [4th Dept 2008]). Although plaintiff could not specifically identify the cause of her fall, there is "sufficient evidence in the record from which a jury could reasonably conclude that the [water, slush, and ice] caused or contributed to plaintiff's accident" (*Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293 [4th Dept 2010]). Stated another way, plaintiff's deposition testimony in which she stated that she fell in the "immediate vicinity" where she observed the water, slush, and ice rendered "any other potential cause of her fall 'sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' " (*Nolan v Onondaga County*, 61 AD3d 1431, 1432 [4th Dept 2009]; *see generally Schneider*, 67 NY2d at 744).

Regarding the cause of action and cross-claims for contractual indemnification, FacilitySource contends on its appeal that the court erred in denying those parts of its motion seeking summary judgment dismissing Pep Boys's cause of action for contractual indemnification against it and seeking summary judgment on its cross-claim for contractual indemnification against Red Rose. Pep Boys contends on its cross-appeal that the court erred in denying its cross-motions with respect to the contractual indemnification causes of action against FacilitySource and Red Rose. Red Rose contends on its cross-appeal that the court erred in denying that part of its motion seeking summary judgment dismissing the cause of action and cross-claim against it for contractual indemnification. We reject those contentions.

As an initial matter, contrary to Red Rose's suggestion, Pep Boys, as FacilitySource's customer, is an intended third-party beneficiary of the indemnification provision of the SPA as a matter of law (*see generally Beasock v Canisius Coll.*, 126 AD3d 1403, 1404 [4th Dept 2015]). Thus, insofar as Red Rose claims that Pep Boys is not entitled to contractual indemnification based on lack of privity, that claim is rejected.

" '[T]he right to contractual indemnification depends upon the specific language of the contract' " (*Vega v FNUB, Inc.*, 217 AD3d 1475, 1479 [4th Dept 2023]; *see Allington v Templeton Found.*, 167 AD3d 1437, 1441 [4th Dept 2018]). The contractual indemnification cause of action and cross-claim against Red Rose arise from the SPA. In pertinent part, the SPA requires Red Rose to indemnify FacilitySource and FacilitySource's customers for claims arising out of "(i) any act or omission of [Red Rose] . . . ; (ii) any failure of [Red Rose] . . . to perform the Services [under the SPA] in accordance with generally accepted industry and professional standards; (iii) any breach of [Red Rose's] representations as set forth in [the SPA]; or (iv) any other failure of [Red Rose] . . . to comply with the obligations on [Red

Rose's] part to be performed" (collectively, triggering event). Also, pursuant to the SPA, Red Rose was required to "plow and shovel snow" in various areas on the subject property when at least two inches of snow had fallen with the objective of achieving bare pavement and in a manner that avoided impeding customer access to parking, sidewalks and customer entrances. The SPA required Red Rose to perform various de-icing services, as necessary, after plowing and "in freezing conditions, or in anticipation of freezing conditions."

Here, although the record before the court contained evidence that Red Rose serviced the property at 3:00 a.m. on the date of plaintiff's accident and regarding which vehicles were involved in that service, the record is devoid of evidence about the services actually performed at that time. Moreover, there is no evidence regarding the temperature on the morning of the incident, or whether a sufficient amount of snow had fallen that would require Red Rose to perform its contractual duties. Thus, we conclude that there are triable issues of fact whether Red Rose's acts or omissions constituted a triggering event requiring it to indemnify FacilitySource or Pep Boys pursuant to the SPA. The court therefore properly denied those parts of the cross-motion of Pep Boys and the motion of FacilitySource seeking summary judgment on the cause of action and cross-claim, respectively, for contractual indemnification against Red Rose, and also properly denied that part of the motion of Red Rose seeking summary judgment dismissing the contractual indemnification cause of action and cross-claim against it (*see generally Olivieri v Barnes & Noble, Inc.*, 208 AD3d 1001, 1003-1004 [4th Dept 2022]).

Similarly, based upon the language of the Master Services Agreement (MSA) between Pep Boys and FacilitySource, we conclude that the court properly denied that part of Pep Boys's cross-motion and that part of FacilitySource's motion with respect to the contractual indemnification cause of action against FacilitySource. Pursuant to the indemnification provision in the MSA, FacilitySource was required to indemnify Pep Boys for FacilitySource's own negligence in the performance of its contractual duties or for the negligence of its subcontractor, i.e., Red Rose. As noted, inasmuch as there is no evidence regarding the temperature, the amount of snowfall, or what services Red Rose performed on the date of the accident, issues of fact exist whether Red Rose was negligent and thus whether the indemnification provision in the MSA was triggered (*see generally Krajnik v Forbes Homes, Inc.*, 120 AD3d 902, 904 [4th Dept 2014]; *Hennard v Boyce*, 6 AD3d 1132, 1134 [4th Dept 2004]; *Brickel v Buffalo Mun. Hous. Auth.*, 280 AD2d 985, 985 [4th Dept 2001]). Further, insofar as Pep Boys contends that it is entitled to indemnification from FacilitySource based upon FacilitySource's negligent selection of Red Rose as a contractor, we agree with the court that such a contention incorrectly presupposes a finding that Red Rose actually acted negligently.

With respect to Pep Boys's cause of action and Red Rose's cross-claim for contribution against FacilitySource, FacilitySource contends on its appeal that the court erred in denying that part of its motion

for summary judgment dismissing the contribution cause of action and cross-claim against it because it owed no independent duty of care to plaintiff. We agree, and we therefore modify the order accordingly. " 'To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that the third-party defendant owed it a duty of reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries' " (*Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 [4th Dept 2011]). A claim for contribution should be dismissed when the party from which contribution is sought owed no legal duty to the injured plaintiff or the party seeking contribution other than its contractual obligations (*see Abramowitz v Home Depot USA, Inc.*, 79 AD3d 675, 677 [2d Dept 2010]). Here, FacilitySource established that it did not owe Pep Boys or Red Rose a legal duty outside of its contractual obligation. Thus, the viability of the contribution claim and cross-claim against FacilitySource turns on whether it owed plaintiff a duty of care.

Regarding that issue, the Court of Appeals has explained that, "a party who enters a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of [their] duties, launche[s] a force or instrument of harm . . . ; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . , and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002] [internal quotation marks omitted]). Here, FacilitySource established that none of the *Espinal* exceptions apply, and neither Pep Boys nor Red Rose raised a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). For the same reasons that we conclude that FacilitySource is entitled to summary judgment dismissing the contribution cause of action and cross-claim against it, we reject Pep Boys's contention on its cross-appeal that the court erred in denying that part of its cross-motion seeking summary judgment on the contribution cause of action against FacilitySource.

By contrast, contrary to the contentions of Red Rose on its cross-appeal, we conclude that the court properly denied Red Rose's motion for summary judgment insofar as it sought dismissal of Pep Boys's and FacilitySource's respective cause of action and cross-claim for contribution against it because there are triable issues of fact whether Red Rose failed to exercise reasonable care in the performance of its duties and thereby launched a force or instrument of harm (*see Meyers-Kraft v Keem*, 64 AD3d 1172, 1173 [4th Dept 2009]; *see also Bregaudit v Loretto Health & Rehabilitation Ctr.*, 211 AD3d 1582, 1583-1584 [4th Dept 2022]). As stated above, there is no evidence regarding what services Red Rose performed on the date of the accident or if it left the ice and snow that allegedly caused plaintiff's slip and fall. Thus, because a triable issue of fact exists, there is no basis to grant that part of Red Rose's motion seeking summary judgment

dismissing the contribution cause of action or cross-claim against it. To the extent that Pep Boys contends on its cross-appeal that the court erred in denying that part of its cross-motion seeking summary judgment on its cause of action for contribution against Red Rose, we reject that contention for the same reason.

We further agree with FacilitySource on its appeal that the court erred in denying that part of its motion seeking summary judgment dismissing the common-law indemnification cause of action and cross-claim against it, and we therefore further modify the order accordingly. "[T]o establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Provens v Ben-Fall Dev., LLC*, 163 AD3d 1496, 1499 [4th Dept 2018] [internal quotation marks omitted]). Here, FacilitySource met its initial burden on its motion of establishing that it was free of any " 'negligence that contributed to the cause of plaintiff's accident' " (*York v Thompson Sta. Inc.*, 172 AD3d 1593, 1597 [3d Dept 2019]), and Pep Boys and Red Rose did not raise an issue of fact in opposition thereto. Thus, we likewise reject Pep Boys's contention on its cross-appeal that the court erred in denying that part of its cross-motion seeking summary judgment on the common-law indemnification cause of action against FacilitySource.

Contrary to the contention of Pep Boys and Red Rose on their respective cross-appeals, we conclude that the court properly denied that part of Red Rose's motion seeking summary judgment dismissing the common-law indemnification cause of action and cross-claim against it and that part of Pep Boys's cross-motion seeking summary judgment on its common-law indemnification cause of action against Red Rose. There are issues of fact whether Red Rose's negligence may have contributed to plaintiff's accident, i.e., whether it launched the force or instrument of harm that resulted in plaintiff's injury (*see generally Espinal*, 98 NY2d at 140).

FacilitySource further contends on its appeal that the court erred in denying that part of its motion seeking summary judgment dismissing Pep Boys's cause of action against it for failure to procure and maintain insurance. We agree, and we further modify the order accordingly. FacilitySource met its initial burden with respect to that part of the motion. Pep Boys did not oppose the motion to that extent, thus implicitly conceding FacilitySource's entitlement to summary judgment on that ground (*see Whitaker v Kennedy/Town of Poland*, 162 AD3d 1542, 1543-1544 [4th Dept 2018]; *Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521 [4th Dept 2015]), and, in any event, failed to raise an issue of fact precluding summary judgment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to the contention of Red Rose on its cross-appeal, we conclude that triable issues of fact exist whether Red Rose procured the required insurance and, therefore, we agree with FacilitySource on appeal that the court erred in granting that part of Red Rose's motion

seeking summary judgment dismissing FacilitySource's cross-claim for failure to procure insurance (*see generally Zuckerman*, 49 NY2d at 562). We further modify the order accordingly.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**974**

**KA 20-01192**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS ORTEGA, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered September 3, 2020. The judgment convicted defendant upon a plea of guilty of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that his waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Ahmed*, 188 AD3d 1626, 1626 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**991**

**CA 22-01746**

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

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CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANNA J. SMITH, AS TRUSTEE OF THE THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, AND AS EXECUTOR OF THE ESTATE OF THEODORE P. SMITH, DECEASED, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered January 31, 2022. The order, inter alia, denied the motion of defendant for an evidentiary hearing on, inter alia, the partition of real property.

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

Same memorandum as in *Smith v Smith* ([appeal No. 4] – AD3d – [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**992**

**CA 22-01747**

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

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CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANNA J. SMITH, AS TRUSTEE OF THE THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, AND AS EXECUTOR OF THE ESTATE OF THEODORE P. SMITH, DECEASED, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered June 17, 2022. The order, inter alia, ordered the public sale of certain real property.

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

Same memorandum as in *Smith v Smith* ([appeal No. 4] – AD3d – [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**993**

**CA 23-00858**

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

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CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANNA J. SMITH, AS TRUSTEE OF THE THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, AND AS EXECUTOR OF THE ESTATE OF THEODORE P. SMITH, DECEASED, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered May 5, 2023. The order, inter alia, directed the public sale of certain real property.

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

Same memorandum as in *Smith v Smith* ([appeal No. 4] – AD3d – [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**994**

**CA 23-01008**

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

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CHRISTOPHER SMITH AND MICHAEL SMITH, AS TRUSTEES OF THE JAY AND PATRICIA SMITH IRREVOCABLE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ANNA J. SMITH, AS TRUSTEE OF THE THEODORE P. SMITH INCOME ONLY IRREVOCABLE TRUST, AND AS EXECUTOR OF THE ESTATE OF THEODORE P. SMITH, DECEASED, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

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HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND SCHOENECK & KING, PLLC, SYRACUSE (DANIEL J. PAUTZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (John H. Crandall, A.J.), entered May 4, 2023. The order and judgment, inter alia, ordered a partition and sale of certain real property.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Herkimer County, for further proceedings in accordance with the following memorandum: These appeals involve real property owned by the Jay and Patricia Smith Irrevocable Trust and the Theodore P. Smith Income Only Irrevocable Trust as tenants in common. Plaintiffs, who are trustees of the Jay and Patricia Smith Irrevocable Trust, commenced this action seeking, inter alia, a judgment directing that the property be sold at public auction. Defendant, who is the trustee of the Theodore P. Smith Income Only Irrevocable Trust and the executor of the estate of Theodore P. Smith (decedent), filed an answer and asserted several counterclaims, including a counterclaim seeking to partition the property under RPAPL 993. Ultimately, Supreme Court issued an order and judgment directing, inter alia, that the property be sold at public auction.

In appeal No. 1, defendant appeals from an order denying an oral motion by defendant and decedent for, inter alia, a hearing on whether the property may be partitioned without undue prejudice to the parties and an accounting. We dismiss that appeal inasmuch as the oral motion was not made on notice, and therefore defendant may not appeal as of

right from the order denying the motion (*see* CPLR 5701 [a] [2], [3]; *Matter of Henshaw v Hildebrand*, 191 AD3d 1237, 1238 [4th Dept 2021]).

In appeal No. 2, defendant appeals from an order that, inter alia, directed that the property be sold at public auction, which the court subsequently vacated. That appeal must be dismissed inasmuch as "[n]o appeal lies from a vacated . . . order" (*Matter of Niagara Mohawk Power Corp. v Town of Tonawanda Assessor*, 219 AD2d 883, 883 [4th Dept 1995]).

In appeal No. 3, defendant appeals from a subsequent order that also directed, inter alia, that the property be sold at public auction. That appeal must be dismissed inasmuch as the order in appeal No. 3 was superseded by the order and judgment in appeal No. 4 (*see Wells Fargo Bank, N.A. v Cafasso*, 158 AD3d 848, 848 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Weiss*, 133 AD3d 704, 704 [2d Dept 2015]; *see generally Amendola v Kendzia*, 17 AD3d 1105, 1106-1107 [4th Dept 2005]; *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

In appeal No. 4, defendant appeals from an order and judgment that, inter alia, directed that the property be sold at public auction under the direction of a named referee. We reverse in appeal No. 4 because the court erred in effectively converting the oral motion seeking a hearing to a summary judgment motion.

"A person holding and in possession of real property as joint tenant or tenant in common . . . may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners" (RPAPL 901 [1]). "The right to partition is not absolute, however, and . . . the remedy is always subject to the equities between the parties" (*Coston v Greene*, 188 AD3d 1147, 1147 [2d Dept 2020] [internal quotation marks omitted]; *see Cooney v Shepard*, 118 AD3d 1376, 1377 [4th Dept 2014]).

"The actual physical partition of property is statutorily authorized as the preferred method and is presumed appropriate unless one party demonstrates that physical partition would cause great prejudice to the owners, in which case the property must be sold at public auction" (*Snyder Fulton St., LLC v Fulton Interest, LLC*, 57 AD3d 511, 513 [2d Dept 2008], *lv dismissed* 12 NY3d 755 [2009]; *see* RPAPL 915). "Whether physical partition or sale is appropriate is a question of fact" (*Snyder Fulton St., LLC*, 57 AD3d at 513; *see Macy v Nelson*, 62 NY 638, 638-639 [1875]). "The question is whether the whole property, taken together, will be greatly injured or diminished in value if separated into . . . parts, in the hands of . . . different persons, according to their several rights or interests in the whole: in other words, whether the aggregate value of the several parts when held by different individuals in severalty will be materially less than the whole value of the property if owned by one person" (*Snyder Fulton St., LLC*, 57 AD3d at 513 [internal quotation marks omitted]).

Here, defendant and decedent made an oral motion for, inter alia, a hearing on whether the property could be partitioned. Rather than decide that motion, the court directed the parties to exchange expert reports and set the matter down for a conference, at which time a hearing would be scheduled if the parties could not come to an agreement regarding partition. However, when the parties appeared for the scheduled conference, the court did not set a date for the hearing, but, instead, held the conference, and subsequently, in effect, granted summary judgment to plaintiffs. Because "there was no motion for summary judgment pending before the court at that time, . . . it was error for the court to grant such relief" (*Guo v Mon-Chin Guo*, 137 AD3d 974, 975 [2d Dept 2016]). Although a court "has the power to award summary judgment to a nonmoving party, predicated upon a motion for the relief by another party, it may not sua sponte award summary judgment if no party has moved for summary judgment . . . , unless it appears from a reading of the parties' papers that they were deliberately charting a course for summary judgment by laying bare their proof" (*Case v Cayuga County*, 60 AD3d 1426, 1427-1428 [4th Dept 2009], *lv dismissed* 13 NY3d 770 [2009] [internal quotation marks omitted]). Here, contrary to plaintiffs' contention, it does not appear that the parties were deliberately charting a course for summary judgment. Indeed, the only motion pending before the court was the oral motion of defendant and decedent for, inter alia, a hearing. Therefore, we reverse the order and judgment in appeal No. 4 and remit the matter for a hearing on whether the property may be partitioned without undue prejudice and for an accounting. The accounting shall be held "*before* interlocutory judgment is rendered" (RPAPL 911 [emphasis added]; *see Tuminno v Waite*, 110 AD3d 1456, 1457-1458 [4th Dept 2013]; *Colley v Romas*, 50 AD3d 1338, 1340 [3d Dept 2008]; *Grossman v Baker*, 182 AD2d 1119, 1119 [4th Dept 1992]).

Further, contrary to plaintiffs' contention, we conclude that in appeal No. 4 defendant submitted the "papers and other exhibits upon which the judgment or order was founded" (CPLR 5526).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**3**

**KA 21-00615**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL GREEN, JR., DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered August 4, 2020. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We agree with defendant, and the People correctly concede, that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We are therefore not precluded from reviewing defendant's challenge to the severity of his sentence. Nevertheless, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**7**

**CA 23-00416**

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

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BOGDAN MSCICHOWSKI, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MLMIC INSURANCE COMPANY, FORMERLY KNOWN AS MEDICAL LIABILITY MUTUAL INSURANCE COMPANY, DEFENDANT-RESPONDENT.

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ROTHENBERG LAW, ROCHESTER (DAVID ROTHENBERG OF COUNSEL), AND CERULLI, MASSARE & LEMBKE, FOR PLAINTIFF-APPELLANT.

RIVKIN RADLER LLP, UNIONDALE (JOANNE M. ENGELDRUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Gail Donofrio, J.), entered February 1, 2023, in a declaratory judgment action. The order and judgment denied the motion of plaintiff for partial summary judgment, granted the cross-motion of defendant for summary judgment and declared that defendant has no duty to defend or indemnify plaintiff in the underlying action.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the cross-motion is denied, the declaration is vacated, the motion is granted in part, judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that defendant is obligated to defend plaintiff in the underlying action,

and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Plaintiff, a licensed pediatrician, commenced this action seeking, among other things, a declaration that defendant has a duty to defend and indemnify him in the underlying action commenced against him by a former patient who alleges that plaintiff sexually abused her as a child. Plaintiff moved for partial summary judgment declaring that defendant is obligated to defend him in the underlying action, and defendant cross-moved for summary judgment declaring that it has no duty to defend or to indemnify plaintiff in the underlying action. Supreme Court denied plaintiff's motion and granted defendant's cross-motion on the grounds that the complaint in the underlying action did not assert claims arising from a "medical incident" or "professional services," as those terms are defined in the subject insurance policy,

and in any event that the policy's exclusion for sexual assault precluded coverage. The court therefore granted judgment to defendant declaring that it has no duty to defend or indemnify plaintiff in the underlying action. On appeal, plaintiff contends that the court erred in denying his motion and in granting the cross-motion. We agree.

"It is well settled that an insurance company's duty to defend is broader than its duty to indemnify" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]). "Indeed, the duty to defend is exceedingly broad[,] and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*id*. [internal quotation marks omitted]). In fact, "the duty to defend exists even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (*Batt v State of New York*, 112 AD3d 1285, 1286-1287 [4th Dept 2013] [internal quotation marks omitted]; *see Automobile Ins. Co. of Hartford*, 7 NY3d at 137; *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). "If [the] complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks omitted]; *see Main St. Am. Assur. Co. v Merchants Mut. Ins. Co.*, 209 AD3d 1266, 1267 [4th Dept 2022]; *Pixley Dev. Corp. v Erie Ins. Co.*, 174 AD3d 1415, 1416 [4th Dept 2019]).

Here, although the complaint in the underlying action primarily alleges that plaintiff sexually abused his former patient during a medical examination, it also contains "facts or allegations" that bring the claim "potentially within the protection purchased" for claims arising from professional services rendered by plaintiff, thus triggering the duty to defend (*Technicon Elecs. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989]; *see Chung v Physicians Reciprocal Insurers*, 221 AD2d 907, 907 [4th Dept 1995]). For instance, the underlying complaint alleges that plaintiff improperly diagnosed, cared for and treated the former patient in question, and failed to provide her with "proper and appropriate pediatric care." The underlying complaint further alleges that plaintiff inserted his finger into the former patient's vagina "without gloves," suggesting that perhaps such action would have been medically proper had plaintiff been wearing gloves. Without any context or details regarding the nature of the medical treatment being provided by plaintiff at the time of the alleged improper touching of the former patient, we cannot categorically conclude that the underlying complaint is devoid of facts or allegations that potentially bring the former patient's claims within the protection purchased by plaintiff in the subject liability policy.

In light of the above, we conclude that defendant failed to meet its initial burden on its cross-motion of establishing that it is entitled to a declaration that it is not obligated to defend or indemnify plaintiff (*see generally Hillcrest Coatings, Inc. v Colony Ins. Co.*, 151 AD3d 1643, 1645-1646 [4th Dept 2017]). In particular, defendant failed to meet its "heavy burden" of establishing that all of the claims asserted in the underlying complaint are subject to the

policy's exclusion for sexual assault and battery (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 654-655 [1993]; *see Hillcrest Coatings, Inc.*, 151 AD3d at 1645-1646; *Georgetown Capital Group, Inc. v Everest Natl. Ins. Co.*, 104 AD3d 1150, 1152 [4th Dept 2013]). We further conclude based on the foregoing that plaintiff met his initial burden on his motion with respect to defendant's obligation to defend, that defendant failed to raise a triable issue of fact in that regard, and that plaintiff is therefore entitled to summary judgment declaring that defendant is obligated to defend him in the underlying action (*see generally Georgetown Capital Group, Inc.*, 104 AD3d at 1152-1153).

Finally, we remit the matter to Supreme Court for a determination on the merits of those parts of plaintiff's motion seeking declarations that plaintiff may retain counsel of his choice in the underlying action and that defendant is responsible for paying attorneys' fees and costs with respect to that action.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**22**

**KA 19-01428**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAVON ROYAL, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered June 19, 2019. The judgment convicted defendant upon his plea of guilty of aggravated criminal contempt and aggravated family offense.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of aggravated criminal contempt (Penal Law § 215.52 [1]) and aggravated family offense (§ 240.75), defendant contends that his waiver of the right to appeal is invalid, that Supreme Court erred in imposing an enhanced sentence, and that the enhanced sentence is unduly harsh and severe. We affirm.

Defendant was indicted on nine counts arising from three separate incidents in 2017 and 2018 when he physically assaulted his former girlfriend in violation of an order of protection. He pleaded guilty to two counts in exchange for a sentencing commitment of concurrent indeterminate sentences with a maximum of 3½ to 7 years' incarceration. During the plea proceeding, the court advised defendant that it would not be bound by the plea agreement if, among other things, defendant failed to voluntarily appear for sentencing. Defendant, who thereafter remained in custody following the plea proceeding, subsequently refused to appear for sentencing. As a result, the court adjourned sentencing, issued an order compelling defendant to be produced, and held an *Outley* hearing to determine whether defendant had violated a condition of the plea agreement (*see generally People v Outley*, 80 NY2d 702, 713 [1993]). Following the *Outley* hearing, the court determined that defendant had violated a condition of his plea agreement and sentenced him, as a second felony offender, to consecutive indeterminate terms aggregating to 5½ to 11

years' incarceration.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as the People concede, and therefore does not preclude our review of his challenge to the severity of the sentence (*see People v Love*, 181 AD3d 1193, 1193 [4th Dept 2020]), we conclude that the sentence is not unduly harsh or severe.

We further reject defendant's contention that the court erred in imposing an enhanced sentence based upon his postplea conduct. It is well settled that " '[w]hen a defendant violates a condition of the plea agreement, the court is no longer bound by the agreement and is free to impose a greater sentence' " (*People v Sprague*, 82 AD3d 1649, 1649 [4th Dept 2011], *lv denied* 17 NY3d 801 [2011]; *see People v Stelter*, 196 AD3d 1047, 1048 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]). Where, as here, "there is a denial [by a defendant that the violation occurred], the court must [then] conduct an inquiry at which the defendant has an opportunity to show that the [violation]" did not occur (*Outley*, 80 NY2d at 713). The format of that inquiry is within the discretion of the court (*see id.*) and, contrary to defendant's contention, it was not improper for the court to take sworn testimony from a witness over the telephone inasmuch as that "enable[d] the court to assure itself that the information upon which it bas[ed] the sentence [was] reliable and accurate" (*People v McIntosh*, 213 AD3d 1266, 1267 [4th Dept 2023] [internal quotation marks omitted]). Defendant was "afforded the opportunity to testify to his ostensibly exculpatory explanations" at the hearing (*id.*), but declined to do so. Thus, we conclude that the "court [properly] determined that . . . defendant had the opportunity to be present [in court] but failed to avail himself of the opportunity by his own volition" (*People v Epps*, 37 NY2d 343, 350 [1975], *cert denied* 423 US 999 [1975]), thereby violating a condition of the plea agreement and justifying the enhanced sentence imposed by the court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**31**

**CA 23-01016**

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

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IN THE MATTER OF DAVID M. ABBATOY, JR., ESQ.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TODD K. BAXTER, MONROE COUNTY SHERIFF, ANDREW BEYEA, MONROE COUNTY SHERIFF'S DEPUTY, DAVID BOLTON, MONROE COUNTY SHERIFF'S INVESTIGATOR, JEFFREY BRANAGAN, MONROE COUNTY SHERIFF'S INVESTIGATOR, DEBORAH FEEHAN, MONROE COUNTY SHERIFF'S INVESTIGATOR, KRISTY KATHER, MONROE COUNTY SHERIFF'S DEPUTY, LEAH LAROCQUE, MONROE COUNTY SHERIFF'S INVESTIGATOR, GREGORY PROKOP, MONROE COUNTY SHERIFF'S DEPUTY, MICHAEL SHANNON, MONROE COUNTY SHERIFF'S INVESTIGATOR, SCOTT WALSH, MONROE COUNTY SHERIFF'S SERGEANT, RESPONDENTS-RESPONDENTS,
AND MONROE COUNTY POLICE BENEVOLENT ASSOCIATION, INC., INTERVENOR-RESPONDENT.

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EASTON THOMPSON KASPEREK SHIFFRIN, LLP, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR PETITIONER-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

BLITMAN & KING LLP, ROCHESTER (NOLAN J. LAFLER OF COUNSEL), FOR INTERVENOR-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered November 29, 2022, in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the amended petition is reinstated, the amended petition is granted, and the determination is annulled.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents to disclose, pursuant to the Freedom of Information Law (Public Officers Law § 84 *et seq.* [FOIL]), certain law enforcement disciplinary records. Petitioner appeals from a judgment that dismissed the amended petition after

Supreme Court concluded that respondents were not required to produce records from proceedings conducted on or before June 12, 2020. We reverse.

In this case, we are presented with the issue whether the repeal of former Civil Rights Law § 50-a necessitates a retroactivity analysis (*cf. Matter of New York Civ. Liberties Union v City of Rochester*, 210 AD3d 1400, 1400-1401 [4th Dept 2022], *lv granted* 39 NY3d 915 [2023]). We agree with petitioner that it does not. Former section 50-a operated as an exception to the general rule that permitted public access through FOIL to certain government records, i.e., it exempted from disclosure "[a]ll personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency" (*see Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 563 [2018]). When section 50-a was repealed on June 12, 2020, that exception was removed. " 'A statute is not retroactive . . . when made to apply to future transactions merely because such transactions relate to and are founded upon antecedent events' " (*Forti v New York State Ethics Commn.*, 75 NY2d 596, 609 [1990]). Likewise, it is not a retroactive application of the repeal of section 50-a to conclude that past police disciplinary records are no longer subject to that exception and are now subject to FOIL; it is merely a recognition that police departments faced with FOIL requests cannot rely on an exception that no longer exists to evade their prospective duty of disclosure (*see generally Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 228-229 [2017]; *Forti*, 75 NY2d at 609-610; *State ex rel. Beacon Journal Pub. Co. v University of Akron*, 64 Ohio St 2d 392, 394-397 [1980]). The court therefore erred in its determination that the exception set forth in section 50-a barred disclosure to petitioner of the requested records from proceedings conducted on or before the date on which that section was repealed and in dismissing the amended petition.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**32**

**CA 22-01860**

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

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HARRY HALL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOD'S HOUSE OF REFUGE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered October 31, 2022. The order granted in part the motion of defendant seeking, inter alia, to compel plaintiff to submit to a medical examination.

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

Memorandum: In this action to recover for personal injuries sustained by plaintiff while performing roofing work, plaintiff appeals in appeal No. 1 from an order that granted defendant's motion to compel and for a protective order in part and, inter alia, compelled plaintiff to appear for a medical examination on a date certain and precluded plaintiff from attending the examination with a third party. In appeal No. 2, plaintiff appeals from an order that granted defendant's motion to supplement the record in appeal No. 1 to include defendant's memorandum of law. Under the circumstances, we affirm in both appeals.

Plaintiff's sole contention in appeal No. 1 is that Supreme Court erred in acting sua sponte when it precluded plaintiff from attending the examination with a third party. We reject the contention that the court granted sua sponte relief. The affidavit of the examining physician, offered in support of defendant's motion, asserts that barring third parties from attending the examination is necessary to accurately assess plaintiff and that the presence of third parties represents a substantial deviation from standardized test procedures, which would render the test results unreliable (*see generally A.W. v County of Oneida*, 34 AD3d 1236, 1237-1238 [4th Dept 2006]). Similarly, defendant argued in its memorandum of law that "the presence of any third party will skew the results of the exam. Thus,

the court should grant defendant's motion and enter an order compelling plaintiff's attendance (alone) at the [examination]." In light of the foregoing, we reject plaintiff's argument that the court sua sponte granted undemanded relief or deprived plaintiff of the opportunity to brief or be heard on that issue (*see generally Tirado v Miller*, 75 AD3d 153, 158, 160 [2d Dept 2010]), inasmuch as a plain reading of defendant's motion papers placed plaintiff on notice that defendant sought to bar plaintiff from attending the examination with any third party (*see generally id.* at 158), and plaintiff did not oppose that request below. We note that plaintiff did not contest in this appeal that part of the order barring video or audio recording of the examination for litigation purposes, thereby abandoning any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]), and thus we take no position on that issue here.

With respect to appeal No. 2, we conclude that the court properly granted defendant's motion to include the memorandum of law in the record on appeal No. 1 because it is relevant to the issue of preservation (*cf. Zawatski v Cheektowaga-Maryvale Union Free School Dist.*, 261 AD2d 860, 860 [4th Dept 1999], *lv denied* 94 NY2d 754 [1999]), i.e., whether, contrary to plaintiff's contention, defendant sought to bar plaintiff from attending the examination with any third party in its initial motion.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**33**

**CA 23-01370**

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

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HARRY HALL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GOD'S HOUSE OF REFUGE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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PARISI & BELLAVIA, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP PFALZGRAF LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (James A. Vazzana, J.), entered August 11, 2023. The order granted the motion of defendant to supplement a record on appeal.

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

Same memorandum as in *Hall v God's House of Refuge* ([appeal No. 1] — AD3d — [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**45**

**CA 23-00635**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

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THE ESTATE OF KATHRYN ESSIG, DECEASED,
BY BARRY ESSIG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN F. ESSIG, DEFENDANT-APPELLANT.

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

JAMES G. DISTEFANO, FAYETTEVILLE, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered December 22, 2022. The order, inter alia, granted plaintiff a default judgment and determined damages.

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

Memorandum: Plaintiff commenced this action to recover on an installment loan contract. Defendant failed to respond to the complaint, and plaintiff moved for a default judgment. Defendant opposed the motion, contending, inter alia, that he had not been served with the complaint, and he cross-moved for, among other things, leave to serve an answer. Defendant now appeals from an order that, inter alia, granted plaintiff a default judgment and awarded plaintiff damages as well as attorneys' fees and costs. We affirm.

Initially, we note that, pursuant to CPLR 5511, "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." Thus, in general, "[n]o appeal lies from an order entered upon the default of the appealing party" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]). That rule does not apply, however, " '[w]here, as here, a party appears and contests an application for entry of a default judgment,' " and thus defendant's contentions are properly before us on this appeal (*Spano v Kline*, 50 AD3d 1499, 1499 [4th Dept 2008], *lv denied* 11 NY3d 702 [2008], *lv denied* 12 NY3d 704 [2009]).

With respect to the merits, we reject defendant's contention that Supreme Court erred in granting plaintiff's motion and that defendant was entitled to a traverse hearing. Plaintiff established his

entitlement to default judgment against defendant by submitting "proof of service of the summons and the complaint, the facts constituting the claim, and . . . defendant's default" (*Diederich v Wetzel*, 112 AD3d 883, 883 [2d Dept 2013]; *see LeChase Constr. Servs., LLC v JM Bus. Assoc. Corp.*, 181 AD3d 1294, 1295 [4th Dept 2020]; *PNC Bank, N.A. v Harmonson*, 154 AD3d 1347, 1348 [4th Dept 2017]). " 'Ordinarily, the affidavit of a process server constitutes prima facie evidence that the defendant was validly served' . . . Although 'bare and unsubstantiated denials are insufficient to rebut the presumption of service . . . , a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing' " (*Cach, LLC v Ryan*, 158 AD3d 1193, 1194 [4th Dept 2018]; *see Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1659 [4th Dept 2017]). In support of the motion, plaintiff submitted an affidavit of a process server stating that defendant was personally served (*see* CPLR 308 [1]; *see also* CPLR 313) at a particular time and date at an address in Zephyrhills, Florida, and describing the race, hair, age, height, and weight of the person served.

In opposition to the motion, defendant submitted an affidavit stating that the address where he was allegedly served "[was] not [his] residence"; that "[n]o one [had] ever served [him] with papers for a new lawsuit"; that "[n]o one [had] ever come to [his] residence in Florida to serve [him] papers for this lawsuit"; and that "[n]o one [had] delivered lawsuit papers to [him] at any other address." Contrary to defendant's assertion, this is not a situation in which service was required to be mailed to a residence (*cf.* CPLR 308 [2], [4]). Rather, this situation involves personal service, which, pursuant to CPLR 308 (1), may be made "by delivering the summons . . . to the person to be served" (*see also* CPLR 313). There is no requirement that such service be effectuated at any particular location and, as a result, it is irrelevant that the address listed on the affidavit of service is not defendant's residence.

Moreover, defendant did not dispute that he matched the description of the person served as set forth in the affidavit of the process server, contending only that "you can't swing a dead cat in Florida without hitting a man of [the same] description." Discrepancies between the appearance of the person allegedly served and the description given in the affidavit of service "must be substantiated by something more than a claim by the parties allegedly served that the descriptions of their appearances were incorrect" (*US Bank N.A. v Cherubin*, 141 AD3d 514, 516 [2d Dept 2016]; *see Fusion Funding v Loftti Inc.*, 216 AD3d 1416, 1417 [4th Dept 2023]*; Green Tree Servicing, LLC v Frantzeskakis*, 200 AD3d 654, 654-655 [2d Dept 2021]).

Aside from general denials of service, defendant submitted no specific facts that would rebut the prima facie evidence of service provided by the affidavit from the process server. We thus conclude "that defendant's 'denial of service in this case was insufficient to rebut the presumption of proper service created by the plaintiff's duly executed affidavit of service' " (*Wright v Denard*, 111 AD3d 1330,

1331 [4th Dept 2013]; *see Robert K. Lesser Living Trust, Dated Apr. 21, 2005 v United Secular Am. Ctr. for the Disabled, Inc.*, 164 AD3d 1659, 1660 [4th Dept 2018]) or to raise issues of fact requiring a traverse hearing (*see Robert K. Lesser Living Trust, Dated Apr. 21, 2005*, 164 AD3d at 1660-1661).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**48**

**CA 23-00199**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

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CONSUMERS BEVERAGES, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAVCON DEVELOPMENT LLC, DEFENDANT-APPELLANT.

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COLUCCI & GALLAHER, P.C., BUFFALO (TORREY E. GRENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (JAMES P. MILBRAND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 14, 2022. The order denied defendant's motion to disqualify Barclay Damon LLP from representing plaintiff in this action.

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

Memorandum: Defendant, Kavcon Development LLC (Kavcon), appeals from an order that denied its motion to disqualify Barclay Damon LLP (Barclay Damon) from representing plaintiff, Consumers Beverages, Inc. (CBI), in, among other things, this action to recover on a "Demand Note" payable to CBI by Kavcon in the amount of $3.8 million plus interest. It is undisputed that, at the time the Demand Note was issued, Barclay Damon represented both CBI and Kavcon.

CBI and Kavcon are family-owned businesses founded decades ago by a family patriarch. Six of the patriarch's children are current or former members of Kavcon and current or former shareholders of CBI, and they have been embroiled in litigation related to the two business entities (*see Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1569 [4th Dept 2021] [*Kavanaugh I*]; *Kavanaugh v Kavanaugh*, 200 AD3d 1576, 1577 [4th Dept 2021] [*Kavanaugh II*]) (collectively, prior *Kavanaugh* appeals). The prior *Kavanaugh* appeals involved challenges made by three of the children to two of the other children's transfers of their ownership interests in the business entities to a sixth child, Neil Kavanaugh (*see Kavanaugh I*, 200 AD3d at 1569; *Kavanaugh II*, 200 AD3d at 1577).

At the time of the transfers, Neil was the managing member of Kavcon and was also president and majority shareholder of CBI. Those transfers were ultimately declared null and void (*see Kavanaugh I*, 200 AD3d at 1569; *see also Kavanaugh II*, 200 AD3d at 1577), and Neil was

eventually replaced by another sibling as managing member of Kavcon. The new managing member immediately terminated Barclay Damon as counsel for Kavcon. Neil retained his position with CBI, continued to retain Barclay Damon as counsel for CBI, and subsequently made a demand for Kavcon to pay CBI the amount due on the Demand Note.

Counsel for Kavcon rejected CBI's demand for payment, claiming, inter alia, that "[b]ecause Barclay Damon was representing both Kavcon . . . and [CBI] . . . when the [Demand Note] was signed," there was a conflict of interest with Barclay Damon's attempt to enforce the Demand Note against Kavcon. CBI, still represented by Barclay Damon, thereafter commenced the instant action for breach of the Demand Note and unjust enrichment.

Kavcon, through new counsel, moved to disqualify Barclay Damon as counsel for CBI on the ground that there was conflict of interest under Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.9 (a). Kavcon contends on appeal that Supreme Court abused its discretion in denying the motion. We reject that contention inasmuch as we conclude that Kavcon failed to establish all of the elements required to disqualify Barclay Damon from representing CBI in this action.

As a preliminary matter, we note the seriousness of a motion to disqualify a party's counsel of choice. "Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]; *see Matter of Abrams [John Anonymous]*, 62 NY2d 183, 196 [1984]). When the Rules of Professional Conduct are invoked in ongoing litigation rather than in a disciplinary proceeding to punish a lawyer's alleged misconduct, "disqualification of a [party's] law firm can stall and derail the proceedings, redounding to the strategic advantage of one party over another" (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 443). Thus, disqualification "is a severe remedy which should only be done in cases where counsel's conduct will probably taint the underlying trial" (*Harris v Erie County Med. Ctr. Corp.*, 175 AD3d 1104, 1106 [4th Dept 2019] [internal quotation marks omitted]; *see Mancheski v Gabelli Group Capital Partners, Inc.*, 22 AD3d 532, 534 [2d Dept 2005]).

Nevertheless, " '[a] motion to disqualify another party's attorney is addressed to the sound discretion of the trial court' " (*Bison Plumbing City v Benderson*, 281 AD2d 955, 955 [4th Dept 2001]; *see Rose v Thrifty Rent-A-Car Sys.*, 305 AD2d 484, 485 [2d Dept 2003]). A party bringing a disqualification motion "ha[s] the burden of making a clear showing that disqualification is warranted" (*Matter of Colello* [appeal No. 3], 167 AD3d 1445, 1447 [4th Dept 2018] [internal quotation marks omitted]; *see Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]). To meet that burden, the moving party must establish: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are

materially adverse" (*Matter of Carl B., Jr. [Carl B., Sr.]*, 181 AD3d 1161, 1161-1162 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020] [internal quotation marks omitted]; *see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996], *rearg denied* 89 NY2d 917 [1996]; *Colello*, 167 AD3d at 1447).

CBI correctly concedes that Kavcon established the first and third elements of the disqualification test, i.e., that Barclay Damon represented CBI at the time the Demand Note was executed and that the interests of CBI and Kavcon are materially adverse. Thus, the only issue before this Court is whether Kavcon established that the matters involved in both representations are substantially related.

To demonstrate that the matters are substantially related, Kavcon "had to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation *or* that [Barclay Damon] received specific, confidential information substantially related to the present litigation" (*Sgromo v St. Joseph's Hosp. Health Ctr.*, 245 AD2d 1096, 1097 [4th Dept 1997] [emphasis added]; *see Benevolent & Protective Order of Elks of United States of Am. v Creative Comfort Sys., Inc.*, 175 AD3d 887, 888 [4th Dept 2019]; *Becker v Perla*, 125 AD3d 575, 575 [1st Dept 2015]). We note that, despite Kavcon's references to "confidential information" as part of its summary of rule 1.9 of the Rules of Professional Conduct (22 NYCRR 1200.0) in its main brief, Kavcon does not explicitly contend in that brief that Barclay Damon received specific confidential information that was substantially related to this litigation. We thus deem any contention related thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). To the extent that Kavcon advances its confidential information argument for the first time in its reply brief, that contention is not properly before this Court (*see Brooks v City of Buffalo*, 209 AD3d 1270, 1272 [4th Dept 2022]) and we therefore do not address its merits.

We reject Kavcon's contention that the court erred in determining that the current and former litigations are not identical to or essentially the same as those in the prior representation (*see Sgromo*, 245 AD2d at 1097). In this action, CBI is seeking to collect on a debt purportedly owed by Kavcon to CBI. The earlier actions involved either a purported breach of fiduciary duty by Neil or Neil's alleged improper purchase of shares from his siblings (*see generally Becker*, 125 AD3d at 575). Inasmuch as Kavcon failed to demonstrate that the former and current representations were substantially related (*see CNY Mech. Assoc. v Fidelity & Guar. Ins. Co.*, 229 AD2d 950, 951 [4th Dept 1996]), it failed to meet its burden of demonstrating that disqualification is warranted.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**49**

**CA 23-00279**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

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SARAH ZIELINSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE BLESSIOS, M.D., ET AL., DEFENDANTS, RICHARD D. BLOOMBERG, M.D., TIMOTHY R. RASMUSSON, M.D., AND SURGICAL ASSOCIATES OF WESTERN NEW YORK, P.C., DEFENDANTS-RESPONDENTS.

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 10, 2023. The order granted in part the motion of, among others, defendants Richard D. Bloomberg, M.D., Timothy R. Rasmusson, M.D., and Surgical Associates of Western New York, P.C., for summary judgment, dismissed the complaint against Richard D. Bloomberg, M.D. and Timothy R. Rasmusson, M.D. and dismissed the claims for vicarious liability against Surgical Associates of Western New York, P.C., to the extent that they are based on the conduct of Richard D. Bloomberg, M.D., Timothy R. Rasmusson, M.D., and defendant Rurik C. Johnson, M.D.

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

Memorandum: After plaintiff presented at an emergency department complaining of severe abdominal pain, defendant Richard D. Bloomberg, M.D., the on-call surgeon, performed an exploratory laparotomy, which revealed the presence of a large mass in plaintiff's stomach. During the surgery, Bloomberg consulted with defendant Timothy R. Rasmusson, M.D. Bloomberg and Rasmusson also consulted with defendant George Blessios, M.D., a specialist in hepatobiliary surgery. All three physicians agreed that plaintiff required a second exploratory surgery to determine how to remove the mass. The next day, Blessios performed the second exploratory surgery and removed the mass, along with plaintiff's stomach and several other internal organs, via a Whipple procedure. Plaintiff commenced this medical malpractice action asserting, inter alia, that the Whipple procedure was unnecessary and that Bloomberg's and Rasmusson's negligent care led to the performance of the unnecessary procedure. Bloomberg and Rasmusson, among others,

moved for summary judgment dismissing the complaint and all cross-claims against them. Plaintiff appeals from an order that, inter alia, granted that part of the motion with respect to Bloomberg and Rasmusson, and we affirm.

On a motion for summary judgment in a medical malpractice action, "a defendant has the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023] [internal quotation marks omitted]). Once a defendant meets the initial burden, "[t]he burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact . . . only as to the elements on which the defendant has met the prima facie burden" (*id.* [internal quotation marks omitted]).

"[A] physician may satisfy his or her duty of care to a patient by referring the patient to a specialist who is better equipped to handle [the patient's] condition" (*Revere v Burke*, 200 AD3d 1607, 1608 [4th Dept 2021] [internal quotation marks omitted]). Here, Bloomberg and Rasmusson fulfilled their duty of care by referring plaintiff to Blessios because plaintiff's condition involved anatomical structures that were outside their area of expertise (*see Doe v Schwarzwald*, 142 AD3d 578, 579 [2d Dept 2016]). The movants' expert opined that Blessios had an expertise in hepatobiliary procedures that Bloomberg and Rasmusson lacked. Plaintiff failed to raise a triable issue of fact in opposition inasmuch as plaintiff's expert failed to address, much less oppose, that assessment of the physicians' expertise (*see Page v Niagara Falls Mem. Med. Ctr.*, 174 AD3d 1318, 1320-1321 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]). Moreover, plaintiff's assertion that Bloomberg, Rasmusson, and Blessios jointly diagnosed plaintiff is belied by the record, and plaintiff presented no evidence that Blessios formed a diagnosis or conducted the second procedure in reliance on Bloomberg's or Rasmusson's initial impressions. Thus, even assuming, arguendo, that plaintiff raised a triable issue of fact whether Bloomberg and Rasmusson were negligent in their care or treatment, we conclude, contrary to plaintiff's contention, that plaintiff failed to raise a triable issue of fact in opposition to Bloomberg's and Rasmusson's showing that any such negligence was not a proximate cause of her injuries—i.e., the performance of an allegedly unnecessary Whipple procedure. Supreme Court therefore properly granted that part of the motion with respect to Bloomberg and Rasmusson (*see Pasek v Catholic Health Sys., Inc.*, 186 AD3d 1035, 1038 [4th Dept 2020]; *Page*, 174 AD3d at 1320-1321).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**53**

**CA 23-00344**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

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JAMES A. ZAEPFEL, TONAWANDA PIRSON LLC, AND
95 PIRSON PARKWAY LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (B. KEVIN BURKE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered January 17, 2023. The order, among other things, denied defendant’s motion to set aside the jury verdict.

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

Same memorandum as in *Zaepfel v Town of Tonawanda* ([appeal No. 2] — AD3d — [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**54**

**CA 23-00440**

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, AND GREENWOOD, JJ.

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JAMES A. ZAEPFEL, TONAWANDA PIRSON LLC, AND
95 PIRSON PARKWAY LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

GROSS SHUMAN P.C., BUFFALO (B. KEVIN BURKE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered February 16, 2023. The order and judgment, among other things, awarded plaintiffs the sum of $1,664,801.48 as against defendant, upon a jury verdict.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting the posttrial motion in part, setting aside the verdict with respect to the third cause of action insofar as it is based on defendant's failure to construct a retention pond and a new trial is granted on the third cause of action to that extent, and setting aside the verdict with respect to damages on the first cause of action, and as modified the order and judgment is affirmed without costs and a new trial is granted on damages only with respect to the first cause of action unless plaintiffs, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of damages for the first cause of action to $10,100, in which event the order and judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action asserting six causes of action arising out of defendant's sale of vacant land (property) to plaintiff Tonawanda Pirson, LLC (Pirson), which constructed a commerce center on the site. As relevant to this appeal, the first cause of action (billboard claim) asserts that defendant committed the tort of conversion when it retained a post-closing rent check from a company that leased part of the property for purposes of erecting a billboard. The second cause of action (wetlands claim) asserts that, as a condition precedent to the land purchase contract (contract), defendant and Pirson agreed to jointly apply for and obtain any necessary permits from the Army Corp of

Engineers (ACE). ACE issued the permit but required the permittees to create or finance several acres of replacement wetlands, representing twice the acreage that would be displaced by the commerce center project. Plaintiffs allege that they constructed defendant's share of the replacement wetlands to comply with the ACE permit and that defendant did not pay plaintiffs' invoice for their expenses with respect thereto, thereby breaching the contract. The third cause of action (improvements claim) asserts, inter alia, that defendant promised to construct, on adjacent land retained by defendant, a storm water retention pond (retention pond) that would service the property. It is undisputed that defendant's purported promise was never expressly memorialized in the contract. Plaintiffs allege that defendant breached the contract by failing to construct a retention pond and that plaintiffs were therefore required to construct one on the property at their expense.

Defendant moved for summary judgment dismissing the complaint. Supreme Court granted the motion with respect to the fourth through sixth causes of action but denied the motion with respect to the first, second, and third causes of action, concluding that the billboard and wetlands claims were not barred by the statute of limitations or the statute of frauds and that the improvements claim was not barred by the merger doctrine. At trial, the jury determined that defendant was liable for conversion under the billboard claim and awarded plaintiffs $15,550 in compensatory damages. It further determined that defendant was liable under the wetlands claim and awarded plaintiffs $226,500 in compensatory damages. The jury also found defendant liable under the improvements claim and, as relevant on appeal, awarded plaintiffs $748,217.10 for the retention pond. Thereafter, defendant moved to set aside the jury verdict (posttrial motion) on the ground that the verdict was against the weight of the evidence, requiring a new trial, or, in the alternative, to set aside or reduce the award of damages. The court denied the posttrial motion and issued an order and judgment (judgment) in favor of plaintiffs. In appeal No. 1, defendant appeals from the order denying its posttrial motion. In appeal No. 2, defendant appeals from the judgment awarding money damages to plaintiffs.

As an initial matter, we note that the appeal from the order in appeal No. 1 must be dismissed inasmuch as the order in that appeal is subsumed in the judgment in appeal No. 2 (*see Stribing v Wendel & Loecher, Inc.* [appeal No. 2], 194 AD3d 1390, 1390-1391 [4th Dept 2021]). The appeal from the judgment in appeal No. 2 brings up for review the propriety of the order in appeal No. 1 (*see Almuganahi v Gonzalez*, 174 AD3d 1492, 1493 [4th Dept 2019]; *see generally* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d 241, 248 [1976]). The appeal from the judgment in appeal No. 2 does not bring up for review the propriety of that part of the court's order denying defendant's motion insofar as it sought summary judgment dismissing the improvements claim: the denial of that part of the motion did not necessarily affect the final judgment inasmuch as it did not deprive defendant of the further opportunity to litigate the issue in question, i.e., defendant's contention that there was no breach of contract with respect to the improvements claim (*see Bonczar v American Multi-Cinema, Inc.*, 38 NY3d

1023, 1025-1026 [2022], *rearg denied* 38 NY3d 1170 [2022]; *see generally* CPLR 5501 [a] [1]). The appeal from the judgment in appeal No. 2 does bring up for review the propriety of that part of the court's order denying defendant's motion insofar as it sought summary judgment dismissing the billboard and wetlands claims. Denial of the motion with respect to those two claims—which was in effect a motion for dismissal under CPLR 3211 (a) (5)—necessarily affected the final judgment by "necessarily remov[ing] . . . legal issue[s] from the case so that there was no further opportunity during the litigation to raise the question[s] decided by the prior non-final order" (*Bonczar*, 38 NY3d at 1026 [internal quotation marks omitted]; *see Costea v Vemen Mgt. Corp.*, 213 AD3d 634, 636 [2d Dept 2023]). Specifically, the court determined that those two claims were timely and that the wetlands claim was not barred by the statute of frauds.

Contrary to defendant's contention, we conclude that the court properly denied defendant's motion insofar as it sought summary judgment dismissing the billboard claim on the ground that it was barred by the applicable statute of limitations (*see* General Municipal Law § 50-i [1]). The billboard claim sounds in conversion and therefore "accrue[d] on the date the conversion [took] place" (*Morrow v Brighthouse Life Ins. Co. of NY*, 200 AD3d 1622, 1624 [4th Dept 2021]), not upon "discovery or the exercise of diligence to discover" (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). In arguing that the billboard claim is barred by the statute of limitations, defendant relies solely on the allegations in the complaint in support of its assertion that the claim accrued when defendant received the rent check for the billboard in January 2015, rendering the November 2016 commencement of this action untimely. The mere fact that defendant accepted the rental funds in January 2015 does not, however, establish that defendant had the requisite intent, at that time, to convert plaintiffs' property (*see generally DiMatteo v Cosentino*, 71 AD3d 1430, 1431 [4th Dept 2010]). Consequently, we conclude that defendant did not meet its initial burden on the motion (*see Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011]; *see generally Baker v Eastern Niagara Hosp. Inc.*, 217 AD3d 1331, 1332 [4th Dept 2023]; *Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]). Thus, the burden never shifted to plaintiffs to aver evidentiary facts establishing that the limitations period had not expired, that it was tolled, or that an exception to the statute of limitations applied (*see Baker*, 217 AD3d at 1334; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Larkin*, 81 AD3d at 1355).

Defendant has "effectively abandoned any challenge" to the court's denial of that part of the motion seeking summary judgment dismissing the wetlands claim inasmuch as defendant, on appeal, does not address the dispositive basis for the court's determination, i.e., that the wetlands claim is not barred by the statute of limitations or the statute of frauds because it was premised on defendant's failure

to comply with the ACE permit required by the contract (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 206 AD3d 1688, 1689 [4th Dept 2022] [internal quotation marks omitted]; *see Papaj v County of Erie*, 211 AD3d 1617, 1618 [4th Dept 2022]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Defendant further contends that the court erred in denying its posttrial motion to set aside the jury verdict as against the weight of the evidence or, in the alternative, to reduce the damages award (*see generally* CPLR 4404 [a]). "A motion to set aside a jury verdict as against the weight of the evidence should not be granted unless the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Gumas v Niagara Frontier Tr. Metro Sys., Inc.*, 189 AD3d 2095, 2096 [4th Dept 2020]; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Senycia v Vosseler*, 217 AD3d 1520, 1522 [4th Dept 2023]).

With respect to the billboard claim, we conclude that the verdict is not against the weight of the evidence on the issue of liability. The evidence amply established that defendant received the 2015 rent check pursuant to the billboard lease and that plaintiffs never received that check. We agree with defendant, however, that the damages award on the billboard claim is against the weight of the evidence (*see generally* CPLR 4404 [a]). The evidence at trial established that defendant received and wrongfully withheld from plaintiffs only the rent check for 2015, which pursuant to the lease could be for no more than $10,100. In our view, consistent with the evidence adduced at trial, an award for $10,100 would be reasonable compensation for plaintiffs' injuries under the billboard claim. We therefore modify the judgment accordingly, and we grant a new trial on damages on the first cause of action unless plaintiffs, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to decrease the award to $10,100 (*see Ferro v Maline*, 31 AD2d 779, 779 [4th Dept 1969]; *see also Pullman v Pullman*, 216 AD2d 886, 887 [4th Dept 1995]).

With respect to the wetlands claim, defendant does not dispute that it was obligated to provide replacement wetlands and that it failed in that obligation, but it does contend that the damages award on the wetlands claim should be set aside as against the weight of the evidence because the amount awarded exceeded plaintiffs' actual cost to construct the replacement wetlands on defendant's behalf. We reject that contention. In support of the wetlands claim, plaintiffs introduced in evidence the receipt they gave defendant memorializing the costs of constructing the replacement wetlands, as well as expert testimony establishing, to a reasonable degree of certainty, that the value of the wetlands constructed by plaintiffs was $226,500. We therefore conclude that the jury's award of damages on the wetlands claim is supported by a "fair interpretation of the evidence" (*Gumas*, 189 AD3d at 2096).

Finally, we agree with defendant that the verdict is against the

weight of the evidence with respect to the improvements claim insofar as it is predicated on defendant's failure to construct the retention pond. The undisputed evidence at trial established that the express terms of the contract did not require defendant to construct the retention pond. Plaintiffs established no more than that there had been pre-contract discussions concerning the retention pond. Moreover, to the extent that plaintiffs assert that defendant's failure to construct a retention pond constituted a breach of the contractual provision requiring defendant to provide storm utilities tie-ins to plaintiffs' property line, that argument was refuted by undisputed testimony from one of Pirson's owners that defendant did, in fact, connect the storm utilities to plaintiffs' property line. The court thus erred in denying that part of the posttrial motion seeking to set aside the verdict with respect to the third cause of action insofar as it is based on defendant's failure to construct a retention pond. We therefore further modify the judgment accordingly, and we grant a new trial on the third cause of action to that extent (*see generally* CPLR 4404 [a]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**62**

**KA 18-01373**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE NEWTON, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered March 15, 2018. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment that, upon his admission to violating a condition of probation, revoked the sentence of probation imposed upon his conviction of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]) and sentenced him to a term of imprisonment followed by a period of postrelease supervision. Defendant's contention that his admission was not knowing, voluntary, and intelligent inasmuch as County Court failed to advise him on the record that he would be subject to postrelease supervision if the court sentenced him to a term of imprisonment is not preserved for our review (*see People v Collins*, 194 AD3d 1421, 1421 [4th Dept 2021], *lv denied* 37 NY3d 971 [2021]; *see generally People v Williams*, 27 NY3d 212, 222 [2016]), 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]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**83**

**CA 23-00910**

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

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RAG HERKIMER, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE GLIDER OIL COMPANY, INC., DEFENDANT-APPELLANT.

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BOND, SCHOENECK & KING PLLC, SYRACUSE (J.P. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered May 18, 2023. The order and judgment, inter alia, awarded plaintiff money damages.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion for a directed verdict is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action to recover the costs of remediation after petroleum contamination was discovered in the soil on property owned by plaintiff and leased to defendant, on which defendant operated a gas station. Following motion practice, the matter proceeded to trial on the issue of damages, which resulted in a verdict in favor of plaintiff. Defendant appeals from an order and judgment that, inter alia, denied defendant's motion during trial for a directed verdict pursuant to CPLR 4401 and its motion to set aside the verdict pursuant to CPLR 4404 (a) and awarded plaintiff a money judgment against defendant.

We agree with defendant that it was entitled to a directed verdict. Even affording plaintiff every inference that may properly be drawn from the evidence presented at trial and considering the evidence in the light most favorable to plaintiff (*see Senycia v Vosseler*, 217 AD3d 1520, 1521 [4th Dept 2023]), we conclude that there is no rational process by which the jury could have found that payments were made by plaintiff for remediation. Instead, the evidence established that any such payments were made by a managing agent, nonparty Gibraltar Management, which was not the property owner nor a party to the lease. We conclude that the jury's determination that billing Gibraltar Management resulted in payment by plaintiff could only have been reached "based upon sheer speculation" (*Montas v JJC Constr. Corp.*, 20 NY3d 1016, 1018 [2013] [internal quotation marks

omitted]; *see Maxon Intl. v International Harvester Co.*, 82 AD2d 1006, 1007 [3d Dept 1981], *affd for reasons stated* 56 NY2d 879 [1982]).

Therefore, we reverse the order and judgment, grant the motion for a directed verdict, and dismiss the complaint.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**89**

**CA 22-01722**

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

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ROSARIO BARONE, III, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LIBERTY CAB COMPANY, YELLOW CAB, LIBERTY YELLOW CAB COMPANY, BUFFALO MANAGEMENT, INC., WILLIAM YUNKE, ZORAN DRCA, LIBERTY COMMUNICATIONS, INC., RED STAR AUTO, INC., AND BLACK ROCK AUTO SALES, INC., DEFENDANTS-RESPONDENTS.

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COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARTH CONDREN LLP, BUFFALO (PIERRE A. VINCENT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LIBERTY CAB COMPANY, YELLOW CAB, LIBERTY YELLOW CAB COMPANY, WILLIAM YUNKE, AND LIBERTY COMMUNICATIONS, INC.

LAW OFFICES OF JAMES MORRIS, BUFFALO (JAMES E. MORRIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MANAGEMENT, INC., ZORAN DRCA, RED STAR AUTO, INC., AND BLACK ROCK AUTO SALES, INC..

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Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered October 5, 2022. The order granted the motions of defendants for summary judgment.

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

Memorandum: In this personal injury action arising out of a robbery by a backseat passenger while plaintiff was driving a taxicab owned by defendant Buffalo Management, Inc. and dispatched by defendant Liberty Communications, Inc., plaintiff appeals from an order that granted defendants' motions for summary judgment dismissing the complaint and any cross-claims. We affirm.

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal quotation marks omitted]). With respect to the third element, "the negligence complained of must have caused the occurrence of the accident from which the injuries flow" (*Rivera v City of New York*, 11 NY2d 856, 857

[1962], *rearg denied* 11 NY2d 1016 [1962], 12 NY2d 715 [1962]). "The causal nexus between a defendant's conduct and the injury will be broken where there are intervening circumstances that are extraordinary under the circumstances, unforeseeable in the normal course of events, different in kind from the foreseeable risks associated with the original negligence, or independent or far removed from the defendant's conduct" (*Rodriguez v Pro Cable Servs. Co. Ltd. Partnership*, 266 AD2d 894, 895 [4th Dept 1999]). In particular, where "the intervening act of [an] assailant was extraordinary and unforeseeable as a matter of law," it may serve "to break the causal connection between the defendant's negligence and the plaintiff's injuries" (*Santiago v New York City Hous. Auth.*, 63 NY2d 761, 763 [1984] [internal quotation marks omitted]).

Assuming, arguendo, the existence of a duty on the part of defendants to provide plaintiff with a taxicab with a functional inner rear door handle, the risk of plaintiff's being shot by a passenger during a robbery "was a different kind of risk from that created by defendants' [alleged] negligence in" failing to do so (*Rodriguez*, 266 AD2d at 895). Thus, we conclude that, as a matter of law, defendants' alleged negligence "furnished the condition or occasion for the injury-producing occurrence and that plaintiff's injuries were the result of intervening circumstances" (*id.*).

We further conclude that defendants owed plaintiff no duty to install a partition or camera in the taxicab (*see Brown v Wal-Mart Stores, Inc.*, 216 AD3d 1390, 1392-1393 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023]).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**100**

**CAF 22-01996**

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

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IN THE MATTER OF BILLY RON ADAMS, JR.,
AND LYDIA C. ADAMS, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

STEPHEN R. JOHN, RESPONDENT-RESPONDENT,
AND MICHELLE J. ADAMS, RESPONDENT-APPELLANT.

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

ALISON BATES, VICTOR, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Ontario County (Frederick G. Reed, A.J.), entered on December 7, 2022, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted joint custody of the subject child to petitioners and respondents with primary physical placement of the subject child with petitioners.

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

Memorandum: Petitioners, the brother and sister-in-law of the subject child, commenced this proceeding pursuant to Family Court Act article 6 seeking joint custody of the child with respondent mother and respondent father with primary physical placement of the child with petitioners. The mother moved for, inter alia, summary judgment dismissing the petition on the ground that Family Court lacked jurisdiction to consider the petition because, several years prior to the petition, the mother had moved out-of-state with the child. The court reserved decision on the motion but nonetheless commenced the hearing on the merits of the petition. Over six months later, the court denied the motion on the ground that issues of fact warranted a hearing on the jurisdictional issue, however, no such hearing was held. Following further appearances, the court issued an oral decision in which it found, without further elaboration, that "extraordinary circumstances" existed and, inter alia, awarded petitioners joint custody of the subject child with the mother and the father, and awarded petitioners primary physical custody of the child. The mother now appeals from the subsequently entered order reflecting the court's determination.

Initially, we conclude that the court erred in addressing the merits of the petition without first resolving whether it had subject matter jurisdiction to do so, inasmuch as this threshold issue implicates a court's "competence to entertain an action" (*Lacks v Lacks*, 41 NY2d 71, 75 [1976], *rearg denied* 41 NY2d 862, 901 [1977]) and any order issued in the absence of subject matter jurisdiction is void (*see Henry v New Jersey Tr. Corp.*, 39 NY3d 361, 367 [2023]; *Matter of Montanez v Tompkinson*, 167 AD3d 616, 619 [2d Dept 2018]). Further, Domestic Relations Law § 75-f expressly provides that where, as here, a party in a child custody proceeding raises an issue regarding the existence of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, that issue "must be given priority on the calendar and handled expeditiously" (Domestic Relations Law § 75-f). The court here not only failed to prioritize that threshold issue, it never expressly resolved the issue before rendering a final determination on the merits.

We nonetheless reject the mother's contention that the court lacked subject matter jurisdiction to consider the petition. The mother's jurisdictional argument relies on Domestic Relations Law § 76, which pertains to an *initial* custody determination. Here, however, at the time of the filing of the instant petition, custody of the subject child as between the mother and the father was governed by an order of Ontario County Family Court. In the instant petition, petitioners effectively seek modification of this order. Thus, the threshold question before us is whether the New York court ever lost or relinquished its exclusive, continuing jurisdiction under Domestic Relations Law § 76-a (*see generally Matter of Bretzinger v Hatcher*, 129 AD3d 1698, 1699 [4th Dept 2015]). On this record, we conclude that it did not. There is no evidence in the record that the court, at any point, determined "that it should relinquish jurisdiction because the child does not have a 'significant connection' with New York, and 'substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships' " (*Matter of Wnorowska v Wnorowski*, 76 AD3d 714, 714 [2d Dept 2010], quoting § 76-a [1] [a]). Indeed, the child has a significant continuing connection to New York in that the father, a respondent in the present petition who had previously been granted joint custody of the child with the mother, was and remains a New York resident. Thus, this is also not a case where "a court of this state or a court of another state determine[d] that the child, the child's parents, and any person acting as a parent do not presently reside in [New York]" (§ 76-a [1] [b]; *cf. Matter of Richard Y. v Victoria Z.*, 198 AD3d 1200, 1202 [3d Dept 2021]).

We agree with the mother, however, that the court's determination to award petitioners joint custody of the child along with herself and the father lacks a sound and substantial basis in the record inasmuch as petitioners failed to establish the existence of extraordinary circumstances. " '[A]s between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the

burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " (*Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545-546 [1976]). "A finding of extraordinary circumstances is rare, and the circumstances must be such that they 'drastically affect the welfare of the child' " (*Matter of Jenny L.S. v Nicole M.*, 39 AD3d 1215, 1215 [4th Dept 2007], *lv denied* 9 NY3d 801 [2007]; *see Bennett*, 40 NY2d at 549). Such circumstances are not established by a mere showing that the nonparent "could do a better job of raising the child" (*Matter of Corey L v Martin L*, 45 NY2d 383, 391 [1978] [internal quotation marks omitted]). Where a nonparent fails to establish extraordinary circumstances, "the inquiry ends" (*Jenny L.S.*, 39 AD3d at 1215 [internal quotation marks omitted]).

Here the court failed to set forth "those facts upon which the rights and liabilities of the parties depend" (*Matter of Valentin v Mendez*, 165 AD3d 1643, 1643-1644 [4th Dept 2018] [internal quotation marks omitted]), specifically its analysis of why extraordinary circumstances existed to warrant an inquiry into whether an award of joint custody to petitioners was in the best interests of the child. The record is nonetheless sufficient for us to make our own determination (*see Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127 [4th Dept 2004]). We conclude that petitioners failed to meet their burden of establishing that the mother "relinquished her superior right to custody" (*Matter of Lynda A.H. v Diane T.O.*, 243 AD2d 24, 26 [4th Dept 1998], *lv denied* 92 NY2d 811 [1998]). Under the circumstances of this case, the mother's decision to leave the child with petitioners for a little over a month before seeking his return did not amount to the type of prolonged separation that would evidence the mother's abandonment of the child or her intent to do so (*see Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1319 [4th Dept 2007]; *see generally Miner v Miner*, 164 AD3d 1620, 1620 [4th Dept 2018]). The record contains no evidence of physical abuse of the child as alleged in the petition. Further, although petitioners alleged drug use by the mother and her partner, the minimal and speculative evidence of the alleged drug use falls far short of establishing that the mother presented a danger to the child or that she could not provide the child a stable home (*see Jody H.*, 43 AD3d at 1319). We therefore reverse the order and dismiss the petition.

In light of our determination, this Court need not reach the issue of the best interests of the child (*see Miner*, 164 AD3d at 1621; *Jenny L.S.*, 39 AD3d at 1215).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**104**

**CA 23-00206**

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

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NIKHIL PATEL, M.D., AND NIKHIL PATEL PHYSICIAN, PLLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SADASHIV S. SHENOY, M.D., AND SADASHIV S. SHENOY, M.D., PLLC, DEFENDANTS-RESPONDENTS.

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ADAMS LECLAIR LLP, ROCHESTER (ROBERT P. YAWMAN, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GARVEY LAW, P.C., BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 13, 2022. The order, among other things, denied that part of the motion of plaintiffs seeking to dismiss defendants' counterclaim.

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

Memorandum: Plaintiffs and defendants entered into an agreement whereby, inter alia, plaintiff Nikhil Patel, M.D. provided professional medical services for defendant Sadashiv S. Shenoy, M.D., PLLC (medical practice) in exchange for one-half of the medical practice's net profits. Eight years later, defendants gave notice that they were terminating the agreement. Plaintiffs, in turn, gave notice that they were exercising their option to purchase the medical practice pursuant to a provision in the agreement. After defendants failed to respond to that notice, plaintiffs commenced the instant action alleging that defendants, inter alia, breached the agreement. After discovery and some motion practice, defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) or, in the alternative, for leave to amend their answer pursuant to CPLR 3025 (b) to add a counterclaim seeking to recover overpayments of funds to plaintiffs. Supreme Court issued an order in which it determined that defendants' time to move for dismissal had expired, but the court chose to "treat the application as one for summary judgment, pursuant to CPLR 3212." The court then denied defendants' motion to the extent that it sought summary judgment dismissing the complaint, but granted defendants' motion to the extent that it sought leave to amend the answer and assert the counterclaim for overpayment. Plaintiffs thereafter moved to dismiss the counterclaim and for leave to reargue their opposition

to defendants' motion. Plaintiffs now appeal from an order that granted that part of plaintiffs' motion seeking leave to reargue and, upon reargument, adhered to the determination in the prior order, and denied that part of plaintiffs' motion seeking to dismiss the counterclaim. We affirm.

Here, upon reargument, the court did not err when it adhered to its prior determination to grant that branch of defendants' motion for leave to amend the answer to assert the counterclaim. "It is axiomatic that [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1592 [4th Dept 2016] [internal quotation marks omitted]). Here, contrary to plaintiffs' contention, the proposed counterclaim is not patently lacking in merit inasmuch as it alleges a cause of action for money had and received based on the allegations that plaintiffs received money that belonged to defendants, specifically revenue from "call contracts" that were not to be included in the gross profits of the medical practice (*see generally Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]; *Lebovits v Bassman*, 120 AD3d 1198, 1199 [2d Dept 2014]). Furthermore, plaintiffs failed to show that they were prejudiced inasmuch as the call contract revenues were in dispute from the commencement of the litigation, and thus the amendment to the answer did not cause plaintiffs to "incur some change in position or hindrance in the preparation of their case" (*Burke, Albright, Harter & Rzepka LLP v Sills*, 187 AD3d 1507, 1509 [4th Dept 2020]).

We reject plaintiffs' further contention that the court erred in denying their motion insofar as it sought a ruling that, under the statute of limitations, defendants could seek damages pursuant to the counterclaim only for the six-year period ending on the date defendants moved for leave to amend their answer to add the counterclaim. Pursuant to CPLR 203 (f), "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice to the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." A counterclaim in an amended answer cannot " 'relate back under the amended pleading provision where defendant's answer contained only general denials' " (*Joseph Barsuk, Inc. v Niagara Mohawk Power Corp.*, 281 AD2d 875, 876 [4th Dept 2001], *lv dismissed* 97 NY2d 638 [2001]). Here, defendants' initial answer contained a variety of affirmative defenses, including for unjust enrichment, failure to state a cause of action, and inadequacy of consideration, which, read together, show that the counterclaim relates back to the initial pleading (*see Herkimer County Indus. Dev. Agency v Village of Herkimer*, 124 AD3d 1298, 1300 [4th Dept 2015]; *Fortin v Hill & Markes*, 2 AD3d 934, 936 [3d Dept 2003]), and therefore the counterclaim is deemed to have been interposed at the time of the initial pleading (*see* CPLR 203 [f]).

Plaintiffs further contend that the court erred in converting defendants' motion to dismiss to a motion for summary judgment.

However, plaintiffs are not aggrieved by that part of the order because the court denied that portion of defendants' motion (*see* CPLR 5511; *see generally Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1571 [4th Dept 2021]).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**108**

**CA 23-00885**

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

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IMADEH NOSEGBE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GERMAIN JEAN CHARLES AND DANIEL RICHTER,
DEFENDANTS-RESPONDENTS.

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IMADEH NOSEGBE, PLAINTIFF-APPELLANT PRO SE.

HARRIS BEACH PLLC, SYRACUSE (BRENDAN M. PALFREYMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered December 20, 2022. The order granted the motion of defendants insofar as it sought to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion to the extent that it seeks to dismiss the second and fourth causes of action and reinstating those causes of action, and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Pro se plaintiff is a dentist who operated a dental practice named Fayetteville Family Dentistry PLLC (FFD). At some point, plaintiff engaged the services of two management companies to convert FFD into a new practice, Family Smiles Dentistry PLLC (FSD). Disagreements arose, leading plaintiff to commence an action against FSD, the two management companies and their principals (first action). While the first action was pending, plaintiff commenced this action against defendants, who are the former or current principals of FSD. Plaintiff alleges in sum and substance that defendants improperly removed her name from the PLLC application for FSD and then misappropriated her property, patient list, business telephone number, and federal tax identification number. In this action, defendants filed a pre-answer motion to dismiss pursuant to CPLR 3211 or, in the alternative, to add FSD as a necessary party or to consolidate this action with the first action. Supreme Court granted the motion insofar as it sought dismissal of the complaint and thus did not address defendants' requests for alternative relief. Plaintiff appeals.

We reject plaintiff's contention that the court erred in granting defendants' motion insofar as it seeks to dismiss the first cause of

action. Even if plaintiff is correct that the court erred in relying on CPLR 3211 (a) (1) in granting the motion to that extent, we nevertheless conclude that the court properly granted the motion insofar as it seeks to dismiss the first cause of action under CPLR 3211 (a) (7). In assessing a motion under CPLR 3211 (a) (7) where the court has considered evidentiary material submitted in support of or in opposition to the motion, "the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [internal quotation marks omitted]; *see Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 298 [2017]).

The first cause of action purports to sound in fraud. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[,] and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Carlson*, 30 NY3d at 310; *Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1255 [4th Dept 2014]). "CPLR 3016 (b) provides that where a cause of action or defense is based upon fraud, 'the circumstances constituting the wrong shall be stated in detail' " (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). Although the particularity requirements should not be so strictly interpreted to prevent an otherwise valid cause of action "where those circumstances are peculiarly within the knowledge of the party [alleged to have committed the fraud]" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]; *see Heckl*, 122 AD3d at 1255), there are no allegations of any material misrepresentation made by either defendant to plaintiff, let alone any misrepresentation that defendants knew was false or that was meant to induce reliance. Upon review of the allegations in the complaint, it does not appear that plaintiff ever conversed with either defendant about anything until after the events that are alleged as the basis of the first cause of action. We therefore conclude that the court properly granted defendants' motion with respect to the first cause of action. In light of our determination, we do not address plaintiff's remaining contentions related to that cause of action.

We agree with plaintiff, however, that the court abused its discretion in granting the motion to the extent that it seeks to dismiss the second and fourth causes of action pursuant to CPLR 3211 (a) (4), under which courts have broad discretion in determining whether to dismiss an action where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." Even assuming, arguendo, that there is an identity of issues between those two causes of action and the issues raised in the first action, we agree with plaintiff that there was no identity of parties.

The first action was against FSD, the management companies and the principals of those management companies. This action is against the principals of FSD. Although "complete identity of parties is not a necessity for dismissal under CPLR 3211 (a) (4) . . . , there must at least be a substantial identity of parties which generally is

present when at least one plaintiff and one defendant is common in each action" (*Cellino & Barnes, P.C. v Law Off. of Christopher J. Cassar, P.C.*, 140 AD3d 1732, 1734 [4th Dept 2016] [internal quotation marks omitted]; *see Matter of Witkowski v HS 570, Inc.*, 218 AD3d 1230, 1232 [4th Dept 2023]; *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]). "If the parties are not the same and even though [the] plaintiffs seek much the same end by their actions, the subsequent action should not be dismissed" (*Forget v Raymer*, 65 AD2d 953, 954 [4th Dept 1978]; *see Witkowski*, 218 AD3d at 1232; *cf. Sealand Waste LLC v Town of Carroll*, 169 AD3d 1464, 1464 [4th Dept 2019]).

Generally, a substantial identity of parties "is present when at least one plaintiff and one defendant is common in each action" (*Morgulas v Yudell Realty*, 161 AD2d 211, 213 [1st Dept 1990]; *see Cellino & Barnes, P.C.*, 140 AD3d at 1734). Further, "where . . . a plaintiff seeks the same damages for the same alleged injuries relating to the same transaction from *close corporate affiliates*, a court may properly make a finding that parties have 'substantially similar' identities for purposes of the first-in-time rule" (*Syncora Guar. Inc.*, 110 AD3d at 96 [emphasis added]). Here, however, none of the defendants is common in each action, and the defendants in the first action and this action are not close corporate affiliates. Rather, defendants in this action are the former and current principals of FSD, i.e., the corporate defendant in the first action. It is well settled that " '[i]ndividual principals of a corporation are legally distinguishable from the corporation itself' and a court may not 'find an identity of parties by, in effect, piercing the corporate veil without a request that this be done and, even more importantly, any demonstration . . . that such a result is warranted' " (*Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017]; *see Morgulas*, 161 AD2d at 213). Unlike *Alpha Beta Capital Partners, L.P. v Schepis* (2018 NY Slip Op 32348[U] [Sup Ct, NY County 2018]), where a motion pursuant to CPLR 3211 (a) (4) to dismiss a second action was granted after the "plaintiff commenced a prior action against the [principal] defendants in their corporate capacities and [then brought a] second action based on the very same claim . . . against them in their capacities as individual principals" (*id.* at *2), in this case there was never any prior action against these defendants.

Plaintiff further contends that the court erred in granting the motion insofar as it seeks to dismiss the fourth cause of action pursuant to CPLR 3211 (a) (1), which permits a court to dismiss a cause of action where it is conclusively refuted by documentary evidence. Although the court did not cite that statutory section as a basis for dismissing that cause of action, to the extent that plaintiff makes that argument and defendants raise that ground on appeal as an alternative theory of affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488 [1978]), we address the merits. Contrary to plaintiff's initial contention, defendants, in their motion, sought to dismiss the fourth

cause of action under CPLR 3211 (a) (1). Although the notice of motion cited only CPLR 3211 (a) (4) and (7) as the grounds for the motion, the memorandum of law submitted in support of the motion also asserted that the first and fourth causes of action should be dismissed under CPLR 3211 (a) (1) (NY St Cts Elec Filing [NYSCEF] Doc No. 5 at 7-9). It is well settled that this Court may consider memoranda of law for preservation purposes (*see Town of W. Seneca v Kideney Architects, P.C.*, 187 AD3d 1509, 1510 [4th Dept 2020]; *Byrd v Roneker*, 90 AD3d 1648, 1649 [4th Dept 2011]), and that we may take judicial notice of the records in NYSCEF (*see HoganWillig, PLLC v Swormville Fire Co., Inc.*, 210 AD3d 1369, 1371 [4th Dept 2022]; *Matter of Clifford*, 204 AD3d 1397, 1397 [4th Dept 2022]).

We agree with plaintiff that the court erred in using text message excerpts to justify dismissal of the fourth cause of action or, indeed, any cause of action. Documents such as text messages "do not meet the requirements for documentary evidence" to support a CPLR 3211 (a) (4) motion (*MJ Lilly Assoc., LLC v Ovis Creative, LLC,* 221 AD3d 805, 806 [2d Dept 2023] [internal quotation marks omitted]; *see Optical Communications Group, Inc. v Worms*, 217 AD3d 458, 459 [1st Dept 2023]; *Kalaj v 21 Fountain Place, LLC*, 169 AD3d 657, 658 [2d Dept 2019]; *cf. Gottesman Co. v A.E.W., Inc.*, 190 AD3d 522, 524 [1st Dept 2021], *lv denied* 37 NY3d 916 [2021]; *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 92 [4th Dept 2015]). "To be considered documentary, evidence must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable" (*Bath & Twenty, LLC v Federal Sav. Bank*, 198 AD3d 855, 855-856 [2d Dept 2021]; *see Eisner v Cusumano Constr., Inc.*, 132 AD3d 940, 942 [2d Dept 2015]; *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). Here, the text messages do not even identify the person who is communicating with plaintiff. The names and numbers are redacted. Moreover, the text messages do not "conclusively establish[ ] a defense as a matter of law" with respect to the fourth cause of action (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1183 [4th Dept 2017]; *see generally Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021]).

To the extent that the court granted defendants' motion insofar as it seeks to dismiss the second cause of action pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, we agree with plaintiff that the court erred in dismissing the second cause of action on that ground. The second cause of action alleges that defendants converted plaintiff's personal property, including dental equipment, to their own use. "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property . . . and (2) [a] defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]; *see Palermo v Taccone*, 79 AD3d 1616, 1619-1620 [4th Dept 2010]). Affording the pleading a liberal construction and assuming that the allegations contained within it are true, as we must (*see Simkin v Blank*, 19 NY3d 46, 52 [2012]), we

conclude that the pleading includes sufficient allegations to support a cause of action for conversion. Plaintiff alleged that each defendant exerted dominion and control over property to which she had a possessory right or interest (*see generally Colavito*, 8 NY3d at 50).

Based on the foregoing, we therefore modify the order by denying defendants' motion to the extent that it seeks to dismiss the second and fourth causes of action and reinstating those causes of action. Inasmuch as the court did not rule on defendants' requests for alternative relief, we remit the matter to Supreme Court for consideration of the alternative relief sought in defendants' motion (*see Stiggins v Town of N. Dansville*, 155 AD3d 1617, 1619-1620 [4th Dept 2017]).

Finally, we note that plaintiff has failed to address the court's determination to grant defendants' motion insofar as it seeks dismissal of the third cause of action, and we therefore conclude that plaintiff has abandoned any challenge to the dismissal of that cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**113**

**KA 23-00351**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL P. FORSYTH, DEFENDANT-APPELLANT.

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LEAH R. NOWOTARSKI, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (CHELSIE HAMILTON OF COUNSEL), FOR RESPONDENT.

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Appeal from an order of the Wyoming County Court (Michael M. Mohun, J.), dated February 22, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in treating his presumptive level three classification as mandatory. We reject that contention. Based on his prior conviction of a felony sex crime, defendant was subject to an "automatic override[ ], the application of which will result in a presumptive risk assessment of level three" (*People v Howard*, 27 NY3d 337, 341 [2016]). Here, the court properly applied the automatic override, and properly determined that it created a presumption of, but not mandatory classification as, a level three risk (*see People v Edmonds*, 133 AD3d 1332, 1332-1333 [4th Dept 2015], *lv denied* 26 NY3d 918 [2016]). Indeed, after recognizing the presumption, the court explicitly considered and rejected defendant's request for a downward departure (*cf. People v Douglas*, 199 AD3d 1330, 1331 [4th Dept 2021]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his request for a downward departure. Here, each of the mitigating circumstances alleged by defendant was " 'of a kind or to a degree . . . adequately taken into account by the [risk assessment g]uidelines' " (*People v Johnson*, 218 AD3d 1363, 1364 [4th Dept 2023], quoting *People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Jewell*, 119 AD3d 1446, 1448-1449 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]; *see generally Howard*, 27 NY3d at 342).

In light of our determination, we do not reach defendant's alternative contention that the court erred in its initial assessment of points before the application of the presumptive override (*see People v Krembel*, 150 AD3d 1702, 1703 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**114**

**KA 22-01000**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS ARCHIE, DEFENDANT-APPELLANT.

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CAMBARERI & BRENNECK, SYRACUSE (MELISSA K. SWARTZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (James H. Cecile, A.J.), rendered June 16, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arises from an incident in which the police recovered a gun following an attempted traffic stop of a vehicle that defendant was driving. According to police testimony at a suppression hearing, defendant refused to pull over his vehicle when the police officers who were pursuing it activated their patrol car's overhead lights and siren in an attempt to stop the vehicle and, during their continued pursuit, the police observed the gun that was recovered being thrown from the vehicle by a front seat passenger. Defendant was later apprehended after the vehicle crashed and he and the passenger fled on foot.

Defendant contends that the police acted unlawfully in their initial pursuit and attempted stop of the vehicle that he was driving and, therefore, County Court erred in refusing to suppress evidence obtained as a result of such unlawful conduct. We reject that contention. It is well settled that a police officer may stop a vehicle when they have "probable cause to believe a driver has committed a traffic infraction," regardless of whether the officer's "primary motivation is to conduct another investigation" (*People v Robinson*, 97 NY2d 341, 346 [2001]; *see People v Addison*, 199 AD3d 1321, 1321-1322 [4th Dept 2021]). Moreover, "the credibility determinations of the suppression court are entitled to great

deference on appeal and will not be disturbed unless clearly unsupported by the record" (*Addison*, 199 AD3d at 1322 [internal quotation marks omitted]; *see People v Montgomery*, 217 AD3d 1526, 1527 [4th Dept 2023]; *People v Robles-Pizarro*, 198 AD3d 1379, 1379 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]).

Here, affording great deference to the court's resolution of credibility issues at the suppression hearing (*see generally People v Prochilo*, 41 NY2d 759, 761 [1977]), we conclude that the record supports the court's determination that the police acted lawfully in their pursuit and attempted stop of defendant's vehicle (*see People v Coss*, 189 AD3d 1759, 1762 [3d Dept 2020]; *People v Cox*, 215 AD2d 684, 684 [2d Dept 1995], *lv denied* 86 NY2d 841 [1995]; *see generally Robinson*, 97 NY2d at 348-349). At the suppression hearing, one of the officers involved in the attempted traffic stop testified that, prior to the pursuit of defendant's vehicle, he observed the vehicle driving away from the scene of a reported shooting at a "very high rate of speed," i.e., a rate that appeared to be "above and beyond the speed limit," in violation of the Vehicle and Traffic Law. "[A] qualified police officer's testimony that [they] visually estimated the speed of a defendant's vehicle may be sufficient to establish that the defendant exceeded the speed limit" where the People "establish the officer[']s training and qualifications to support their visual estimates of the speed of the vehicle" (*People v Suttles*, 214 AD3d 1313, 1314 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]). Here, the officer testified that he received such training and that, although he could not recall having personally issued a speeding ticket, he used that training as part of his duties as a patrol officer (*see People v Scott*, 189 AD3d 2110, 2110-2111 [4th Dept 2020], *lv denied* 36 NY3d 1123 [2021]). Contrary to defendant's contention, "there is nothing about the officer's testimony in that regard that is unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *reconsideration denied* 28 NY3d 932 [2016] [internal quotation marks omitted]).

Defendant's contention that the court should have recused itself is unpreserved for our review (*see* CPL 470.05 [2]; *People v Gulbin*, 165 AD3d 1611, 1612 [4th Dept 2018], *lv denied* 32 NY3d 1172 [2019]; *People v LaValley*, 41 AD3d 1153, 1154 [4th Dept 2007], *lv denied* 9 NY3d 877 [2007]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**138**

**KA 21-01592**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN BISH, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered August 19, 2021. The judgment convicted defendant upon his plea of guilty of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, the indictment is dismissed, and the matter is remitted to Erie County Court, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that County Court erred in denying his motion to dismiss the indictment pursuant to, inter alia, CPL 30.30. We agree.

Where, as here, the defendant is charged with a felony, the People must be ready for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cooper*, 90 NY2d 292, 294 [1997]). The statutory period is calculated by "computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992]). "[A] defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Session*, 206 AD3d 1678, 1680 [4th Dept 2022] [internal quotation marks omitted]; *see People v Allard*, 28 NY3d 41, 45 [2016]). The People then "bear the burden of demonstrating sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]; *see Allard*, 28 NY3d at 45; *People v Brown*, 28 NY3d 392, 403 [2016]). "[P]ostreadiness delay may be charged to the People when the delay is attributable to their inaction

and directly implicates their ability to proceed to trial" (*Brown*, 28 NY3d at 404 [internal quotation marks omitted]).

Here, the statutory speedy trial period was 182 days (*see* CPL 30.30 [1] [a]; *Cortes*, 80 NY2d at 207 n 3). There is no dispute that the 108 days between October 10, 2017, i.e., the date of defendant's arraignment in City Court on the felony complaint, and January 26, 2018, i.e., the date of defendant's arraignment in County Court on the indictment, was chargeable to the People (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]; *see also People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]). The court also charged the People with the 14-day period between June 28, 2018 and July 13, 2018, when the People were aware of defendant's newly assigned counsel yet chose not to serve him with their motion response, and with 6 days between the time the People were ordered to disclose the grand jury minutes and the date such disclosure occurred. This appeal is concerned with, inter alia, the period between November 1, 2018 and January 22, 2019. On November 1, 2018, the People made an off-the-record request to adjourn the *Huntley* hearing that was scheduled to occur on November 8, 2018. The hearing was not held until January 22, 2019.

"Normally, the People will be charged only with the actual period of adjournment requested, following their initial statement of readiness; any additional period of delay, for the convenience of the court's calendar, will be excludable" (*People v Reid*, 214 AD2d 396, 397 [1st Dept 1995]; *see Brown*, 28 NY3d at 404; *People v Barnett*, 158 AD3d 1279, 1281 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]). The People, however, "bear the burden of ensuring that the record explains the cause of adjournments sufficiently for the court to determine which party should properly be charged with any delay" (*Brown*, 28 NY3d at 404 [internal quotation marks omitted]). Here, there is no explanation as to the reason for the requested adjournment in the record, and there is no indication on the record of the length of the adjournment the People were requesting. Thus, the entire period is chargeable to the People (*see People v Collins*, 82 NY2d 177, 181-182 [1993]; *Reid*, 214 AD2d at 397; *see also People ex rel. Sykes v Mitchell*, 184 AD2d 466, 467-468 [1st Dept 1992]). Furthermore, the adjournment is not excludable inasmuch as defendant did not expressly consent to the adjournment (*see People v Nunez*, 47 AD3d 545, 546 [1st Dept 2008]). Thus, the total period of time chargeable to the People is 210 days, several days beyond the 182 days allowable in this case (*see generally* CPL 30.30 [1] [a]).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**155**

**CA 23-00223**

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

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CHRISTOPHER CRYSLER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JENNIFER IRIS CRYSLER, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MEHMET ERK, M.D., ET AL., DEFENDANTS, DONALD D. HICKEY, M.D., KALEIDA HEALTH AND MILLARD FILLMORE SUBURBAN HOSPITAL, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

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ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered January 4, 2023. The order, inter alia, granted in part the motion of plaintiff to compel disclosure.

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

Same memorandum as in *Crysler v Erk* ([appeal No. 2] — AD3d — [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**156**

**CA 23-00730**

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

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CHRISTOPHER CRYSLER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JENNIFER IRIS CRYSLER, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MEHMET ERK, M.D., ET AL., DEFENDANTS, DONALD D. HICKEY, M.D., KALEIDA HEALTH, AND MILLARD FILLMORE SUBURBAN HOSPITAL, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

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ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ, PONTERIO & COMERFORD, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order the Supreme Court, Erie County (Henry J. Nowak, J.), entered April 13, 2023. The order granted the motion of defendants-appellants for leave to reargue and, upon reargument, adhered to a prior order granting in part the motion of plaintiff to compel disclosure.

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

Memorandum: In this medical malpractice action, plaintiff seeks damages resulting from the alleged negligence of defendant Mehmet Erk, M.D. in perforating the bowel of plaintiff's decedent during laparoscopic surgery. The surgery was performed at defendant Millard Fillmore Suburban Hospital (hospital), which is within the healthcare network of defendant Kaleida Health. As alleged in the amended complaint, Kaleida Health, inter alia, failed to develop and adhere to reasonable procedures for reviewing a physician's qualifications when it granted Erk privileges to perform surgical procedures at its facilities. Plaintiff and decedent, prior to her death, moved for an order compelling Kaleida Health to, inter alia, produce a representative with knowledge of prior incidents involving injuries to patients as a result of operations performed by Erk, and defendants-appellants (defendants) cross-moved for a protective order. In appeal No. 1, defendants appeal from an order that, inter alia, granted the motion and the cross-motion in part and, as relevant on appeal, directed that Kaleida Health "produce for deposition a representative

or representatives with any knowledge of prior incidents or complaints involving injuries to patients as a result of operations performed by . . . Erk before" the date of decedent's operation, provided that the representative did not learn of such incidents and complaints solely within the credentialing or recredentialing process or Kaleida Health's medical malpractice prevention and quality assurance programs. In appeal No. 2, defendants appeal from an order granting their motion for, among other things, leave to reargue their cross-motion and opposition to the motion to compel and, upon reargument, altering certain language, which is not relevant here, in the order in appeal No. 1. Defendants contend in both appeals that Supreme Court abused its discretion by not imposing additional restrictions on the deposition. We reject that contention.

As an initial matter, we note that appeal No. 1 must be dismissed inasmuch as the order in that appeal was, upon reargument, superseded by the order in appeal No. 2 (*see Santaro v Finocchio* [appeal No. 2], 221 AD3d 1489, 1490 [4th Dept 2023]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

With respect to appeal No. 2, it is well settled that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). Here, plaintiff asserts a cause of action against Kaleida Health for the negligent credentialing of Erk (*see Raschel v Rish*, 110 AD2d 1067, 1068 [4th Dept 1985], *appeal dismissed* 65 NY2d 923 [1985]). While Public Health Law § 2805-m and Education Law § 6527 (3) protect from disclosure the proceedings and records relating to Kaleida Health's quality assurance and medical malpractice prevention program, which include its credentialing and recredentialing process, "[t]here are many ways in which [a] hospital might have acquired knowledge of the alleged prior negligence of [a] defendant doctor wholly apart from any review committee meeting [and] [s]uch information is discoverable by [a] plaintiff as is information as to whether, armed with such knowledge, the hospital took any action to limit staff privileges extended to" the defendant doctor (*Byork v Carmer*, 109 AD2d 1087, 1088 [4th Dept 1985]; *cf*. *Jousma v Kolli*, 149 AD3d 1520, 1521 [4th Dept 2017]).

"[T]he court is invested with broad discretion to supervise discovery . . . , and only a clear abuse of discretion will prompt appellate action" (*Castro v Admar Supply Co., Inc.* [appeal No. 2], 159 AD3d 1616, 1617 [4th Dept 2018]; *see generally Hirschfeld v Hirschfeld*, 69 NY2d 842, 844 [1987]). Contrary to defendants' contention, we conclude that the court did not abuse its discretion in denying that part of their reargument motion seeking, upon reargument, a protective order imposing additional restrictions upon the deposition of a Kaleida Health representative with respect to prior incidents and complaints involving injuries to patients as a result of operations performed by Erk.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**159**

**KA 22-01824**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KARL O. DIGGS, DEFENDANT-APPELLANT.

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THOMAS L. PELYCH, HORNELL, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 6, 2022. The judgment convicted defendant upon a jury verdict of robbery in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]).

We reject defendant's contention that he was deprived of effective assistance of counsel by defense counsel's failure to make a timely pretrial motion for a *Mapp* hearing. The failure to make a particular pretrial motion generally does not, by itself, establish ineffective assistance of counsel (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Here, there was little or no chance that the motion, even if timely, would have been successful (*see generally People v Thornton*, 213 AD3d 1332, 1333 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]). Moreover, viewing the evidence, the law, and the circumstances of the case together and as of the time of representation, we conclude that defense counsel provided meaningful representation (*see People v Satterfield*, 66 NY2d 796, 798-800 [1985]; *People v Spencer*, 209 AD2d 1011, 1011 [4th Dept 1994], *lv denied* 84 NY2d 1039 [1995]).

Contrary to defendant's further contention, his sentence is not unduly harsh or severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**161**

**KA 22-01454**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KALIK MCMILLAN, DEFENDANT-APPELLANT.

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JEFFREY CHABROWE, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 13, 2019. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). We affirm. By pleading guilty, defendant forfeited his contention that County Court erred in denying his severance motion (*see People v Hunter*, 49 AD3d 1243, 1243 [4th Dept 2008]; *People v Jackson*, 288 AD2d 939, 939 [4th Dept 2001], *lv denied* 97 NY2d 729 [2002]; *People v Cotton*, 219 AD2d 836, 837 [4th Dept 1995], *lv denied* 87 NY2d 900 [1995]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**164**

**KA 22-01900**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V OPINION AND ORDER

DARRYL PARKER, DEFENDANT-RESPONDENT.

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JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR APPELLANT.

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

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Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), dated November 29, 2022, in a proceeding pursuant to CPL 440.20. The order granted the motion of defendant to set aside the sentence imposed as a second felony offender.

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

Opinion by BANNISTER, J.:

The question presented on this appeal is whether defendant, who was sentenced as a second felony offender on the basis of a prior felony marihuana conviction, is entitled to resentencing after successfully moving pursuant to CPL 440.46-a to vacate the prior felony marihuana conviction and have substituted therefor a misdemeanor conviction. We conclude that defendant is entitled to be resentenced.

I

In August 2019, defendant entered a plea of guilty to criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and was sentenced as a second felony offender to a determinate sentence of five years, followed by five years of postrelease supervision. His status as a second felony offender was based on a January 2013 conviction for criminal possession of marihuana in the second degree, which at that time was a felony (former § 221.25).

After defendant's sentencing, the legislature enacted the Marihuana Regulation and Taxation Act (MRTA), effective March 31, 2021, which repealed Penal Law article 221 and enacted in its place article 222 (*see* L 2021, ch 92, §§ 15-16). Under the newly enacted law, the conduct addressed by former section 221.25 was covered by

section 222.30 (1), criminal possession of cannabis in the third degree, a class A misdemeanor.

MRTA provides a procedural mechanism for a person, such as defendant, who has completed serving a sentence for a conviction under Penal Law former article 221 to petition the court of conviction for vacatur of that conviction where, as relevant here, the person would have been guilty of a lesser or potentially less onerous offense under article 222 than under former article 221 (*see* CPL 440.46-a [2] [a] [ii]). Under those circumstances, "the court after affording the parties an opportunity to be heard and present evidence, may substitute, unless it is not in the interests of justice to do so, a conviction for an appropriate lesser offense under article [222] of the penal law" (CPL 440.46-a [2] [b] [ii]). Defendant successfully moved to vacate his January 2013 felony conviction, and Supreme Court (Eagan, J.) replaced that conviction with a conviction under Penal Law § 222.30.

Thereafter, defendant moved pursuant to CPL 440.20 to vacate the sentence imposed for his 2019 conviction. He contended that the vacatur of his prior felony marihuana conviction invalidated the enhanced sentence imposed for his 2019 conviction, which was based on the prior felony conviction. The People now appeal from an order of Supreme Court (Wojtaszek, J.) that granted defendant's motion to set aside the sentence for his 2019 conviction and resentenced him as a first felony offender to 3½ years in prison and 3½ years of postrelease supervision.

II

The People contend on appeal that defendant was not entitled to have his 2019 sentence set aside because defendant's sentence on the felony marihuana conviction was legal when it was imposed in 2013 and the change in law by which his prior marihuana conviction was reduced from a felony to a misdemeanor does not apply retroactively to invalidate his second felony offender sentence. We reject the People's assertion and conclude that MRTA does apply retroactively for predicate felony purposes when a defendant successfully uses the procedural mechanism provided under CPL 440.46-a to vacate the predicate felony conviction.

Generally, nonprocedural statutes "are not to be applied retroactively absent a plainly manifested legislative intent to that effect" (*People v Oliver*, 1 NY2d 152, 157 [1956]). There is an exception, however, when the legislature passes an ameliorative amendment that reduces the punishment for a particular crime (*see People v Behlog*, 74 NY2d 237, 240 [1989]; *Oliver*, 1 NY2d at 159-160).

This Court recently considered the possible retroactive application of other statutory provisions of MRTA and noted that "where the legislature intended for the new laws regulating marihuana to have retroactive effect, it clearly specified so" (*People v Vaughn*, 203 AD3d 1729, 1730 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022], citing CPL 440.46-a).

III

The legislature clearly afforded retroactive relief to certain defendants, like defendant here, when it provided a statutory mechanism for the vacatur or substitution of certain prior felony marihuana offenses (*see* CPL 440.46-a). Relevantly, CPL 440.46-a (3) states that "[u]nder no circumstances may substitution under this section result in the imposition of a term of imprisonment or sentencing term, obligation or condition that is in any way either harsher than the original sentence or harsher than the sentence authorized for any substituted lesser offense." Further, CPL 440.46-a (4) (c) provides in part that "[w]hen a felony conviction is vacated pursuant to this section and a lesser offense that is a misdemeanor or violation is substituted for such conviction, such lesser offense shall be considered a misdemeanor or violation, as the case may be, *for all purposes*" (emphasis added).

It is clear that those provisions of MRTA were intended to be ameliorative (*see* CPL 440.46-a [1]; *see also* L 2021, ch 92, § 2). Indeed, one of the stated purposes of the Cannabis Law enacted as part of MRTA was "to lower social barriers for individuals who had come into contact with the criminal justice system over their involvement in the world of cannabis during the prohibition [e]ra," and the vacatur and resentencing provisions of CPL 440.46-a are intended to serve that goal (Sponsor's Mem in Support of 2023 NY Senate Bill S7505, enacted as L 2023, ch 468, § 1, eff. Sept. 15, 2023, deemed eff. March 31, 2021). By providing the procedural mechanism for vacating or reducing marihuana convictions, the legislature necessarily determined that those crimes no longer serve, or that the lesser penalty sufficiently serves, the legitimate demands of the criminal law (*see Behlog*, 74 NY2d at 240). In turn, we conclude that one of the "purposes" (CPL 440.46-a [4] [c]) served in substituting the misdemeanor for the felony conviction is to allow for the retroactive amelioration of a predicate felony sentence. Moreover, permitting a vacated felony marihuana crime to serve as a predicate felony for the harsher penalty imposed on a second felony offender would contradict the purpose of the statutory provisions.

IV

Accordingly, we conclude that the court properly vacated defendant's 2019 sentence and resentenced defendant as a first-time felony offender, and we therefore affirm the order.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**168**

**TP 23-01589**

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

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IN THE MATTER OF MICHAEL DERBY, PETITIONER,

V MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered September 18, 2023) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul that part of a determination, following a tier III disciplinary hearing, that he violated incarcerated individual rule 113.23 (7 NYCRR 270.2 [B] [14] [xiii] [contraband]). Contrary to petitioner's contention, the misbehavior report and testimony at the hearing constitute substantial evidence to support the determination that he violated that rule by possessing cellophane (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Livingston v Annucci*, 222 AD3d 1391, 1392 [4th Dept 2023]). Any conflicting testimony from petitioner and the other individual witnesses merely presented credibility issues for the Hearing Officer to resolve (*see Foster*, 76 NY2d at 966; *Matter of Delgado v Annucci*, 221 AD3d 1512, 1513 [4th Dept 2023]).

Petitioner next contends that there was not substantial evidence that he possessed contraband because the rule does not expressly prohibit his possession of the item in question, i.e., cellophane. We reject that contention. Inasmuch as the rule states "that any article not 'specifically authorized' by the facility superintendent, his or her designee, or departmental or local facility rules constitutes

contraband . . . , the fact that the cited rule did not expressly prohibit the item[ ] that petitioner was charged with possessing is of no moment" (*Matter of McCollum v Fischer*, 61 AD3d 1194, 1194 [3d Dept 2009], *lv denied* 13 NY3d 703 [2009]). We note that petitioner "does not contend that possession of the [cellophane] had been authorized by the Superintendent at this correctional facility" (*Matter of Mills v Coombe*, 231 AD2d 923, 924 [4th Dept 1996]).

To the extent that petitioner challenges the constitutionality of the rule on the grounds that it is vague and overbroad, we conclude that his challenge is unpreserved for our review (*see Matter of Bottom v Annucci*, 26 NY3d 983, 985 [2015]; *Matter of Rosa v Fischer*, 87 AD3d 1252, 1253 [3d Dept 2011], *lv denied* 19 NY3d 802 [2012]). We lack the discretionary authority to reach that issue (*see Matter of Cornell v Annucci*, 173 AD3d 1760, 1761 [4th Dept 2019]; *see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Finally, petitioner contends that the penalty imposed is excessive. Inasmuch as he failed to raise that contention in his administrative appeal, he " 'failed to exhaust his administrative remedies[,] and this Court has no discretionary power to reach that issue' " (*Matter of Jay v Fischer*, 118 AD3d 1364, 1364 [4th Dept 2014], *appeal dismissed* 24 NY3d 975 [2014]; *see Matter of Inesti v Rizzo*, 155 AD3d 1581, 1583 [4th Dept 2017]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**169**

**CAF 23-00254**

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

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IN THE MATTER OF MILIRA ROBINSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AMIR SANTIAGO, RESPONDENT-APPELLANT.

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DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered August 19, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole and primary physical custody of the subject child with visitation for respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph insofar as it awarded sole legal custody of the subject child to petitioner and awarding joint legal custody of the subject child to petitioner and respondent, and by vacating the first subparagraph of the third ordering paragraph insofar as it directs the parties to modify the visitation schedule to accommodate the school year and summer visitation schedule when appropriate and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order, entered after a hearing, that, inter alia, awarded petitioner mother sole custody and primary physical residence of the subject child, who was born in 2019, with visitation to the father. Contrary to the father's contention, there is a sound and substantial basis in the record for Family Court's determination that primary physical residence with the mother is in the child's best interests (*see Matter of Owens v Pound*, 145 AD3d 1643, 1644 [4th Dept 2016], *lv denied* 29 NY3d 902 [2017]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]). The record established that the mother "is the more stable parent with a higher quality home and is better situated to serve as a primary placement parent" (*Hendrickson v Hendrickson*, 147 AD3d 1522, 1523 [4th

Dept 2017] [internal quotation marks omitted]; *see Matter of Honsberger v Honsberger*, 144 AD3d 1680, 1680 [4th Dept 2016]).

We agree with the father, however, that the court's determination to award sole custody to the mother is not supported by a sound and substantial basis in the record. The record establishes that the mother and the father were able to cooperate with regard to raising the child and that the parties' relationship was not so " 'severely antagonistic and embattled' " as to warrant a sole custody determination (*Matter of K.C. v N.C.*, 215 AD3d 1238, 1239 [4th Dept 2023], *lv denied* 40 NY3d 907 [2023], quoting *Braiman v Braiman*, 44 NY2d 584, 587 [1978]; *cf. Matter of Christopher J.S. v Colleen A.B.*, 43 AD3d 1350, 1350-1351 [4th Dept 2007]). Further, the court acknowledged in its bench decision that the father should have the benefits of joint custody, and it awarded the father independent access to the child's medical and educational records and ordered the mother to consult with the father on major decisions regarding the health, safety, and welfare of the child. Under these circumstances, we conclude that the best interests of the child would be served by awarding the father and mother joint custody, and we therefore modify the order accordingly.

Finally, the father requests that the order be modified to clarify what the visitation schedule will be when the child reaches school age. In its order, the court directed the parties to modify the schedule to accommodate the school year and summer visitation schedule when appropriate, but in its bench decision, the court stated that it would award the father visitation with the child during summer and school breaks. In light of that discrepancy, we further modify the order by vacating the direction that the parties modify the schedule to accommodate the school year and summer visitation schedule when appropriate, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation during the summer and school breaks.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**170**

**CA 23-01077**

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

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IN THE MATTER OF ROCHESTER GENESEE
REGIONAL TRANSPORTATION AUTHORITY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. STENSRUD AND MARIA B. STENSRUD,
RESPONDENTS-APPELLANTS.

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REFERMAT & DANIEL PLLC, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING PLLC, SYRACUSE (TIMOTHY N. MCMAHON OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from a second amended judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered December 13, 2022. The second amended judgment awarded respondents money damages.

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

Memorandum: Respondents appeal from a second amended judgment that awarded them $509,000, plus interest and costs, after a trial in this condemnation proceeding. We reject respondents' contention that Supreme Court's award was not supported by evidence in the record. Where, as here, a court determines that "capitalization of income is the proper valuation procedure and one expert utilizes that method, a court is not required to adopt that testimony per se but may use all the evidence in the record in order to establish fair market value" (*Matter of City of New York [Oceanview Terrace]*, 42 NY2d 948, 949 [1977]). We conclude that the court's determination of the property's value is based on a fair interpretation of the evidence (*see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Matter of Rochester Urban Renewal Agency v Lee*, 83 AD2d 770, 770 [4th Dept 1981]).

We have reviewed respondents' remaining contention and conclude that it does not warrant modification or reversal of the second amended judgment.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**173**

**CA 23-00219**

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

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IN THE MATTER OF LOONEY INJURY LAW, PLLC,
AND JOHN W. LOONEY, ESQ., PETITIONERS-RESPONDENTS,

V ORDER

CELLINO LAW, LLP, AND ROSS M. CELLINO, JR., ESQ.,
RESPONDENTS-APPELLANTS.

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CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), dated January 27, 2023. The order denied the motion of respondents to dismiss the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 22, 2024,

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**175**

**CA 23-01435**

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

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WILLIAM V. ROCHE AND KARI ROCHE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

PRECISION SHOOTING EQUIPMENT, INC.,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

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

LAW OFFICES OF JOHN WALLACE, HARTFORD, CONNECTICUT (KEVIN J. KRUPPA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Craig D. Hannah, J.), entered August 15, 2023. The order, insofar as appealed from, granted the motion of defendant Precision Shooting Equipment, Inc., to compel further testing of a compound bow.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs and the motion is denied.

Memorandum: Plaintiffs commenced this negligence and products liability action seeking damages for injuries sustained by plaintiff William V. Roche when he was struck in the eye while using a compound bow manufactured by defendant Precision Shooting Equipment, Inc. (PSE). PSE moved to compel an inspection of the bow by its expert. Upon agreement of the parties, PSE conducted a visual inspection of the bow and took measurements and photographs. Thereafter, PSE sought additional testing of the bow that would involve replacing a damaged component, re-stringing the bow, making certain evaluations with the string drawn, and then reinstalling the damaged component. PSE's expert averred that the testing was non-destructive. Plaintiffs opposed the proposed further testing of the bow, contending that it would be destructive to the bow and was unnecessary. Plaintiffs now appeal, as limited by their brief, from Supreme Court's order insofar as it granted the motion, and we reverse the order insofar as appealed from.

A party "seeking to conduct destructive testing should provide a reasonably specific justification for such testing including, *inter alia*, the basis for its belief that nondestructive testing is

inadequate and that destructive testing is necessary; further, there should be an enumeration and description of the precise tests to be performed, including the extent to which each such test will alter or destroy the item being tested" (*Castro v Alden Leeds, Inc.*, 116 AD2d 549, 550 [2d Dept 1986]; *see Doerrer v Schreiber Foods, Inc.*, 173 AD3d 838, 839 [2d Dept 2019]). Even assuming, arguendo, that the additional testing proposed by PSE is non-destructive, we conclude that PSE failed to establish in the first instance that the additional testing is "material and necessary" to its defense of the action (CPLR 3101 [a]; *see Constantiner v Sovereign Apts., Inc.*, 126 AD3d 532, 532 [1st Dept 2015]; *see generally Forman v Henkin*, 30 NY3d 656, 661 [2018]). PSE's expert made only a conclusory statement that re-stringing the bow with an undamaged component "should better represent the condition it was in prior to the" accident (*see generally Carter v New York City Bd. of Educ.*, 225 AD2d 512, 512 [2d Dept 1996]). Therefore, even in the absence of an abuse of the court's discretion, we substitute our own discretion for that of the motion court and deny the motion (*see generally Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]; *Garcia v Town of Tonawanda*, 210 AD3d 1483, 1486 [4th Dept 2022]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**179**

**KA 23-01062**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELUCIANO PINET PARRILLA, DEFENDANT-APPELLANT.

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

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

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Appeal from a resentence of the Onondaga County Court (Theodore H. Limpert, J.), rendered May 19, 2023. Defendant was resentenced upon his conviction of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the first degree, criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree (four counts), criminal possession of a firearm (two counts), and criminal possession of a controlled substance in the seventh degree (two counts).

It is hereby ORDERED that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a resentence upon his conviction of one count of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), one count of criminal sale of a controlled substance in the third degree (§ 220.39 [1]), two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]), four counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [8]), two counts of criminal possession of a firearm (§ 265.01-b [1]), and two counts of criminal possession of a controlled substance in the seventh degree (§ 220.03). Although defendant was originally sentenced on each of those counts following his plea of guilty, County Court thereafter resentenced him, more than 30 days after the original sentence, to amend the periods of postrelease supervision applicable to certain of the counts. Defendant's contentions on appeal regarding the original judgment are thus " 'not properly before us inasmuch as there is no notice of appeal from the original judgment in the record before us, nor is there otherwise any indication in the record that an appeal from that judgment was perfected' " (*People v Dexter*, 71 AD3d

1504, 1504 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]; *see People v Williams*, 163 AD3d 1420, 1421 [4th Dept 2018]). Inasmuch as defendant does not raise any contentions regarding the resentence, we dismiss the appeal (*see generally People v Griffin*, 151 AD3d 1824, 1825 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**180**

**KA 21-01380**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP BRADLEY, DEFENDANT-APPELLANT.

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RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered July 27, 2021. The judgment convicted defendant, upon a jury verdict, of riot in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of riot in the first degree (Penal Law § 240.06 [2]). The conviction arises from an incident at the Auburn Correctional Facility (prison) during which several inmates, including defendant, became violent and several correction officers were injured.

Contrary to defendant's contention, County Court's *Sandoval* ruling did not constitute an abuse of discretion. The court allowed the prosecutor to inquire about defendant's prior conviction of assault in the first degree, but would not allow inquiry into the underlying facts of that conviction (*see People v Lee*, 275 AD2d 995, 996-997 [4th Dept 2000], *lv denied* 95 NY2d 966 [2000]). It is well established that "questioning concerning other crimes is not automatically precluded simply because the crimes to be inquired about are similar to the [crime or] crimes charged" (*People v Pavao*, 59 NY2d 282, 292 [1983]).

Defendant further contends that the court erred in denying his for-cause challenge to a prospective juror, which was based on the prospective juror's failure to include on the jury questionnaire certain information that she later disclosed in response to voir dire questioning. We reject that contention. Here, the prospective juror's omissions on the questionnaire did not demonstrate "a state of mind that is likely to preclude" rendering an impartial verdict (CPL 270.20 [1] [b]), or a " 'preexisting opinion[ ] that might indicate

bias' " (*People v Patterson*, 34 NY3d 1112, 1113 [2019], quoting *People v Arnold*, 96 NY2d 358, 363 [2001]; *see People v Williams*, 184 AD3d 1125, 1126 [4th Dept 2020], *affd* 37 NY3d 314 [2021]). Although the prospective juror did not disclose on the questionnaire that she had at least one relative who had previously worked at the prison, "there was no indication that the juror knew or had a professional or personal relationship with any of the People's witnesses or counsel" (*People v Ellis*, 34 NY3d 1092, 1093 [2019]). Moreover, under the circumstances of this case, it cannot be said that the prospective juror's impartiality was compromised by the fact that she "had [a relative or] relatives in the same profession" as the People's witnesses (*id.* [internal quotation marks omitted]).

To the extent that defendant preserved for our review his contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, contrary to defendant's contention, we conclude that the fine imposed as a component of defendant's sentence is not unduly harsh or severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**185**

**KA 19-02240**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAMIU BLAKE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered September 6, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals, in appeal No. 1, from a judgment convicting him, upon a plea of guilty, of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]) and, in appeal No. 2, from a judgment convicting him, upon a plea of guilty, of criminal possession of a weapon in the second degree (§ 265.03 [3]). The two pleas were entered in a single plea proceeding.

As defendant contends in both appeals and the People correctly concede, the respective waivers of defendant's right to appeal are invalid inasmuch as the written waivers and the oral waiver colloquy " 'mischaracterized the nature of the right[s] that defendant was being asked to cede, portraying the waiver[s] as [overly broad and] an absolute bar to defendant taking an appeal' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends in both appeals that Supreme Court failed to make the necessary determination whether he was eligible for youthful offender treatment. Contrary to defendant's contention, we conclude that the court implicitly resolved the threshold issue of youthful offender eligibility in defendant's favor (*see People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]; *People*

*v Stitt*, 140 AD3d 1783, 1784 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]). Contrary to defendant's further contention in both appeals, even assuming, arguendo, that he was eligible for youthful offender status, we conclude that the court did not abuse its discretion in refusing to grant him that status (*see People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). In addition, we perceive no basis for exercising our own discretion in the interest of justice to adjudicate defendant a youthful offender (*see id.* at 1400-1401).

Finally, we reject defendant's contention in both appeals that his agreed-upon sentences are unduly harsh and severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**186**

**KA 23-01034**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAMIU BLAKE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered September 6, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Blake* ([appeal No. 1] — AD3d — [May 3, 2024] [4th Dept 2024]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**189**

**CA 23-00146**

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

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AMARJIT S. VIRK, M.D., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-RESPONDENT.

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

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

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Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered December 22, 2022. The order granted the motion of defendant for summary judgment and dismissed the amended complaint.

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

Memorandum: Plaintiff is an anesthesiologist who, until shortly after the occurrence of an incident involving a patient in May 2013, provided services to hospitals owned and operated by defendant. During the relevant time frame, plaintiff was employed by nonparty Maple-Gate Anesthesiologists (Maple-Gate), which had been retained by defendant as its exclusive provider for anesthesiology services. During the incident in question (May 2013 incident), plaintiff allegedly provided substandard care to a patient at one of defendant's hospitals. Four days after that incident, defendant sent plaintiff a letter, signed by the president of defendant's medical and dental staff, notifying plaintiff that defendant was issuing a precautionary suspension that temporarily prohibited him from practicing in any of defendant's hospitals and facilities. A day after the letter was sent, Maple-Gate terminated plaintiff's employment. Plaintiff alleges in this action that defendant harmed his reputation by publishing the letter documenting his precautionary suspension to Maple-Gate, the National Practitioner Data Bank (NPDB), and the New York State Department of Health's Office of Professional Medical Conduct (OPMC).

According to plaintiff, his precautionary suspension had been engineered, with retaliatory and discriminatory animus, by defendant's chief of anesthesia services—someone who also worked for Maple-Gate. That doctor had been responsible for conducting an internal investigation into the May 2013 incident, and he reported his findings

to defendant's chief medical officer. The chief medical officer and the president of defendant's medical and dental staff jointly made the decision to issue the precautionary suspension, relying on the findings of the internal investigation.

Plaintiff declined to request a hearing or participate in any hearing process offered by defendant to challenge his precautionary suspension, and ultimately resigned his privileges to practice at defendant's hospitals and facilities. Plaintiff nevertheless commenced a CPLR article 78 proceeding seeking, inter alia, to annul defendant's determination issuing the precautionary suspension, and he obtained a judgment annulling that determination and rescinding defendant's report of the precautionary suspension to NPDB and OPMC. Plaintiff also successfully pursued breach of contract and civil rights claims against, inter alia, Maple-Gate in an arbitration proceeding, based on findings that Maple-Gate had not followed proper procedures in terminating plaintiff and that its decision to terminate him had been motivated by non-discriminatory animus due to a bad faith investigation into the May 2013 incident.

Plaintiff commenced this action asserting in an amended complaint causes of action for, inter alia, defamation, injurious falsehood, and tortious interference with contract based on defendant's issuance of the precautionary suspension, which it related to NPDB, OPMC, and Maple-Gate. He now appeals from an order that granted defendant's motion for summary judgment dismissing the amended complaint. We affirm.

Initially, we conclude that Supreme Court properly granted the motion with respect to the defamation cause of action. "It is well established that [t]he elements of a cause of action for defamation 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" (*Conklin v Laxen*, 180 AD3d 1358, 1360 [4th Dept 2020] [internal quotation marks omitted]; *see D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014]). This appeal involves defamation per se inasmuch as the challenged statements allegedly "tend to injure [plaintiff] in [his] trade, business or profession" (*Liberman v Gelstein*, 80 NY2d 429, 435 [1992]).

A statement is privileged if it "is one which, but for the occasion on which it is uttered, would be defamatory and actionable" (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 208 [1983]). On a motion for summary judgment dismissing a defamation cause of action, such cause of action is properly dismissed " 'where a qualified privilege obtains *and* the plaintiff[ ] offer[s] an insufficient showing of actual malice' " (*Shenoy v Kaleida Health*, 158 AD3d 1323, 1323 [4th Dept 2018] [emphasis added], quoting *Trails W. v Wolff*, 32 NY2d 207, 221 [1973]). As relevant here, a "statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of [their] own affairs, in a matter where [their] interest is concerned" (*Stega v*

*New York Downtown Hosp.*, 31 NY3d 661, 669-670 [2018] [internal quotation marks omitted]; *see Toker v Pollak*, 44 NY2d 211, 219 [1978]). Where a defendant establishes that a privilege applies, it has the effect of shifting the burden to the plaintiff to establish actual malice (*see Stega*, 31 NY3d at 670; *Miserendino v Cai*, 218 AD3d 1261, 1266 [4th Dept 2023]).

Here, defendant met its initial burden on the motion of establishing that the challenged statements to NPDB, OPMC, and Maple-Gate were protected by the application of a qualified privilege. With respect to the statement made to NPDB, defendant established that it reported plaintiff's precautionary suspension because it was required to do so by the Health Care Quality Improvement Act of 1986 (HCQIA) (*see* 42 USC § 11101 *et seq.*). The HCQIA "creates a qualified privilege for information provided in medical peer review proceedings concerning the competence or professional conduct of a physician, unless such information is false and the person providing it knew that such information was false" (*Colantonio v Mercy Med. Ctr.*, 135 AD3d 686, 690 [2d Dept 2016], *lv denied* 28 NY3d 903 [2016] [internal quotation marks omitted]; *see* 42 USC §§ 11111 [a] [2]; 11112 [a]). Defendant established that the decision to report the precautionary suspension to NPDB was made "in the reasonable belief that the action was in the furtherance of quality health care" based on its concerns over plaintiff's conduct during the May 2013 incident (§ 11112 [a] [1]). Defendant also established that it engaged in reasonable efforts to obtain the facts surrounding the incident (*see* § 11112 [a] [2]) and that it had made the decision to report the precautionary suspension to NPDB after plaintiff had the opportunity to avail himself of "adequate notice and hearing procedures" (§ 11112 [a] [3]). There is no dispute that plaintiff declined to participate in the available hearing procedures, in favor of resigning his privileges with defendant, and that defendant made its report to NPDB months after that occurred, as it was required to do (*see* § 11133 [a] [1]).

With respect to the statement made to OPMC, we conclude that defendant established that the statement was privileged under the Public Health Law. Public Health Law § 230 requires entities such as defendant to report professional misconduct to OPMC and provides, as relevant here, that "[s]uch reports shall remain confidential and shall not be admitted into evidence in any administrative or judicial proceeding" (§ 230 [11] [a]). Public Health Law § 2805-j requires hospitals to maintain a program to identify and prevent, inter alia, medical malpractice. As relevant here, hospitals are required to enact "[p]olicies to ensure compliance with the reporting requirements of . . . [Public Health Law § 230 (11)]" (§ 2805-j [1] [i]). In connection with those requirements, Public Health Law § 2805-m (3) creates a privilege, stating in pertinent part: "There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any . . . entity on account of the communication of information in the possession of such . . . entity, or on account of any recommendation or evaluation, regarding the qualifications, fitness, or professional conduct or practices of a physician, to any governmental agency . . . as required by[, inter alia, Public Health Law § 2805-j]. The foregoing shall not apply to information which is

untrue and communicated with malicious intent." Here, defendant established that its statement to OPMC was protected by the privilege contained in Public Health Law § 2805-m (3) inasmuch as its decision to notify OPMC about plaintiff's precautionary suspension was done in furtherance of its medical malpractice prevention program, as required by law (*see Colantonio v Mercy Med. Ctr.*, 73 AD3d 966, 968-969 [2d Dept 2010]; *Cooper v Hodge*, 28 AD3d 1149, 1150 [4th Dept 2006]; *see generally Kirell v Vytra Health Plans Long Is., Inc.*, 29 AD3d 638, 639 [2d Dept 2006]).

With respect to Maple-Gate, we conclude that defendant established that its statement about the precautionary suspension was protected by the common interest privilege, which applies "when a person [or entity] makes a good[-]faith, bona fide communication upon a subject in which [the person or entity] has an interest, or a legal, moral or societal interest to speak, and the communication is made to a person [or entity] with a corresponding interest" (*Stevenson v Cramer*, 151 AD3d 1932, 1933 [4th Dept 2017] [internal quotation marks omitted]). Defendant notified Maple-Gate about the precautionary suspension based on its reasonable belief that plaintiff's actions appeared to jeopardize the life and well-being of patients, and required immediate action to reduce such risk. Inasmuch as both entities were health care providers, and given that Maple-Gate was defendant's exclusive provider of anesthesiology services, they shared a "legal, moral or societal interest" in protecting the well-being of patients and preventing medical malpractice (*id.* [internal quotation marks omitted]; *see also Privolos v St. Barnabas Hosp.*, 1 AD3d 126, 127 [1st Dept 2003]; *see generally Liberman*, 80 NY2d at 437).

We further conclude that, in opposition to the motion, plaintiff failed to raise a triable issue of material fact with respect to whether the challenged statements were made by defendant with actual malice sufficient to defeat the application of any of the privileges discussed above. Simply put, the "defense of qualified privilege is defeated by a showing that the defendant spoke with malice, i.e., where it is shown that 'the motivation for making such statements was spite or ill will (common-law malice) or [that] the statements [were] made with [a] high degree of awareness of their probable falsity (constitutional malice)' " (*Kondo-Dresser v Buffalo Pub. Schools*, 17 AD3d 1114, 1115 [4th Dept 2005], quoting *Foster v Churchill*, 87 NY2d 744, 752 [1996]). Even assuming, arguendo, that defendant's chief of anesthesia services acted with malice in conducting a bad faith investigation into the May 2013 incident, we conclude that any malice on his part is irrelevant inasmuch as he was not the official who acted on defendant's behalf in issuing the precautionary suspension letter. Rather, the operative decision-makers—i.e., the speakers—for purposes of this case were defendant's chief medical officer and its president of the medical and dental staff, who made their decision based on their reasonable reliance on the report provided by the chief of anesthesia services.

Notably, "[a] qualified privilege may be sustained if the speaker is genuinely unaware that a statement is false because the failure to investigate its truth, standing alone, is not enough to prove actual

malice even if a prudent person would have investigated before publishing the statement" (*Sweeney v Prisoners' Legal Servs. of N.Y.*, 84 NY2d 786, 793 [1995]). Here, plaintiff submitted no evidence that defendant's chief medical officer or its president of the medical and dental staff knew that the report of the chief of anesthesia services was false or made in bad faith. There is also no evidence supplied by plaintiff that the relevant decision-makers intentionally avoided learning the truth about the accusations against plaintiff. To the extent that those decision-makers were aware of any past strife between plaintiff and the chief of anesthesia services, it is well settled that "[e]arlier disputes are not evidence of malice" (*Matter of Williams v County of Genesee*, 306 AD2d 865, 868 [4th Dept 2003] [internal quotation marks omitted]; *see Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 64 [1959]).

For the same reasons detailed above, we further conclude that the court properly granted the motion with respect to the injurious falsehood cause of action inasmuch as defendant established that the challenged statements were privileged (*see American Petroleum Inst. v TechnoMedia Intl., Inc.*, 699 F Supp 2d 258, 267 n 7 [D DC 2010]; *see generally Chernick v Rothstein*, 204 AD2d 508, 509 [2d Dept 1994]; 2A NY PJI 3:55 at 615-616 [2024]), and plaintiff failed to raise a triable issue of material fact in opposition on the issue of actual malice (*see Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d 1309, 1312 [2d Dept 2018]).

Finally, we reject plaintiff's contention that the court erred in granting the motion with respect to the cause of action for tortious interference with contract. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *see Canandaigua Natl. Bank & Trust Co. v Acquest S. Park, LLC*, 170 AD3d 1663, 1664-1665 [4th Dept 2019]). Here, defendant met its initial burden on the motion with respect to that cause of action by submitting evidence establishing that it did not intentionally induce Maple-Gate to breach its employment contract with plaintiff by issuing the precautionary suspension. Rather, defendant established that it informed Maple-Gate, its exclusive provider at the time for anesthesiology services, about the suspension based exclusively on its concerns about patient safety (*see Amalfi, Inc. v 428 Co., Inc.*, 185 AD3d 1553, 1556 [4th Dept 2020]). We further conclude that, in opposition, plaintiff did not raise an issue of fact in that respect (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**195**

**TP 23-01593**

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

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IN THE MATTER OF PEOPLE OF THE STATE OF
NEW YORK ON RELATION OF PAUL RAMOS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS
AND COMMUNITY SUPERVISION, RESPONDENT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARAH HANSEN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (RACHEL RAIMONDI OF COUNSEL), FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Kevin P. Kuehner, J.], entered September 14, 2023) to review a determination of respondent. The determination revoked petitioner's parole status.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of the Administrative Law Judge, following a parole revocation hearing, revoking his release to parole supervision and ordering him to serve a 36-month time assessment. Pursuant to CPLR 7804 (g), the proceeding was transferred to this Court in September 2023.

In November 2023, petitioner was convicted upon a guilty plea of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and was sentenced to a determinate term of imprisonment of six years and 1½ years of postrelease supervision, to run concurrently with his prior sentence.

Notably, the petition does not challenge the determination that petitioner violated his parole conditions by failing to abide by his curfew on March 10, 2022. Rather, petitioner challenges the parole violations relating to his possession of drug paraphernalia and possession of a firearm, and he challenges the alleged excessiveness of the time assessment. Thus, an order granting the petition would leave in place both the sustained charge for the curfew violation and the delinquency date of March 10, 2022, which was established in

connection with the curfew violation. As a result, the calculation of petitioner's remaining term of postrelease supervision would be unaffected by a ruling in favor of petitioner in this proceeding.

We conclude that because petitioner has identified no other "readily ascertainable and legally significant enduring consequence[ ]" of the parole revocation determination, petitioner's challenge to that determination was rendered moot upon his November 2023 conviction, and the proceeding must be dismissed (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671 [2015]; *see generally People ex rel. Daniels v Beaver*, 303 AD2d 1025, 1025 [4th Dept 2003]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**213**

**KA 22-01350**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCO A. ALMONTE, DEFENDANT-APPELLANT.

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

MARCO A. ALMONTE, DEFENDANT-APPELLANT PRO SE.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KAYLAN C. PORTER OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered August 16, 2022. The judgment convicted defendant upon a jury verdict of kidnapping in the second degree, strangulation in the second degree, assault in the third degree and criminal contempt in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the second degree (Penal Law § 135.20), strangulation in the second degree (§ 121.12), assault in the third degree (§ 120.00 [1]), and criminal contempt in the first degree (§ 215.51 [b] [iii]).

In his main brief, defendant contends that County Court erred in denying his request to charge unlawful imprisonment in the second degree as a lesser included offense of kidnapping in the second degree. We reject that contention. Viewing the evidence in the light most favorable to defendant, there is no reasonable view of the evidence that defendant committed the crime of unlawful imprisonment in the second degree, which requires a determination that defendant restrained the victim (*see* Penal Law § 135.05), but not kidnapping in the second degree, which requires a determination that defendant abducted the victim (*see* § 135.20; *see generally People v Randolph*, 81 NY2d 868, 869 [1993]). As relevant here, the term abduct "means to restrain a person with intent to prevent [their] liberation by . . . using or threatening to use deadly physical force" (§ 135.00 [2] [b]). Here, the only means employed by defendant to restrain the victim was his threatened use of a gun. Under these circumstances, the victim's "restraint can only be reasonably viewed as an abduction" (*People v*

*Linderberry*, 222 AD2d 731, 734 [3d Dept 1995], *lv denied* 87 NY2d 975 [1996]; *see People v Sanford*, 48 AD3d 221, 221-222 [1st Dept 2008], *lv denied* 10 NY3d 869 [2008]; *People v Gardner*, 28 AD3d 1221, 1222 [4th Dept 2006], *lv denied* 7 NY3d 812 [2006]).

Defendant's contention in his main brief that the evidence is legally insufficient to support the conviction of kidnapping in the second degree because the evidence failed to establish the element of abduction is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, "we necessarily review the evidence adduced as to each of the elements of the crime[ ] in the context of our review of defendant's challenge regarding the weight of the evidence" with respect to that crime (*People v Desmond*, 224 AD3d 1303, 1304 [4th Dept 2024], *lv denied* 41 NY3d 964 [2024] [internal quotation marks omitted]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]). Viewing the evidence in light of the elements of the crime of kidnapping in the second degree as charged to the jury, we conclude that, although an acquittal would not have been unreasonable, the verdict with respect to that crime is not against the weight of the evidence (*see Danielson*, 9 NY3d at 349; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention in his pro se supplemental brief that his conviction of criminal contempt in the first degree is not supported by legally sufficient evidence is unpreserved inasmuch as defendant failed to raise that contention in his motion for a trial order of dismissal (*see Gray*, 86 NY2d at 19; *People v Hill*, 206 AD3d 1616, 1618 [4th Dept 2022], *lv denied* 38 NY3d 1151 [2022]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

In his main brief, defendant contends that the court erred in denying that part of his omnibus motion seeking to dismiss the charge of kidnapping in the second degree pursuant to the merger doctrine. The kidnapping merger doctrine is a judicially-created doctrine intended to prevent overcharging and "to prohibit a conviction for kidnapping based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and independent criminal responsibility for kidnapping may not fairly be attributed to the accused" (*People v Hanley*, 20 NY3d 601, 605-606 [2013] [internal quotation marks omitted]). A kidnapping charge "is generally deemed to merge with another offense only where there is minimal asportation immediately preceding the other crime or where the restraint and underlying crime are essentially simultaneous" (*id.* at 606 [internal quotation marks omitted]). Even if that is so, however, there is no merger where "the manner of detention is egregious" (*id.* [internal quotation marks omitted]). We agree with defendant that the court erred in concluding that the merger doctrine did not apply because defendant was charged only with kidnapping and, therefore, there was no other crime with which the count could merge.

Here, defendant correctly contends that he had committed acts

that would have supported a conviction for menacing and, therefore, the merger doctrine was applicable whether he was charged with the lesser offense or not (*cf. People v Denson*, 26 NY3d 179 [2015]). The position advocated by the People would undermine the entire purpose of the merger doctrine, which was "to rectify th[e] problem of overcharging," by permitting a prosecutor "to charge a defendant with kidnapping in order to expose [defendant] to the heavier penalty even if the underlying criminal conduct constituted a robbery, rape or some other offense carrying a lesser term of incarceration" (*Hanley*, 20 NY3d at 605 [internal quotation marks omitted]).

Inasmuch as the court did not rule on the People's alternative argument—i.e., that the merger doctrine did not apply because any alleged menacing of the victim was incidental to the kidnapping—we may not affirm the decision on that ground (*see People v Concepcion*, 17 NY3d 192, 195 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]; *People v Smith*, 202 AD3d 1492, 1494 [4th Dept 2022]). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on the motion in accordance with this memorandum (*see generally People v Gambale*, 150 AD3d 1667, 1669-1670 [4th Dept 2017]).

Defendant contends that the court erred in denying his request to charge the jury with justification involving the use of ordinary physical force. We reject that contention. "Deadly physical force" is defined as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [11]). We agree with the court here that defendant's application of "pressure and force against [the] victim's neck to obstruct h[er] breathing and cause stupor constitute[d] 'deadly physical force' for purposes of Penal Law § 35.15 (2)" (*People v Pietoso*, 168 AD3d 1276, 1281 [3d Dept 2019], *lv denied* 33 NY3d 1034 [2019]), and there is no reasonable view of the evidence that defendant used anything but deadly physical force (*see People v Poston*, 95 AD3d 729, 730 [1st Dept 2012], *lv denied* 19 NY3d 1104 [2012]).

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants modification or reversal of the judgment.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**214**

**KA 20-00013**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL CARMICHAEL, ALSO KNOWN AS PAUL WEIDNER,
DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (SABRINA ASHA BREMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered December 12, 2019. The judgment convicted defendant upon a guilty plea of driving while intoxicated (two counts), aggravated unlicensed operation of a motor vehicle in the first degree and driving a vehicle not equipped with an ignition interlock device.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, two counts of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and one count of aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]) defendant contends that reversal of the judgment and vacatur of the plea are required because Supreme Court failed to inform him before he pleaded guilty that a fine was mandated upon his conviction of aggravated unlicensed operation of a motor vehicle in the first degree (*see* § 511 [3] [b] [i]). We agree.

"[I]n order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" (*People v Jones*, 118 AD3d 1360, 1361 [4th Dept 2014]; *see generally People v Hill*, 9 NY3d 189, 191 [2007], *cert denied* 553 US 1048 [2008]). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" (*People v Harnett*, 16 NY3d 200, 205 [2011]), and the failure to advise

a defendant at the time of the guilty plea of a direct consequence of that plea "requires that [the] plea be vacated" (*People v Tung Nguyen*, 191 AD3d 1329, 1330 [4th Dept 2021] [internal quotation marks omitted]). Here, the court failed to advise defendant that the sentence imposed on a person convicted of aggravated unlicensed operation of a motor vehicle in the first degree must include a fine in an amount between $500 and $5,000 (*see* Vehicle and Traffic Law § 511 [3] [b] [i]).

We note that, because defendant's challenge to the voluntariness of his plea would survive even a valid waiver of the right to appeal (*see People v Thomas*, 34 NY3d 545, 558 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we need not address his contention with respect to the validity of that waiver (*see People v Barnes*, 206 AD3d 1713, 1714 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022]). We further note that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" (*People v Turner*, 24 NY3d 254, 259 [2014]).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**223**

**CA 23-00136**

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

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LINDA A. FRY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KRISTINA A. DOYLE, DEFENDANT-RESPONDENT.

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LEWIS & LEWIS, P.C., BUFFALO (ADAM DELLEBOVI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, EDMESTON (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 11, 2023. The order, insofar as appealed from, granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained in an automobile accident with defendant. As relevant here, plaintiff asserted that, as a result of the accident, she suffered posttraumatic stress disorder (PTSD), which she alleged constituted a serious injury within the meaning of Insurance Law § 5102 (d) under the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories. She further alleged that she incurred economic loss in excess of basic economic loss (BEL). Plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint. We affirm.

We conclude that, contrary to plaintiff's contention, Supreme Court properly granted the motion with respect to the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories based on her PTSD inasmuch as defendant met her initial burden of establishing that plaintiff's PTSD was not causally related to the accident but instead was related to preexisting conditions (*see Pommells v Perez*, 4 NY3d 566, 573-574 [2005]; *Dudley v Imbesi*, 121 AD3d 1461, 1461-1462 [3d Dept 2014]). Furthermore, we conclude that plaintiff's submissions in opposition to the motion "did not adequately address how plaintiff's current [PTSD], in light of [plaintiff's] past medical history, [is] causally related to the accident" (*Kwitek v Seier*, 105 AD3d 1419, 1421 [4th Dept 2013]

[internal quotation marks omitted]; *see Smith v State Farm Mut. Auto. Ins. Co.*, 176 AD3d 1608, 1610 [4th Dept 2019]).

We also reject plaintiff's contention that the court erred in granting the motion with respect to her BEL claim. Although a claim for economic loss does not require the plaintiff to have sustained a serious injury (*see generally Montgomery v Daniels*, 38 NY2d 41, 47-48 [1975]; *Colvin v Slawoniewski*, 15 AD3d 900, 900 [4th Dept 2005]; *Barnes v Kociszewski*, 4 AD3d 824, 825 [4th Dept 2004]), defendant met her initial burden by establishing that plaintiff did not sustain any injury that was causally related to the accident, and plaintiff failed to raise a triable issue of fact with respect to the BEL claim (*see Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400-1401 [4th Dept 2010]; *see also Sywak v Grande*, 217 AD3d 1382, 1385 [4th Dept 2023]).

In light of our conclusion, plaintiff's remaining contention is academic.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**224**

**CA 23-00699**

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

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IN THE MATTER OF ARBITRATION BETWEEN
BUFFALO TEACHERS' FEDERATION,
PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BOARD OF EDUCATION OF BUFFALO CITY SCHOOL
DISTRICT, RESPONDENT-APPELLANT.

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CAVETTE A. CHAMBERS, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT T. REILLY, LATHAM (JOSE L. MANJARREZ OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Amy C. Martoche, J.), entered April 14, 2023, in a proceeding pursuant to CPLR article 75. The order and judgment granted the petition seeking to vacate an arbitration award and denied respondent's application to confirm the award.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the petition is denied, the application is granted and the arbitration award is confirmed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking to vacate an arbitration award determining that a grievance was not arbitrable on the ground that petitioner had failed to timely demand arbitration within the time specified in the parties' collective bargaining agreement (CBA). On appeal from an order and judgment granting the petition and denying the application of respondent to confirm the award, respondent contends that Supreme Court erred in determining that the arbitrator manifestly disregarded the substantive law applicable to the parties' dispute and that the award was irrational. We agree.

It is well settled that "an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]). "Under CPLR 7511 (b) an arbitration award must be vacated if, as relevant here, a party's rights were impaired by an arbitrator who 'exceeded [their] power' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010], quoting CPLR 7511 [b] [1] [iii]). "[A]n

arbitrator 'exceed[s] [their] power' under the meaning of the statute where [their] 'award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*id.*), or where the arbitrator " 'manifestly disregard[s]' the substantive law applicable to the parties' dispute" (*Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 127 [4th Dept 2017], quoting *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Matter of Gerber v Goldberg Segalla LLP*, 199 AD3d 1354, 1355 [4th Dept 2021]). "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an arbitrator has made an error of law or fact' " (*Kowaleski*, 16 NY3d at 91, quoting *Falzone*, 15 NY3d at 534; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003]). As the Court of Appeals has explained, "[c]ourts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). The party seeking to vacate an arbitration award thus bears a heavy burden to establish that the arbitrator exceeded their power (*see Matter of Asset Protection & Sec. Servs., LP v Service Empls. Intl. Union, Local 200 United*, 19 NY3d 1009, 1011 [2012]; *North Syracuse Cent. School Dist. v North Syracuse Educ. Assn.*, 45 NY2d 195, 200 [1978]).

We agree with respondent that the court erred in vacating the award on the ground that the arbitrator manifestly disregarded the substantive law applicable to the parties' dispute. "[M]anifest disregard of law is a severely limited doctrine" inasmuch as "[i]t is a doctrine of last resort limited to the rare occurrences of apparent egregious impropriety on the part of the arbitrator[ ]" that "requires more than a simple error in law or a failure by the arbitrator[ ] to understand or apply it; and, it is more than an erroneous interpretation of the law" (*Wien & Malkin LLP*, 6 NY3d at 480-481 [internal quotation marks omitted]). "To modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrator[ ] knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator[ ] was well defined, explicit, and clearly applicable to the case" (*Schiferle*, 155 AD3d at 127 [internal quotation marks omitted]; *see Wien & Malkin LLP*, 6 NY3d at 481; *Barone v Haskins*, 193 AD3d 1388, 1391 [4th Dept 2021], *appeal dismissed* 37 NY3d 1032 [2021], *lv denied* 37 NY3d 919 [2022]).

Here, the court determined that the arbitrator manifestly disregarded "substantive law" applicable to the parties' dispute when the arbitrator distinguished, rather than applied, two prior arbitration awards that petitioner and the court read as favorable to

petitioner's position on the timeliness issue. That was error. "The effect, if any, to be given to an earlier arbitration award in subsequent arbitration proceedings is a matter for determination in that forum" (*Matter of City School Dist. of City of Tonawanda v Tonawanda Educ. Assn.*, 63 NY2d 846, 848 [1984]; *see Falzone*, 15 NY3d at 534-535; *Board of Educ. of Patchogue-Medford Union Free School Dist. v Patchogue-Medford Congress of Teachers*, 48 NY2d 812, 813 [1979]; *see generally* 20 Richard A. Lord, Williston on Contracts § 56:92 [4th ed, May 2023 update]). Neither petitioner nor the court identified any "substantive law applicable to the parties' dispute" to support application of the doctrine of manifest disregard of law (*Schiferle*, 155 AD3d at 127; *see Matter of Daesang Corp. v NutraSweet Co.*, 167 AD3d 1, 21 n 15 [1st Dept 2018], *lv denied* 32 NY3d 915 [2019]). In any event, even if the two prior arbitration awards constituted substantive law, inasmuch as the record establishes that the arbitrator considered, but distinguished, those arbitration awards, we conclude that petitioner failed to establish that the arbitrator "knew of a governing legal principle" that was "well defined, explicit, and clearly applicable to the case" and "yet refused to apply it or ignored it altogether" (*Schiferle*, 155 AD3d at 127 [internal quotation marks omitted]; *see Matter of McKenna, Long & Aldridge, LLP v Ironshore Specialty Ins. Co.*, 176 AD3d 526, 527 [1st Dept 2019], *lv denied* 35 NY3d 906 [2020]).

We further agree with respondent that the court erred in vacating the award on the ground that it was irrational. "An award is irrational if there is no proof whatever to justify the award" (*Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1122 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013] [internal quotation marks omitted]). Where, however, "an arbitrator offer[s] even a barely colorable justification for the outcome reached, the arbitration award must be upheld" (*id.* [internal quotation marks omitted]; *see Wien & Malkin LLP*, 6 NY3d at 479).

Here, the arbitrator issued a thoughtful, well-reasoned opinion and award in which he considered the terms of the CBA, the evidence adduced at the hearing, and prior arbitration awards, and we thus conclude that "[i]t cannot be said that the arbitrator's procedural resolution of the issue concerning compliance with the contractual requirement that the demand for arbitration be made within a specified time . . . was irrational" (*Matter of Diaz v Pilgrim State Psychiatric Ctr. of State of N.Y.*, 62 NY2d 693, 695 [1984]; *see Matter of Town of Greece Guardians' Club, Local 1170, Communication Workers of Am. [Town of Greece]*, 167 AD3d 1452, 1455 [4th Dept 2018]; *Farino v State of New York*, 55 AD2d 843, 843 [4th Dept 1976]).

Contrary to petitioner's proffered alternative grounds for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]), we conclude that petitioner failed to meet its burden of establishing that the arbitrator's award "is violative of a strong public policy . . . or exceeds a specifically enumerated limitation on his power" (*Matter of Silverman*

*[Benmor Coats]*, 61 NY2d 299, 308 [1984], *rearg denied* 62 NY2d 803 [1984]; *see Matter of Rochester City School Dist. [Rochester Assn. of Paraprofessionals]*, 34 AD3d 1351, 1351-1352 [4th Dept 2006], *lv denied* 8 NY3d 807 [2007]).

Based on the foregoing, we reverse the order and judgment, deny the petition, grant the application, and confirm the award. In light of our determination, we do not address respondent's remaining contentions.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**232**

**TP 23-01625**

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

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IN THE MATTER OF GERALD D. LISOWSKI, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, THE APPEALS BOARD OF ADMINISTRATION ADJUDICATION BUREAU STATE DEPARTMENT OF MOTOR VEHICLES AND MARK J.F. SCHROEDER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF DEPARTMENT OF MOTOR VEHICLES OF STATE OF NEW YORK, RESPONDENTS.

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CIMASI LAW OFFICE, AMHERST (MICHAEL C. CIMASI OF COUNSEL), AND LIPPES & LIPPES, BUFFALO, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Kelly A. Vacco, J.], entered September 19, 2023) to review a determination of respondents. The determination revoked the driver's license of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. Petitioner contends that the police lacked reasonable grounds to believe that he had been driving while intoxicated or impaired, which is a prerequisite for suspension of his license under Vehicle and Traffic Law § 1194 (2) (a) (1), and that the arresting officer's approach of his vehicle was unlawful under *People v De Bour* (40 NY2d 210 [1976]). Because petitioner did not advance those contentions at the administrative hearing, however, he failed to preserve them for our review (*see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Matter of Reuss v Schroeder*, 217 AD3d 1083, 1084 [3d Dept 2023]), and we have no discretionary authority to review those contentions in this CPLR article 78 proceeding (*see Khan*, 96 NY2d at 880; *Matter of Parsons v New York State Dept. of Motor Vehs. Appeals Bd.*, 224 AD3d 1263, 1264 [4th Dept 2024]).

We reject petitioner's further contention that the Department of Motor Vehicles Appeals Board improperly drew an adverse inference against him based upon his failure to testify at the hearing (*see Matter of Vasquez v Egan*, 174 AD3d 811, 813 [2d Dept 2019]; *Matter of Barr v New York State Dept. of Motor Vehs.*, 155 AD3d 1159, 1161 [3d Dept 2017], *lv denied* 31 NY3d 907 [2018]; *Matter of Peeso v Fiala*, 130 AD3d 1442, 1443-1444 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015]).

We have reviewed petitioner's remaining contentions and conclude that none warrants annulment of the determination.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**235**

**KA 19-00972**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE MANNING, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered April 2, 2019. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon (CPW) in the second degree, for possession of a loaded firearm outside his home or place of business (Penal Law § 265.03 [3]), and CPW in the third degree, for possession of an assault weapon (§ 265.02 [7]). The prosecution arose from an incident in which police officers responding to a report of shots being fired observed defendant fleeing into a home while holding a weapon. Following defendant's voluntary surrender, a search of the home recovered a loaded Russian-manufactured Izhmash 7.62 by 39 millimeter semiautomatic rifle with a pistol grip, a detachable magazine, and the stock removed. Both counts of the indictment identified the recovered weapon as a "semiautomatic rifle." At trial, the responding police officers testified that they had observed the weapon in defendant's possession, and a forensic firearms examiner testified that it was operable. After the People rested, defendant moved for a trial order of dismissal, arguing, inter alia, that the People had failed to introduce evidence that the recovered weapon was "designed or redesigned, made or remade, and intended to be fired from the shoulder," a necessary element for a weapon to constitute a "rifle" as defined in Penal Law § 265.00 (11). In response, the People moved to reopen their proof to recall the forensic firearms examiner to testify on the issue. Supreme Court granted the People's motion, and reserved

decision on defendant's motion. Upon being recalled, the People's forensic firearms examiner testified that the recovered weapon was designed to contain a stock and to be fired from the shoulder, and that the stock must have been removed at one point after it was manufactured. The People again rested, and the court denied defendant's motion.

Defendant contends that the court erred in permitting the People to reopen their case. We reject that contention. "[A]lthough CPL 260.30 sets forth the sequence of a trial by jury [in a criminal case], [t]he statutory framework . . . is not a rigid one and the common-law power of the trial court to alter the order of proof in its discretion and in furtherance of justice remains at least up to the time the case is submitted to the jury" (*People v Owens*, 159 AD3d 1349, 1351 [4th Dept 2018] [internal quotation marks omitted]; *see People v Olson*, 34 NY2d 349, 353 [1974]). Where the People inadvertently fail to submit evidence with respect to an essential element upon which they have the burden of proof, it is within the discretion of the trial court to grant a motion to reopen their case to allow them to submit that evidence under the "narrow circumstances" where: (1) "the missing element is simple to prove"; (2) such missing element is "not seriously contested"; and (3) "reopening the case does not unduly prejudice the defense" (*People v Whipple*, 97 NY2d 1, 8 [2001]; *see People v Diehl*, 128 AD3d 1409, 1410 [4th Dept 2015]). Here, with respect to the first two of those factors, it was simple for the People to prove that the recovered weapon met the statutory definition of a rifle through the uncontradicted testimony of the forensic firearms examiner, and the missing element was not seriously contested inasmuch as it had not been raised by defendant until after the People rested in an apparent attempt to take advantage of a "technical omission" in their proof (*Whipple*, 97 NY2d at 7; *see People v McCorkle*, 111 AD3d 557, 557-558 [1st Dept 2013], *lv denied* 24 NY3d 963 [2014]). With respect to the third factor, although defendant contends that he was prejudiced by an alleged misappropriation of "defense work product" as a result of the reopening of the People's case (*Whipple*, 97 NY2d at 8), we conclude under these circumstances that the "noticing [of] a facial requirement of [Penal Law § 265.00 (11)] that was [previously] uncontested" does not rise to the level of attorney "work product" (*id.*).

Defendant also contends that the evidence is legally insufficient to support the conviction because the People failed to prove that the recovered weapon was a rifle as defined in Penal Law § 265.00 (11). Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could conclude that "the [weapon] was intended to be shot from the shoulder" (*People v Dade*, 187 AD2d 959, 960 [4th Dept 1992], *lv denied* 81 NY2d 838 [1993]; *see also People v Crivillaro*, 170 AD2d 312, 312-313 [1st Dept 1991], *lv denied* 77 NY2d 993 [1991]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the

evidence (*see generally Bleakley*, 69 NY2d at 495). Where, as here, the defendant's challenge is focused upon the credibility of a witness, we accord "great deference to the resolution of credibility issues by the trier of fact because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Cole*, 111 AD3d 1301, 1302 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014], *reconsideration denied* 23 NY3d 1060 [2014] [internal quotation marks omitted]). Here, although a different verdict would not have been unreasonable based on all of the credible evidence (*see Danielson*, 9 NY3d at 348; *Bleakley*, 69 NY2d at 495), the jury credited the uncontradicted testimony of the People's expert, and we see no basis to disturb that determination (*see People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]).

Defendant further contends that the CPW counts of which he was convicted should be dismissed because Penal Law §§ 265.03 (3) and 265.02 (7) are unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Inasmuch as defendant failed to raise a constitutional challenge before the trial court, any such challenge is not preserved for our review (*see People v Maddox*, 218 AD3d 1154, 1154-1155 [4th Dept 2023], *lv denied* 40 NY3d 1081 [2023]; *see also People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]), and we decline to exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, his "challenge to the constitutionality of a statute must be preserved" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]; *see People v Cabrera*, 41 NY3d 35, 42-51 [2023]).

We reject defendant's contention that the sentence is unduly harsh and severe. Finally, to the extent that defendant further contends that he was penalized for exercising his right to a jury trial, that contention is unpreserved for our review (*see People v Huddleston*, 160 AD3d 1359, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**236**

**KA 22-01410**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER NICHOLSON, DEFENDANT-APPELLANT.

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SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Monroe County (Judith A. Sinclair, J.), dated July 20, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order classifying him as a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that he was denied effective assistance of counsel at the SORA classification hearing because his attorney failed to request a downward departure from the presumptive risk level. We reject that contention. It is well established that "[a] defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Greenfield*, 126 AD3d 1488, 1489 [4th Dept 2015], *lv denied* 26 NY3d 903 [2015]) and, here, we conclude that there are no " 'mitigating factors warranting a downward departure from his risk level' " (*Greenfield*, 126 AD3d at 1489; *see People v Allport*, 145 AD3d 1545, 1546 [4th Dept 2016]). Thus, contrary to defendant's contention, his attorney "could have reasonably concluded that there was nothing to litigate at the hearing" (*People v Reid*, 59 AD3d 158, 159 [1st Dept 2009], *lv denied* 12 NY3d 708 [2009]; *see Allport*, 145 AD3d at 1546; *People v Goldbeck*, 104 AD3d 567, 567-568 [1st Dept 2013], *lv denied* 21 NY3d 860 [2013]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**237**

**KA 23-00841**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEFAN D. NICHOLS, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), dated April 11, 2023. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court should have granted his request for a downward departure from risk level three to risk level two. Initially, we note that, although the court failed to set forth its findings of fact and conclusions of law in denying defendant's request for a downward departure, "the record is sufficient for us to make our own findings of fact and conclusions of law," thereby obviating the need for remittal (*People v Snyder*, 218 AD3d 1356, 1356 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; *see People v Antonetti*, 188 AD3d 1630, 1631 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]). With respect to the merits, even assuming, arguendo, that defendant adequately identified mitigating circumstances that are, as a matter of law, of a kind or to a degree not adequately taken into account by the Guidelines and proved their existence by a preponderance of the evidence (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]), we conclude, based upon the totality of the circumstances, that a downward departure is not warranted (*see People v Burgess*, 191 AD3d 1256, 1257 [4th Dept 2021]; *see generally Gillotti*, 23 NY3d at 861).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**242**

**CA 23-01655**

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

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POTENTIA MANAGEMENT GROUP, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEREMY RATAJCZYK, INDIVIDUALLY AND DOING BUSINESS AS ALDEN AUTOMOTIVE, AND RATAJCZYK PROPERTIES, LLC, DEFENDANTS-RESPONDENTS.

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

MCGRATH LAW FIRM, PLLC, KENMORE (PETER MCGRATH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Oneida County (James P. McClusky, J.), entered September 20, 2023. The order granted the motion of defendants insofar as it sought to vacate a default judgment.

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

Memorandum: In this breach of contract action, plaintiff seeks judgment against defendants in the amount of $18,535.26, plus interest and costs. Plaintiff installed LED lighting at premises in Erie County owned by defendant Ratajczyk Properties, LLC, pursuant to a contract between plaintiff and nonparty Alden Automotive, Inc., a corporation owned by defendant Jeremy Ratajczyk. Plaintiff did not receive payment. Two months after "nail and mail" service of the summons and complaint on Jeremy Ratajczyk pursuant to CPLR 308 (4), plaintiff's counsel filed a statement for judgment. However, plaintiff's counsel never served the judgment on defendants with notice of entry. Defendants moved for, inter alia, an order vacating the default judgment on the ground that plaintiff's application for the judgment failed to comply with the statutory requirements of CPLR 3215. Supreme Court granted the motion insofar as it sought to vacate the judgment. Plaintiff appeals and we now affirm.

"[I]t is well settled that courts have inherent power to open defaults beyond that which is contained in the CPLR . . . and that, where a default judgment is entered without compliance with the necessary requirements therefor, that judgment is a nullity and must be vacated" (*Red Creek Natl. Bank v Blue Star Ranch*, 58 AD2d 983, 983-984 [4th Dept 1977]; *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). Here, plaintiff's application for a default judgment

failed to comply with the requirements of CPLR 3215 (f) inasmuch as plaintiff failed to include an affidavit or other proof of defendants' default, proof of service on defendant Ratajczyk Properties, LLC, and an affidavit attesting to service of additional notice on defendant Jeremy Ratajczyk pursuant to CPLR 3215 (g) (3) (i). The default judgment was therefore a nullity and the court properly vacated it (*see Curto v Diehl*, 87 AD3d 1374, 1375 [4th Dept 2011]; *Soggs v Crocco*, 184 AD2d 1021, 1021 [4th Dept 1992]). In light of our determination, we do not reach plaintiff's remaining contentions.

Defendants' contention that the court erred in denying their motion insofar as it sought to dismiss the complaint is not properly before us inasmuch as defendants failed to take a cross-appeal from the order (*see Matter of Miranda Holdings, Inc. v Town Bd. of the Town of Orchard Park*, 206 AD3d 1662, 1664 [4th Dept 2022], *lv dismissed* 39 NY3d 937 [2022]; *Reynhout v Hueston*, 70 AD3d 1409, 1409 [4th Dept 2010]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**244**

**CA 23-00089**

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

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IN THE MATTER OF BUFFALO CITY CEMETERY, INC.,
ALSO KNOWN AS FOREST LAWN, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

215 LOT OWNERS AND/OR NEXT-OF-KIN FOR DECEDENTS
INTERRRED AT ST. MATTHEW'S CEMETERY,
RESPONDENTS-APPELLANTS.

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

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from a decision of the Supreme Court, Erie County (Dennis E. Ward, J.), entered November 30, 2022. The decision granted the petition for approval of the relocation of graves.

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

Memorandum: In this proceeding pursuant to Not-for-Profit Corporation Law § 1510 (e), respondents appeal from a decision granting petitioner's request for a judgment approving, nunc pro tunc, the relocation of 215 graves within its cemetery in West Seneca. It is well settled, however, that "no appeal lies from a decision" (*Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; *see* CPLR 5512 [a]; *Garcia v Town of Tonawanda*, 194 AD3d 1479, 1479-1480 [4th Dept 2021]; *Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]). Although respondents ask us to treat the decision as a judgment and thereby entertain their appeal, we lack discretion to do so inasmuch as the decision from which they appeal lacks the essential requirements of a judgment (*see generally Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]). We therefore dismiss the appeal without addressing the merits of respondents' contentions.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**248**

**TP 23-01620**

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

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IN THE MATTER OF SARAH HASTINGS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, AND ONONDAGA COUNTY CHILDREN AND FAMILY SERVICES, RESPONDENTS.

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FRESHFIELDS BRUCKHAUS DERINGER US LLP, NEW YORK CITY (ARYEH L. KAUFMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF COUNSEL), FOR RESPONDENTS.

ORRICK, HERRINGTON & SUTCLIFFE LLP, NEW YORK CITY (RENE KATHAWALA OF COUNSEL), FOR SANCTUARY FOR FAMILIES, AMICUS CURIAE.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Robert E. Antonacci, II, J.], entered September 14, 2023) to review that part of the determination that petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted by annulling that part of the determination finding that petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field and by directing that respondent New York State Office of Children and Family Services shall be precluded from informing a provider or licensing agency which makes an inquiry that petitioner is the subject of an indicated child maltreatment report, and as modified the determination is confirmed without costs.

Memorandum: Petitioner, at the age of 17 years old, gave birth to the subject child. Petitioner and the child's father, who is several years older than petitioner, thereafter continued an on-again, off-again relationship over the years, during which time the father subjected petitioner to severe physical and emotional domestic violence. Eventually, when the child was in her early teenage years, petitioner and the child resided together in an apartment and, during his frequent visits to the apartment, the father would scream at, use

derogatory names for, and threaten petitioner in the child's presence. Later, tensions between petitioner and the father increased with a series of acrimonious incidents. Even though the father did not have legal custody of her at that time, the child began staying at the father's residence. Petitioner, fearing that the child was not safe with the father and was being unduly influenced by him, made two desperate attempts within a matter of weeks to get the child to leave the father and come with her by, among other things, physically grabbing the child.

Following an investigation into a report of suspected child maltreatment, respondent Onondaga County Children and Family Services (County respondent) determined that the allegations of inadequate guardianship were substantiated with respect to the two incidents in which petitioner made physical contact with the child and filed an indicated report with respondent New York State Central Register of Child Abuse and Maltreatment (Central Register), which is maintained by respondent New York State Office of Children and Family Services (OCFS) (collectively, State respondents). After the State respondents denied petitioner's request to amend the indicated report to unfounded and seal the report, the matter proceeded to a fair hearing before an Administrative Law Judge (ALJ). The ALJ thereafter rendered a determination finding that the County respondent met its burden of establishing by a fair preponderance of the evidence that petitioner committed the acts of child maltreatment giving rise to the indicated report. The ALJ further found that the indicated report was relevant and reasonably related to employment in the childcare field. Without providing any explanatory rationale, the ALJ proclaimed that, after considering the subject guidelines, the indicated report "remain[ed] relevant to child care issues for the following reasons: (1) number of incidents involved in report; (2) seriousness of incidents; (3) recency of report; and finally (4) lack of rehabilitative evidence."

Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul that part of a determination finding that her acts of child maltreatment are relevant and reasonably related to employment in the childcare field. We agree with petitioner that she is entitled to that relief.

"Upon a determination made at a fair hearing . . . that the subject has been shown by a fair preponderance of the evidence to have committed the act or acts of child abuse or maltreatment giving rise to the indicated report, the hearing officer shall determine, based on guidelines developed by [OCFS] . . . , whether such act or acts are relevant and reasonably related to employment" in the childcare field (Social Services Law § 422 [8] [c] [ii]). The aforementioned guidelines published by OCFS provide 10 factors that the hearing officer may consider in making a determination, including "[t]he seriousness of the incident cited in the indicated report"; "[t]he length of time that has elapsed since the most recent incident of child abuse and maltreatment"; and "[t]he number of indicated reports of abuse and maltreatment regarding th[e] subject" (NY St Off of Children & Fam Servs Child Protective Services Manual [OCFS CPS

Manual], ch 3, § C [3] [a], available at https://ocfs.ny.gov/programs/cps/manual [last accessed Mar. 26, 2024]). The guidelines provide that the hearing officer may also consider documentation produced by the subject regarding rehabilitation, under which factor the term "rehabilitation" means "[n]o apparent repeat of the act of child abuse and maltreatment"; "[e]vidence of actions taken by the [subject] to show that they are able to deal positively with a situation or problem that gave rise to the previous incident(s) of child abuse and maltreatment"; and "[e]vidence of success with professional treatment (e.g., counseling or self-help groups) if relevant" (OCFS CPS Manual, ch 3, § C [3] [a]). When, for example, a subject refuses to take responsibility for their actions, acknowledge that they endangered a child, or appreciate the seriousness of their conduct, or fails to recognize and address the causes of their detrimental behavior despite a claim of rehabilitation, the record will support a finding that the subject is likely to commit maltreatment again, which is a factor reasonably related to employment in the childcare field (*see Matter of Leeper v New York State Off. of Children & Family Servs.*, 164 AD3d 1614, 1615 [4th Dept 2018]; *Matter of Warren v New York State Cent. Register of Child Abuse & Maltreatment*, 164 AD3d 1615, 1617 [4th Dept 2018]; *Matter of Velez v New York State Off. of Children*, 157 AD3d 575, 576 [1st Dept 2018]).

"Judicial review of a determination that the . . . acts of maltreatment are relevant and reasonably related to employment as a childcare provider 'is limited to whether the determination is supported by substantial evidence' " (*Matter of Robles v New York State Off. of Children & Family Servs.*, 220 AD3d 798, 799 [2d Dept 2023]; *see e.g. Leeper*, 164 AD3d at 1614; *Warren*, 164 AD3d at 1617). "[S]ubstantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). "The standard is not an exacting one; it is less than a preponderance of the evidence . . . [and] demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Kelly v DiNapoli*, 30 NY3d 674, 684 [2018] [internal quotation marks omitted]). Nonetheless, "substantial evidence does not rise from bare surmise, conjecture, speculation or rumor" (*300 Gramatan Ave. Assoc.*, 45 NY2d at 180), and "[a] mere scintilla of evidence sufficient to justify a suspicion is not sufficient to support a finding upon which legal rights and obligations are based" (*Matter of Stork Rest. v Boland*, 282 NY 256, 273-274 [1940]). "Where substantial evidence exists, the reviewing court may not substitute its judgment for that of the agency, even if the court would have decided the matter differently" (*Matter of Haug v State Univ. of N.Y. at Potsdam*, 32 NY3d 1044, 1046 [2018]).

Here, we agree with petitioner that, when viewed in light of the definition of "rehabilitation" provided by the guidelines, there is no support for the ALJ's determination that the record lacks rehabilitative evidence. First, the record establishes that there was

"[n]o apparent repeat of the act of child abuse and maltreatment" by petitioner (OCFS CPS Manual, ch 3, § C [3] [a]). As petitioner contends, nothing in the record suggests any allegations or risk of repeat misbehavior, much less any actual repeated acts of child abuse or maltreatment, and there was "no evidence presented at the hearing" that petitioner had committed abuse or maltreatment either prior to the indicated report or during the nearly two years thereafter (*Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1294 [4th Dept 2008]; *cf. Leeper*, 164 AD3d at 1614-1615).

Second, the record establishes that petitioner had taken actions to show that she "[is] able to deal positively with [the] situation or problem that gave rise to the previous incident(s) of child . . . maltreatment" (OCFS CPS Manual, ch 3, § C [3] [a]). As petitioner contends, the ALJ failed to consider the evidence of psychological rehabilitation showing that she could deal positively with the trauma she suffered as a result of the domestic violence inflicted upon her by the father, which precipitated the indicated report. Petitioner's marriage and family therapist submitted a letter explaining that petitioner had suffered from post-traumatic stress disorder "as a result of the relationship" with the father, but that petitioner "ha[d] made an enormous amount of progress and ha[d] reached her treatment goals," and "in no way presented as an unfit parent" during the course of her treatment. The psychologist who performed a comprehensive evaluation and testing of petitioner opined that, despite having been "aggressively abused" by the father, there was no indication that petitioner harbored "resentments toward others," petitioner showed "no defensiveness or tendency to distort the facts of the situation," and petitioner scored "unusually low" on the potential for abuse scale, which demonstrated that petitioner had "none of the characteristics, personal status or problems with the child or family members that would raise the question of abusive potential on her part." Petitioner also had a "significantly elevated score on the scale indicating . . . the tendency to maintain emotional stability and to adequately deal with interpersonal exchanges." Moreover, the ALJ ignored petitioner's testimony about her improved ability to deal positively with emotionally challenging situations and the letters from other individuals attesting to petitioner's ability to properly parent the child. The record therefore indisputably establishes that petitioner is able to deal positively with the situation or problem that gave rise to the indicated report.

Third, the record contains uncontroverted evidence of "success with professional treatment" (OCFS CPS Manual, ch 3, § C [3] [a]). In addition to the participation of petitioner and the child in a creative arts therapy program that helps heal and strengthen domestic violence survivors and their children, petitioner's marriage and family therapist opined that petitioner—whose treatment also focused on her relationship with the child by assessing her capacity to be a healthy, emotionally-present parent—had made progress, had reached her treatment goals, and did not present as an unfit parent.

To summarize with respect to the rehabilitation factor, the

uncontroverted evidence in the record establishes that petitioner took responsibility for her actions and acknowledged that she endangered the child (*cf. Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]), and that she rehabilitated herself by successfully attending professional therapy and addressing the causes of her detrimental behaviors (*cf. Leeper*, 164 AD3d at 1615; *Warren*, 164 AD3d at 1617). The ALJ's determination that petitioner failed to rehabilitate herself is therefore not supported by substantial evidence.

Next, we agree with petitioner that the other three factors upon which the ALJ apparently relied do not provide the requisite substantial evidence to support his determination that petitioner's acts of maltreatment remain relevant and reasonably related to employment in the childcare field. Neither the "number of incidents involved in [the] report" nor the purported "seriousness of the incidents" support the ALJ's determination. As petitioner contends, none of the evidence indicated that petitioner acted with any malice toward the child, and the ALJ "never explicitly found that petitioner intended" to harm the child (*Matter of Parker v Carrión*, 80 AD3d 458, 459 [1st Dept 2011]). Moreover, the ALJ noted that the child was not physically injured as a result of the incidents, which occurred within a matter of weeks as part of a single continuing dispute about the child's residence and safety, and there was "no evidence presented at the hearing indicating that the [child] received medical treatment . . . , or that petitioner had used [similar forceful tactics] on any other occasion" before or after the subject incidents (*Hattie G.*, 48 AD3d at 1294). To the extent that the recency of the indicated report had any relevance here, the ALJ arbitrarily excised that factor from its context by completely ignoring petitioner's rehabilitative efforts in the interim (*cf. Leeper*, 164 AD3d at 1614-1615).

We further agree with petitioner that the ALJ failed to "sufficiently address[ ] the [other] relevant guideline factors" (*Matter of Frank C. v Poole*, 214 AD3d 433, 434 [1st Dept 2023], *lv denied* 39 NY3d 915 [2023]; *cf. Matter of Adalisa R. v New York State Off. of Children & Family Servs.*, 190 AD3d 436, 437 [1st Dept 2021]). Most significantly, the ALJ overlooked "[t]he relevant events and circumstances surrounding [petitioner's] actions and inactions as . . . relate[d] to the indicated report" (OCFS CPS Manual, ch 3, § C [3] [a]). The record indisputably establishes that petitioner acted out of desperate concern about the child's safety in the care of the father, a person who had an unmitigated long-term history of engaging in severe domestic abuse against petitioner. The record further establishes that the child suffered no physical injuries as a result of petitioner's actions (*see* OCFS CPS Manual, ch 3, § C [3] [a]). The ALJ also ignored petitioner's prior demonstrated success as a substitute teacher (*see* OCFS CPS Manual, ch 3, § C [3] [a]).

Based on the foregoing, we conclude that substantial evidence does not support the ALJ's determination that the acts of child maltreatment are relevant and reasonably related to employment in the childcare field (*cf. Leeper*, 164 AD3d at 1614-1615; *Warren*, 164 AD3d at 1617; *see generally Hattie G.*, 48 AD3d at 1292-1294). We therefore

modify the determination and grant the petition by annulling that part of the determination finding that petitioner's acts of child maltreatment are relevant and reasonably related to employment in the childcare field and by directing that OCFS shall be precluded from informing a provider or licensing agency which makes an inquiry that petitioner is the subject of an indicated child maltreatment report (*see* Social Services Law § 422 [8] [c] [ii]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**249**

**KA 22-00089**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK J. SEDORE, DEFENDANT-APPELLANT.

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DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 25, 2019. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (three counts), burglary in the second degree, robbery in the first degree (two counts), kidnapping in the second degree, assault in the second degree, and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of burglary in the first degree (Penal Law § 140.30 [1], [2], [3]), two counts of robbery in the first degree (§ 160.15 [2], [3]), and one count each of burglary in the second degree (§ 140.25 [2]), kidnapping in the second degree (§ 135.20), assault in the second degree (§ 120.05 [2]), and grand larceny in the fourth degree (§ 155.30 [7]). We affirm.

Defendant contends that County Court erred in denying his challenge for cause to a prospective juror. We reject that contention. The prospective juror's statements did not demonstrate "a state of mind that is likely to preclude" rendering an impartial verdict (CPL 270.20 [1] [b]), or a " 'preexisting opinion[ ] that might indicate bias' " (*People v Patterson*, 34 NY3d 1112, 1113 [2019], quoting *People v Arnold*, 96 NY2d 358, 363 [2001]). Thus, we agree with the People that the court "was not required to seek an assurance that [the prospective juror] could decide the case impartially" (*People v Williams*, 184 AD3d 1125, 1126 [4th Dept 2020], *affd* 37 NY3d 314 [2021] [internal quotation marks omitted]; *see People v Hall*, 169 AD3d 1379, 1380 [4th Dept 2019], *lv denied* 33 NY3d 976 [2019] [internal quotation marks omitted]). Moreover, even if the prospective juror's statements " 'cast serious doubt on [her] ability to render an impartial verdict,' " the record establishes that she

gave an
" 'unequivocal assurance that [she could] set aside any bias and render an impartial verdict based on the evidence' " (*People v Wright* [appeal No. 2], 104 AD3d 1327, 1328 [4th Dept 2013], *lv denied* 21 NY3d 1012 [2013]).

Defendant next contends that the prosecutor's response to a *Batson* challenge was pretextual and thus, the court erred in summarily concluding that the prosecutor's response was sufficient. Because defendant "failed to articulate to the court 'any reason why he believed that the prosecutor's explanation [was] pretextual,' " he has failed to preserve that contention for our review (*People v Bodine*, 283 AD2d 979, 979 [4th Dept 2001], *lv denied* 96 NY2d 898 [2001]; *see People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]).

Defendant further contends that he did not receive adequate notice of the persistent felony offender proceeding as provided in CPL 400.20 (4). Even assuming, arguendo, that the People failed to comply with that provision by not sending notice of the proceeding to defendant, we conclude that " 'strict compliance with the statute was not required inasmuch as defendant received reasonable notice of the accusations against him and was provided an opportunity to be heard with respect to those accusations during the persistent felony offender proceeding' " (*People v Williams*, 163 AD3d 1422, 1424 [4th Dept 2018]; *see People v Gonzalez*, 61 AD3d 1428, 1428-1429 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**250**

**KA 21-00775**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL SOLOMON-CROCKTON, DEFENDANT-APPELLANT.

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

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

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Appeal from an order of the Supreme Court, Monroe County (Douglas A. Randall, A.J.), entered May 6, 2021. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 14 for release without supervision. Risk factor 14 "is premised on the theory that a sex offender should be supervised by a probation or parole officer who oversees a sex offender caseload or who otherwise specializes in the management of such offenders," and the risk assessment guidelines direct that "[a]n offender who is released without such intensive supervision is assessed points in this category" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 17 [2006] [Guidelines]). The Guidelines expressly address the situation in which "the offender was convicted in a jurisdiction other than New York and subsequently relocates to New York" (*id.*), and provide that, "[i]f such an offender *satisfactorily completed* the terms of that jurisdiction's community supervision, [the offender] will be scored 0 points in this category" (*id.* [emphasis added]).

Here, after his conviction of a sexual offense in Florida, defendant violated the terms of his community supervision two times and completed serving his maximum sentence while incarcerated. Thus, "at the time the court made the SORA determination, defendant was no longer under any supervision" (*People v Miller*, 77 AD3d 1386, 1387

[4th Dept 2010], *lv denied* 16 NY3d 701 [2011]; *see People v Mathews*, 181 AD3d 1103, 1104-1105 [3d Dept 2020]; *People v Middlemiss*, 153 AD3d 1096, 1098 [3d Dept 2017], *lv denied* 30 NY3d 906 [2017]; *People v Leeks*, 43 AD3d 1251, 1252 [3d Dept 2007]), and the "fact that defendant was released without supervision justified the imposition of the points assessed for this risk factor" (*People v Masi*, 195 AD3d 1328, 1329 [3d Dept 2021]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**252**

**KA 23-00923**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JADEN COCKRELL, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from an order of the Supreme Court, Onondaga County (Rory A. McMahon, J.), entered December 16, 2022. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). The risk assessment instrument prepared by the Board of Examiners of Sex Offenders assessed defendant as a presumptive level one risk. At the SORA hearing, the People sought, inter alia, the assessment of additional points under risk factor 3, for number of victims, which would make defendant a presumptive level two risk or, in the alternative, an upward departure to a level two risk. Supreme Court, inter alia, assessed an additional 20 points under risk factor 3, for number of victims, which gave defendant a total of 80 points and made him a presumptive level 2 risk.

As defendant contends, and as the People correctly concede, the court erred in assessing 20 points for the number of victims under risk factor 3 (*see generally People v Menjivar*, 121 AD3d 660, 661 [2d Dept 2014], *lv denied* 24 NY3d 915 [2015]). The court based its assessment on a determination that a 17-year-old was a victim of defendant's conduct. However, 17-year-olds are statutorily excluded from the class of victims under Penal Law § 263.11, to which defendant pleaded guilty. When those points are removed, defendant has a total of 60 points, making him a presumptive level one risk.

Under the circumstances presented, we remit the matter to Supreme

Court for further proceedings on the People's request for an upward departure from defendant's presumptive risk level (*see generally People v Weber*, 40 NY3d 206, 216 [2023]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**258**

**CAF 23-00038**

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

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IN THE MATTER OF TORI-LYNN L. AND LACY-MARIE L.

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

MEMORANDUM AND ORDER

TROY L., RESPONDENT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS R. BABILON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (ERIN WELCH FAIR OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

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Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered December 2, 2022, in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b, respondent father appeals from an order of fact-finding and disposition that, inter alia, adjudicated the subject children to be permanently neglected by the father and terminated the father's parental rights. We affirm.

The father and non-appellant mother are the biological parents of the subject children, who are twin girls. In early July 2018—when the children were approximately three months old—the police responded to a domestic violence report at the residence where the father and the mother had been staying with the children. Upon a safety assessment by petitioner the following day, the mother admitted that the father had subjected her to physical domestic violence, and a representative for petitioner observed that the father's bedroom contained, among other things, a dirty portable crib that contained hypodermic syringes, one of which contained blood. During the investigation, the mother admitted to using heroin just weeks prior to the children's birth and to using cocaine after the children were born, and the father admitted to using cocaine and "molly" during the weekend of the domestic violence incident.

The children were immediately removed from the biological parents' care and thereafter placed with foster parents, with whom they have since remained. Petitioner filed a neglect petition and, upon the admissions of the biological parents, Family Court adjudicated the children neglected in October 2018. The father was ordered to cooperate and make progress in parenting classes, family counseling, and domestic violence counseling. In addition, the court ordered that the father obtain psychological and substance abuse evaluations and follow the recommendations thereof, including any inpatient care. Among other things, the father was also required to submit to random drug screens and avoid any consumption of alcohol, illegal substances, or non-prescribed medications in the presence of the children. The father was permitted to have contact with the children supervised by a person deemed appropriate by petitioner.

The children remained in foster care for years as periodic permanency hearings continued and, eventually, petitioner filed a petition seeking to terminate the parental rights of the biological parents. Petitioner alleged that the father permanently neglected the children on the ground that, notwithstanding petitioner's diligent efforts, the father failed for a period of at least one year—specifically December 1, 2020 to December 22, 2021—substantially and continuously or repeatedly to plan for the future of the children, although physically and financially able to do so. Petitioner alleged in particular that the father disclosed to a psychiatrist in June 2021 that he had been hearing voices telling him to sexually abuse the children, and that he failed to comply with the service plan and failed to ameliorate the problems preventing the safe return of the children to his care.

Following a fact-finding hearing during which petitioner presented, inter alia, the testimony of its caseworker and the father's psychiatrist, the court rendered a bench decision in which it determined that, despite petitioner's diligent efforts, the father had failed to appropriately plan for the future of the children by taking steps necessary to provide an adequate, stable home and parental care. The court further determined after a subsequent dispositional hearing that terminating the father's parental rights and freeing the children for adoption was in the best interests of the children.

Preliminarily, contrary to the assertion of the Attorney for the Children, we conclude on this record that the father timely filed his notice of appeal (*see* Family Ct Act §§ 1113, 1115). On the merits, the father contends that the court erred in determining that petitioner met its burden at the fact-finding hearing of establishing that he permanently neglected the children. We reject that contention.

"An authorized agency that brings a proceeding to terminate parental rights based upon permanent neglect bears the burden of establishing [by clear and convincing evidence] that it has made 'diligent efforts to encourage and strengthen the parental relationship' " (*Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012], quoting Social Services Law § 384-b [7] [a]; *see Matter of*

*Sheila G.*, 61 NY2d 368, 373, 380-381 [1984]). "Once diligent efforts have been established, the agency must prove [by clear and convincing evidence] that the parent has permanently neglected the child" (*Hailey ZZ.*, 19 NY3d at 429) by, as relevant here, "fail[ing] for a period of . . . at least one year . . . substantially and continuously or repeatedly to . . . plan for the future of the child, although physically and financially able to do so" (§ 384-b [7] [a]). "[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time. Good faith alone is not enough: the plan must be realistic and feasible" (*Matter of Star Leslie W.*, 63 NY2d 136, 143 [1984]; *see* § 384-b [7] [c]). "In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent" (§ 384-b [7] [c]). "At a minimum, [the] parent[ ] must 'take steps to correct the conditions that led to the removal of the child from their home . . . [T]he planning requirement also obligates [the] parent[ ] to project a future course of action, taking into account considerations of how the child will be supported financially, physically and emotionally' " (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]).

Here, contrary to the father's contention, we conclude that the court did not err in determining that petitioner established by clear and convincing evidence that, despite its diligent efforts, the father failed to adequately plan for the return of the children (*see* Social Services Law § 384-b [7] [a]; *Matter of Steven D., Jr. [Steven D., Sr.]*, 188 AD3d 1770, 1771 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]). The record establishes that, "[a]lthough [the father] participated in some parts of the [service] program, [he] failed to address or mitigate on a consistent basis the problems preventing the return of the child[ren] and thus failed to plan for the future of the child[ren]" (*Matter of Rasyn W.*, 254 AD2d 827, 827 [4th Dept 1998]). While the father is correct that, prior to June 2021, petitioner had considered the father to be in compliance with the service plan such that the children were scheduled to return to the biological parents that month, petitioner's excusable misperception of the father's progress at that point was, through no fault of its own, as the court properly held, based on the father's active concealment that he was experiencing auditory hallucinations—i.e., hearing voices—that had been instructing him to sexually abuse the children (*see generally Matter of Keith UU.*, 256 AD2d 673, 674-675 [3d Dept 1998], *lv denied* 93 NY2d 801 [1999]). Indeed, the caseworker testified that petitioner received an additional CPS report in June 2021 informing it that the father had disclosed the auditory hallucinations to his psychiatrist. The caseworker specifically explained that, prior to the father's disclosure, petitioner was unaware of the auditory hallucinations issue, and the father would not have been considered compliant with treatment if he was being dishonest with his mental health provider.

Following the father's disclosure, the caseworker asked him to enroll in a counseling program that treats people with sexualized

behaviors. The father, however, did not enroll in that program prior to the end of the statutory period alleged in the petition. Additionally, the father neither completed nor made substantial progress in a mental health treatment program and, after June 2021, he failed to complete a domestic violence education program. During subsequent supervised visitations, the children would often run away from the father and would refer to him as "scary daddy." The caseworker had never used that phrase in the presence of the children, nor was there any indication that the foster parents had spoken to the children about the voices that the father was hearing. Visitation with the father was later terminated in October 2021.

Based on the foregoing, the record establishes both that petitioner's perception of the progress that the father had made prior to June 2021 was due to his own non-disclosure of dangerous delusional thinking regarding the children, and that the father failed to sufficiently comply with the service plan for the remainder of the alleged one-year period (*see Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *Matter of Dakota S.*, 43 AD3d 1414, 1415 [4th Dept 2007]). We thus conclude that, under the circumstances of this case, "the finding of permanent neglect [is not] undermined by the evidence that [petitioner] took steps to arrange for [the] discharge of the child[ren] to [the father], which never materialized due to" the father's newly disclosed and unaddressed auditory hallucinations that were telling him to sexually abuse the children (*Matter of Wilfredo A.M.*, 56 AD3d 338, 338 [1st Dept 2008]).

We further conclude that a different result is not warranted even if the court erred in admitting the full testimony of the psychiatrist on the ground that the father's confidential communications remained subject to physician-client privilege (*see* CPLR 4504; *see generally People v Rivera*, 25 NY3d 256, 260-265 [2015]). The psychiatrist, as a mental health professional, was required to report that he had reasonable cause to suspect that the children were maltreated based on the father's disclosure that he was hearing voices instructing him to sexually abuse the children (*see* Social Services Law § 413 [1] [a]; *see also* § 412 [2] [a]; Family Ct Act § 1012 [f] [i]). The psychiatrist made such a report by immediately placing a telephone call to the caseworker (*see* Social Services Law § 415). The caseworker testified about receiving that report in June 2021 and the actions that petitioner took in response thereto (*see generally Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313-1314 [4th Dept 2012]). The caseworker's testimony alone is sufficient to establish that petitioner's initial position approving the return of the children was based on incomplete information about the father's mental health and the children's safety. As the caseworker's testimony establishes, had the father promptly disclosed his mental health issue while he was under the supervision of petitioner, there would never have been a recommendation to return the children to his care and, having failed to deal with that significant child safety issue, the father would not have been considered compliant with his obligation to plan for the safe return of the children. Inasmuch as the father

thereafter failed to comply with the requested services, including sexualized behavior counseling, the record establishes that the father "did not successfully address or gain insight into the problems that . . . continued to prevent the child[ren's] safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]).

Finally, even assuming, arguendo, that the court erred in admitting in evidence the father's hospital records and in considering one exhibit that had not been properly received into evidence, we conclude that any error is harmless because "the result reached herein would have been the same even had such record[s], or portions thereof, been excluded [or not considered]" (*Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018] [internal quotation marks omitted]; *see Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

All concur except MONTOUR and NOWAK, JJ., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that petitioner met its burden of establishing that respondent father failed to plan for the children's future from April 2021—when the father began hearing voices but failed to disclose it—through December 2021. However, inasmuch as petitioner failed to meet its burden of establishing by clear and convincing evidence that the father failed to plan for the children's future for one full year (*see Matter of Lisa Ann U.*, 52 NY2d 1055, 1057 [1981]; *Matter of Tai-Gi K.Q.-N.B. [Nadine B.]*, 179 AD3d 1056, 1057 [2d Dept 2020]; *see also Matter of Winstoniya D. [Tammi G.]*, 123 AD3d 705, 706-707 [2d Dept 2014]), we respectfully dissent.

To that end, the only evidence of a failure to plan for the children's future from December 2020 to April 2021 was petitioner's exhibit 5, a medical record that referenced the father's admission to continued use of synthetic marihuana. However, that exhibit was withdrawn by petitioner as not properly authenticated and was thereafter never entered into evidence or placed into the record. Inasmuch as the record lacks other admissible evidence that the father failed to plan for the children's future from December 2020 to April 2021, Family Court's improper reliance upon facts outside the record is not harmless (*cf. Matter of Cynthia C.*, 234 AD2d 929, 929 [4th Dept 1996]), and petitioner failed to meet its burden by clear and convincing evidence (*see generally Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 429 [2012]). Therefore, we would reverse the order and dismiss the petition against the father.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**276**

**KA 23-01466**

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

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

OKSANA BROZHYNA, DEFENDANT-RESPONDENT.

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JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR APPELLANT.

JESSICA KULPIT, BUFFALO, FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Erie County Court (James F. Bargnesi, J.), dated August 9, 2023. The order granted the motion of defendant to dismiss an indictment.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**290**

**CA 23-01177**

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

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JENNIFER MCGILL, PLAINTIFF-RESPONDENT,

V ORDER

SARAH EMILY CAMPBELL, DARREN J. CAMPBELL,
DEFENDANTS-RESPONDENTS,
AND PAUL E. SANDELL, DEFENDANT-APPELLANT.

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LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (AMY E. BELMONT OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE CAREY LAW FIRM, LLC, GRAND ISLAND (SHAWN W. CAREY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Erie County (Amy C. Martoche, J.), entered July 11, 2023. The order, insofar as appealed from, denied the motion of defendant Paul E. Sandell for summary judgment dismissing the complaint and any cross-claims against him.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 25, 2024,

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**294**

**KA 22-00853**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON LOOMIS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Jefferson County Court (Daniel R. King, A.J.), rendered July 29, 2020. The judgment convicted defendant upon a guilty plea of criminal sexual act in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of two counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]), defendant contends that the enhanced sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal was not knowingly, voluntarily and intelligently entered (*see People v Fox*, 204 AD3d 1452, 1453-1454 [4th Dept 2022], *lv denied* 39 NY3d 940 [2022]; *see generally People v Thomas*, 34 NY3d 545, 562 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) or otherwise does not encompass his challenge to the severity of the sentence (*see People v Tennant*, 217 AD3d 1564, 1564 [4th Dept 2023]; *People v Baker*, 204 AD3d 1471, 1471 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**295**

**KA 22-01195**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC M. SMITH, DEFENDANT-APPELLANT.

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THOMAS L. PELYCH, HORNELL, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered July 7, 2022. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree, grand larceny in the third degree, and criminal mischief in the third degree.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**297**

**KA 20-01109**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES ADAMS, DEFENDANT-APPELLANT.

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JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered August 11, 2020. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Defendant's conviction stems from his conduct in firing a weapon while in a parking lot of a gas station, which conduct was captured on surveillance videos. We reject defendant's contention that Supreme Court erred in denying his request to charge criminal possession of a weapon in the fourth degree as a lesser included offense of criminal possession of a weapon in the second degree. Defendant requested the lesser included offense on the theory that only blanks were fired from the weapon. Although criminal possession of a weapon in the fourth degree (§ 265.01 [1]) is a lesser included offense of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]; *see People v Johnson*, 74 AD3d 1912, 1913 [4th Dept 2010]; *People v Laing*, 66 AD3d 1353, 1355 [4th Dept 2009], *lv denied* 13 NY3d 908 [2009]), we conclude that "[t]here is no reasonable view of the evidence that would allow the jury to conclude, without resorting to speculation, that defendant committed the lesser offense but not the greater" (*People v Taylor*, 83 AD3d 1505, 1506 [4th Dept 2011], *lv denied* 17 NY3d 822 [2011]; *see Laing*, 66 AD3d at 1355; *see generally People v Cotarelo*, 71 NY2d 941, 942-943 [1988]; *People v Glover*, 57 NY2d 61, 63 [1982]). Although no projectiles were recovered at the scene, a police technician and a firearms examiner testified that the casings in the weapon were consistent with live rounds of ammunition

and not blanks.

We reject defendant's further contention that he was prejudiced by the admission in evidence of body camera footage from police officers who responded to the scene of the shooting and arrested defendant. Defendant's statements on the videos were admissible as party admissions (*see People v Caban*, 5 NY3d 143, 151 n [2005]; *People v Brinkley*, 174 AD3d 1159, 1165-1166 [3d Dept 2019], *lv denied* 34 NY3d 979 [2019]), and their probative value to defendant's consciousness of guilt outweighed the prejudice (*see People v Joe*, 146 AD3d 587, 590 [1st Dept 2017], *lv denied* 29 NY3d 1081 [2017]). To the extent the court erred in admitting the officers' hearsay statements, we conclude that the error is harmless (*see People v Molson*, 89 AD3d 1539, 1541-1542 [4th Dept 2011], *lv denied* 18 NY3d 960 [2012]). The evidence of defendant's guilt was overwhelming, and there was no significant probability that defendant would have been acquitted had those statements been excluded (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**299**

**KA 23-00859**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT A. STEHM, JR., DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered January 3, 2023. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). As defendant correctly concedes, by failing to move to withdraw his plea or to vacate the judgment of conviction, he failed to preserve for our review his contention that the plea was not knowingly, voluntarily and intelligently entered, as well as his challenge to the factual sufficiency of the plea allocution (*see People v Liepke*, 184 AD3d 1109, 1109 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *People v Sheppard*, 154 AD3d 1329, 1329 [4th Dept 2017]). Contrary to defendant's contention, we conclude that this case does not fall within the rare exception to the preservation requirement (*see People v Phillips*, 221 AD3d 1501, 1502 [4th Dept 2023], *lv denied* 41 NY3d 966 [2024]; *People v Szymanski*, 217 AD3d 1415, 1415 [4th Dept 2023], *lv denied* 40 NY3d 952 [2023]; *see generally People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, defendant's challenges to the plea are without merit.

Contrary to his challenge to the voluntariness of the plea, we conclude that defendant's assertion that he did not understand the nature of the plea and its consequences is belied by the record of the plea proceeding (*see People v McCullen*, 162 AD3d 1661, 1661 [4th Dept 2018]). Moreover, " '[a] history of prior mental illness or treatment does not itself call into question [a] defendant's competence' " and, here, "[t]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally

incompetent at the time he entered his guilty plea" (*People v Williams*, 35 AD3d 1273, 1275 [4th Dept 2006], *lv denied* 8 NY3d 928 [2007]; *see People v Cato*, 199 AD3d 1388, 1389 [4th Dept 2021]). Indeed, defendant denied during the plea colloquy that he was suffering from any mental health problems that would make it difficult for him to understand the proceeding, and "[t]here was not the slightest indication that defendant was uninformed, confused or incompetent" at the time he entered the plea (*People v Alexander*, 97 NY2d 482, 486 [2002]; *see Cato*, 199 AD3d at 1389; *People v Jones*, 175 AD3d 1845, 1846 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]).

Defendant's challenge to the factual sufficiency of the plea likewise lacks merit. "Where[,] [as here], a defendant enters a negotiated plea to a lesser crime than one with which he is charged, no factual basis for the plea is required" (*People v Johnson*, 23 NY3d 973, 975 [2014]; *see People v Carbone*, 199 AD3d 1489, 1490 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022]; *People v Norman*, 128 AD3d 1418, 1419 [4th Dept 2015], *lv denied* 27 NY3d 1003 [2016]). The record establishes that County Court nonetheless engaged defendant in a sufficient factual allocution inasmuch as defendant stated therein that he committed the essential elements of the crime to which he pleaded (*see People v Anderson*, 70 AD3d 1320, 1320 [4th Dept 2010], *lv denied* 14 NY3d 885 [2010]). Contrary to defendant's assertions, the fact that defendant "gave monosyllabic responses to [the court's] questions did not render the plea invalid" (*People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017] [internal quotation marks omitted]).

Although defendant further contends that the evidence is legally insufficient to support the conviction, he forfeited that contention by pleading guilty (*see People v Cossette*, 199 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]; *People v Weakfall*, 151 AD3d 1966, 1966 [4th Dept 2017]). Indeed, "it would be logically inconsistent to permit a defendant to enter a plea of guilty based on particular admitted facts, yet to allow that defendant contemporaneously to reserve the right to challenge on appeal the sufficiency of those facts to support a conviction, had there been a trial" (*People v Plunkett*, 19 NY3d 400, 405-406 [2012]; *see Cossette*, 199 AD3d at 1398; *Weakfall*, 151 AD3d at 1966).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**301**

**CAF 23-00528**

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

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IN THE MATTER OF LANDEN S. AND KAMERSON S.
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YATES COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

APRIL S., RESPONDENT,
AND TIMOTHY S., RESPONDENT-APPELLANT.

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RYAN JAMES MULDOON, AUBURN, FOR RESPONDENT-APPELLANT.

RUTH A. CHAFFEE, PENN YAN, FOR PETITIONER-RESPONDENT.

TERESA M. PARE, CANANDAIGUA, ATTORNEY FOR THE CHILD.

SHARON ALLEN, KEUKA PARK, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Yates County (Stacey Romeo, A.J.), entered March 2, 2023, in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed respondent Timothy S. under the supervision of petitioner.

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

Memorandum: In this proceeding brought pursuant to Family Court Act article 10, respondent father appeals from an order of disposition that, inter alia, placed him under the supervision of petitioner for a period of 12 months following an adjudication that he neglected the subject children. As an initial matter, we dismiss the appeal insofar as it concerns the disposition inasmuch as the father consented thereto (*see* CPLR 5511; *Matter of Noah C. [Greg C.]*, 192 AD3d 1676, 1676 [4th Dept 2021]; *Matter of Kendall N. [Angela M.]*, 188 AD3d 1688, 1688 [4th Dept 2020], *lv denied* 36 NY3d 908 [2021]). The appeal, however, brings up for review the order of fact-finding determining that he neglected the children (*see Noah C.*, 192 AD3d at 1676; *Matter of Anthony L. [Lisa P.]*, 144 AD3d 1690, 1691 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Contrary to the father's contention, Family Court did not err in determining that petitioner established that the father neglected the children. To establish neglect, petitioner was required to show, by a preponderance of the evidence, " 'first, that [the] child[ren]'s

physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship' " (*Matter of Jayla A. [Chelsea K.-Isaac C.]*, 151 AD3d 1791, 1792 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act § 1012 [f] [i]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Jeromy J. [Latanya J.]*, 122 AD3d 1398, 1398-1399 [4th Dept 2014], *lv denied* 25 NY3d 901 [2015] [internal quotation marks omitted]).

Here, the record establishes that the father left the subject children at the mother's home and in her long-term care, despite the fact that it was in violation of the order of protection that the father had previously sought and obtained. The record further established that the father failed to assist the mother with the children's mental health issues and multiple absences from school. We therefore conclude that " 'there is a sound and substantial basis to support [the court's] finding that the child[ren were] in imminent danger of impairment as a result of [the father's] failure to exercise a minimum degree of care' " (*Matter of Claudina E.P. [Stephanie M.]*, 91 AD3d 1324, 1324 [4th Dept 2012]; *see generally Nicholson*, 3 NY3d at 368-370).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**302**

**CA 23-00754**

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

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ANTHONY FALSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHILDREN AND FAMILY SERVICES, DEFENDANT-RESPONDENT.

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ANTHONY FALSO, PLAINTIFF-APPELLANT PRO SE.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (MIGUEL A. MUNOZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Monroe County (Elena F. Cariola, J.), entered October 26, 2022. The order granted the motion of defendant to dismiss the complaint and denied the cross-motion of plaintiff for leave to file a late notice of claim and to amend the complaint.

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

Memorandum: Plaintiff commenced this action seeking compensation for damage to his home and for mental anguish caused by a child, who was placed with him temporarily. Plaintiff was friends with the child's mother, and they lived with him for over a month in the spring of 2022 until the mother was able to secure new housing. Shortly after the mother and the child moved into new housing, the mother's ex-boyfriend broke into their apartment. Defendant's caseworkers asked plaintiff, upon the mother's suggestion, if the child could live with him until the mother again obtained new housing. Plaintiff agreed, and the child moved in with him in early June 2022. The child, however, allegedly caused damage to plaintiff's home, such as stains on the carpet and scratches on the furniture. Plaintiff asked defendant to remove the child, and she was removed a few days later. In his complaint, plaintiff asserted causes of action for breach of fiduciary duty and negligence. Plaintiff alleged that defendant knew or should have known that the child posed a danger to herself and others, yet never informed plaintiff before placing her with him. Plaintiff alleged that he agreed to be the child's foster caregiver upon defendant's express and implied assurances that the child would not present any problems, risks, or dangers for him by living with him.

Defendant moved to dismiss the complaint for, inter alia, failure to state a cause of action. Plaintiff cross-moved for leave to file a

late notice of claim and to amend the complaint. Supreme Court granted the motion and denied the cross-motion. Plaintiff appeals, and we affirm.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In assessing a motion under CPLR 3211 (a) (7) where the court has considered evidentiary material in support of or in opposition to the motion, "[t]he criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one" (*id.* at 88 [internal quotation marks omitted]).

Contrary to plaintiff's contention, defendant did not owe any duty to him inasmuch as, during the relevant time period, he was not a "foster parent" nor was the child a "foster child" as defined by Social Services Law § 371 (19). Defendant submitted documentary evidence establishing that the child was not "in the care, custody or guardianship" (*id.*) of defendant until the issuance of a removal order that was made after the child left plaintiff's home.

Even, assuming, arguendo, that plaintiff was a foster parent and the child was a foster child, we further conclude that the allegations in the complaint do not establish the existence of a special duty with respect to the negligence cause of action (*see Weisbrod-Moore v Cayuga County*, 216 AD3d 1459, 1459 [4th Dept 2023]; *Abraham v City of New York*, 39 AD3d 21, 28-29 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008]). "When a negligence claim is asserted against a municipality acting in a governmental capacity, as here, the plaintiff must prove the existence of a special duty" (*Maldovan v County of Erie*, 39 NY3d 166, 171 [2022], *rearg denied* 39 NY3d 1067 [2023]; *see McLean v City of New York*, 12 NY3d 194, 199 [2009]). "[A] special duty may arise in three situations: where '(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition' " (*Maldovan*, 39 NY3d at 171; *see McLean*, 12 NY3d at 199). "[T]he special duty rule is based on the rationale that exposing municipalities to tort liability may 'render them less, not more, effective in protecting their citizens' " (*Maldovan*, 39 NY3d at 174). "[T]he government is not an insurer against harm suffered by its citizenry at the hands of third parties" (*Valdez v City of New York*, 18 NY3d 69, 75 [2011]), and "a 'crushing burden' should not be imposed on a governmental body 'in the absence of [statutory] language clearly designed to have that effect' " (*McLean*, 12 NY3d at 204).

Plaintiff did not allege defendant's violation of any statutory duty or that the third situation applies, and thus only the second situation is at issue here. "[T]o establish that the government voluntarily assumed a duty to the plaintiff beyond what it generally owes to the public, the plaintiff must establish: (1) an assumption

by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Maldovan*, 39 NY3d at 172 [internal quotation marks omitted]; *see Valdez*, 18 NY3d at 80; *McLean*, 12 NY3d at 201). Here, plaintiff failed to make the necessary allegations that defendant voluntarily assumed a duty to him beyond what it generally owed to the public. There were no " 'promises or actions' by which [defendant] assumed a duty to do something on [plaintiff's] behalf" (*McLean*, 12 NY3d at 201). Defendant's "duty to [plaintiff] was neither more nor less than its duty to any other [foster parent taking in a child]" (*id.*). Defendant's alleged assurances that the child would not present any problems, risks or dangers for plaintiff does not constitute an assumption of an affirmative duty to act.

Plaintiff failed to address the breach of fiduciary duty cause of action in his brief and has thus abandoned that cause of action (*see Behrens v City of Buffalo*, 217 AD3d 1589, 1590 [4th Dept 2023]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). In any event, the court properly dismissed that cause of action because plaintiff failed to allege that there was a fiduciary relationship between plaintiff and defendant (*see generally Health v Hyland*, 200 AD3d 1654, 1655 [4th Dept 2021]).

Contrary to plaintiff's further contention, the court properly denied his cross-motion. Although leave to amend a pleading is freely granted, it should be denied where the proposed amendment is patently lacking in merit (*see Broyles v Town of Evans*, 147 AD3d 1496, 1497 [4th Dept 2017]; *Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1662 [4th Dept 2009]). Plaintiff's proposed amended complaint simply added parties, i.e., employees of defendant, and did not add any new substantive allegations or causes of action. Inasmuch as the proposed amended complaint was patently without merit, the cross-motion seeking leave to file an amended complaint and late notice of claim was properly denied (*see Turner v Roswell Park Cancer Inst. Corp.*, 214 AD3d 1376, 1377-1378 [4th Dept 2023]; *Magic Circle Films Intl., LLC v Entertainment One U.S. LP*, 199 AD3d 1444, 1445 [4th Dept 2021]; *Matter of Lo Tempio v Erie County Health Dept.*, 17 AD3d 1161, 1161-1162 [4th Dept 2005]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**305**

**CA 23-00448**

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

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IN THE MATTER OF LOONEY INJURY LAW, PLLC, AND JOHN W. LOONEY, ESQ., PETITIONERS-RESPONDENTS,

V ORDER

CELLINO LAW, LLP, AND ROSS M. CELLINO, JR., ESQ., RESPONDENTS-APPELLANTS.

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CELLINO LAW LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

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Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered March 2, 2023. The order apportioned certain legal fees.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 26, 2024,

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**306**

**CA 23-01339**

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

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LEONNA M. MCCURTY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL D. ROBERTS, DEFENDANT-APPELLANT.

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CERIO LAW OFFICES PLLC, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR DEFENDANT-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an amended order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered February 13, 2023. The amended order, inter alia, granted the motion of plaintiff to hold defendant in contempt.

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

Memorandum: Defendant appeals from an amended order that, inter alia, held him in contempt of the parties' judgment of divorce for failing to pay a portion of his maintenance obligation and ordered him to pay the arrears owed to plaintiff. We affirm.

We note at the outset that defendant's notice of appeal incorrectly states the date on which the amended order was entered. However, we exercise our discretion to treat the notice of appeal as valid pursuant to CPLR 5520 (c) (*see Cook v Estate of Achzet*, 214 AD3d 1369, 1371 [4th Dept 2023]).

We reject defendant's contention that Supreme Court erred in finding him in contempt for violating the parties' judgment of divorce. A finding of civil contempt must be supported by four elements: (1) a lawful court order "expressing an unequivocal mandate"; (2) "reasonable certainty" that the order was disobeyed; (3) knowledge of the court's order by the party in contempt; and (4) prejudice to the right of a party to the litigation (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015] [internal quotation marks omitted]). "The party seeking an order of contempt has the burden of establishing those four elements by clear and convincing evidence" (*Dotzler v Buono*, 144 AD3d 1512, 1514 [4th Dept 2016]). Contrary to defendant's contention, the court properly determined that plaintiff met her burden by clear and convincing evidence inasmuch as the provision of

the judgment requiring defendant to pay plaintiff a certain amount of maintenance for a period of three years was unambiguous and expressed an unequivocal mandate (*cf. Matter of Brookover v Harris,* 217 AD3d 1411, 1412 [4th Dept 2023]).

Contrary to defendant's further contention, the court did not err in finding defendant in contempt without conducting a hearing. "A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense" (*El-Dehdan v El-Dehdan*, 114 AD3d 4, 17 [2d Dept 2013], *affd* 26 NY3d 19 [2015]; *see Jaffe v Jaffe*, 44 AD3d 825, 826 [2d Dept 2007]). Here, defendant failed to raise an issue of fact on his defense, i.e., his inability to pay the maintenance obligation (*see generally El-Dehdan*, 26 NY3d at 35-36). Instead, defendant simply stated in his affidavit that permitting the award of full maintenance for the three-year period would be "unaffordable." "Such '[v]ague and conclusory allegations of . . . inability to pay or perform are not acceptable' " (*id.* at 36; *see Ovsanikow v Ovsanikow*, 224 AD2d 786, 787 [3d Dept 1996]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**307**

**CA 23-00470**

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

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PEARL STREET PARKING ASSOCIATES LLC
AND VIOLET REALTY, INC.,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND BUFFALO CIVIC AUTO RAMPS,
INC., DEFENDANTS-RESPONDENTS-APPELLANTS.

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GROSS SHUMAN P.C., BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MITCHELL J. BANAS, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

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Appeal and cross-appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 17, 2023. The order granted in part the motion of defendants to dismiss the first, second and fifth causes of action in the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion insofar as it sought dismissal of the first cause of action against defendant Buffalo Civic Auto Ramps, Inc. and reinstating the first cause of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action against defendants City of Buffalo (City) and Buffalo Civic Auto Ramps, Inc. (BCAR) asserting causes of action for breach of contract, waste, negligence, and conversion. Pursuant to an agreement (agreement) entered into between plaintiffs' predecessors and the City in 1965, plaintiffs' predecessors agreed to build commercial buildings and an underground parking facility (ramp) and then sell the ramp to the City upon completion. The agreement gave plaintiffs' predecessors a right of reversion after 30 years. If they exercised such right, the City would continue operation of the ramp for an additional 20 years, after which title to the ramp would be transferred. When the construction was complete in 1969, plaintiffs' predecessors and the City entered into a conveyance (conveyance) transferring title to the ramp to the City. In 1999, plaintiff Violet Realty, Inc. exercised its right of reversion, and plaintiffs obtained fee simple title to the ramp in July 2019.

Plaintiffs commenced this action in January 2020 alleging that the City had agreed to maintain the ramp during its period of ownership and failed to do so. Defendants moved pursuant to CPLR 3211 (a) (1), (5), and (7) or, alternatively, pursuant to CPLR 3212, to dismiss the first and second causes of action for breach of contract and the fifth cause of action for conversion in the amended complaint. Supreme Court granted defendants' motion in part by dismissing the first cause of action insofar as it is asserted against BCAR and dismissing the second cause of action in its entirety. Plaintiffs now appeal, and defendants cross-appeal.

Initially, we consider defendants' motion as one to dismiss only inasmuch as defendants had not yet answered the amended complaint at the time the court issued its order. The motion insofar as it sought summary judgment was therefore premature (*see* CPLR 3212 [a]; *Gold Medal Packing v Rubin*, 6 AD3d 1084, 1085 [4th Dept 2004]; *see generally City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985]). On a motion to dismiss pursuant to CPLR 3211 (a) (7), we must "accept the facts as alleged in the complaint as true, accord plaintiffs 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]). Further, "[a] motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiffs'] claim[s]" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]).

Addressing first defendants' cross-appeal, we reject their contention that the court erred in denying their motion insofar as it sought dismissal of the first cause of action against the City, for breach of contract, to the extent that it alleges that the City failed to properly maintain and repair the ramp. "[A] contract must be construed in a manner which gives effect to each and every part, so as not to render any provision 'meaningless or without force or effect' " (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]). The conveyance gave the City the sole right to operate the ramp for 30 years, and for an additional 20 years if plaintiffs' predecessors exercised their right of reversion, and provided that during the period of its operation, the City "shall pay all costs of operation and maintenance" of the ramp. Defendants contend that the conveyance merely required them to pay for any maintenance of the ramp, not to actually undertake any maintenance in the first instance. We reject defendants' strained interpretation inasmuch as it would impermissibly render the relevant provision without force or effect (*see generally id.*).

We further reject defendants' contention that the court erred in denying their motion insofar as it sought to dismiss so much of the first cause of action against the City and the fifth cause of action, for conversion, seeking to recover damages based on defendants' failure to turn over certain personal property. The right of reversion in the agreement and conveyance gave plaintiffs' predecessors the right to acquire the ramp "and all equipment or

property of every description used in its operation." Plaintiffs alleged that defendants failed to return all equipment or property used in the ramp's operation, in particular the parking revenue and control system (system), when defendants conveyed the ramp to them in 2019. Although defendants contend that plaintiffs already purchased their own system at the time the ramp was conveyed to them, there are questions of fact whether defendants' conduct prior thereto required plaintiffs to purchase the new system. We therefore conclude that the documentary evidence failed to "utterly refute[ ] plaintiff[s'] factual allegations" and thus did not "conclusively establish[ ] a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Town of Mexico v County of Oswego*, 175 AD3d 876, 878 [4th Dept 2019]).

Addressing next plaintiffs' appeal, we agree with plaintiffs that the court erred in granting the motion insofar as it sought dismissal of the first cause of action against BCAR, and we therefore modify the order accordingly. An assignee of rights under a contract may be bound to perform the duties under that contract if the party expressly assumes to do so (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 402 [1957], *rearg denied* 3 NY2d 941 [1957]; *Ivory Dev., LLC v Roe*, 135 AD3d 1216, 1222 [3d Dept 2016]). During the period of the City's ownership of the ramp, the City and BCAR entered into various operating agreements pursuant to which BCAR agreed to operate and maintain the ramp in good repair. The operating agreements stated that they were "subject to the terms" of the conveyance, including the maintenance provisions. Specifically, the City "assign[ed] its rights under [the conveyance] regarding . . . operation of the . . . [r]amp . . . to BCAR" and BCAR "accept[ed] the responsibilities of the City under [the conveyance] with regard to operation and maintenance, and the cost of such operation and maintenance." Thus, contrary to defendants' contention, the documentary evidence does not refute plaintiffs' breach of contract claim in the first cause of action that, despite BCAR not being a signatory to the conveyance, it may be held liable as an assignee of the City (*see Tantallon Austin Hotel, LLC v Wilmington Trust, N.A.*, 209 AD3d 513, 514 [1st Dept 2022]).

Contrary to plaintiffs' further contention, however, the court properly granted defendants' motion insofar as it sought dismissal of the second cause of action, for breach of contract on the basis that plaintiffs were third-party beneficiaries of the operating agreements between the City and BCAR. "[A] third party may sue as a beneficiary on a contract made for [its] benefit. However, an intent to benefit the third party must be shown, and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 710 [2018] [internal quotation marks omitted]). Such intent is shown "when the third party is the only one who could recover for the breach of contract or when it is otherwise clear from the language of the contract that there was an intent to permit enforcement by the third party" (*id.* [internal quotation marks omitted]). Those circumstances do not apply here (*see Matter of Columbus Monument Corp. v City of Syracuse*, 218 AD3d 1184, 1188-1189 [4th Dept 2023]; *Old Crompond Rd., LLC v County of Westchester*, 201

AD3d 806, 808-809 [2d Dept 2022]), and we therefore agree with defendants that plaintiffs were merely incidental beneficiaries of the operating agreements between the City and BCAR (*see Fields Enters. Inc. v Bristol Harbour Vil. Assn., Inc.*, 217 AD3d 1433, 1436 [4th Dept 2023]).

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**310**

**KA 20-00052**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN GILMORE, DEFENDANT-APPELLANT.

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SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (FABIENNE N. SANTACROCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 11, 2018. The judgment convicted defendant upon a guilty plea of burglary in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]), defendant contends that his sentence is unduly harsh and severe. Although defendant has no prior criminal record, he admittedly broke into the victim's home and repeatedly struck him with a baseball bat, causing the victim to sustain a concussion and several fractured bones. In light of the violent nature of the offense and considering that defendant received significantly less than the maximum term of imprisonment, we perceive no basis in the record to exercise our power to modify the negotiated sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**312**

**KA 22-01651**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT C. DEANGELIS, DEFENDANT-APPELLANT.

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THOMAS L. PELYCH, HORNELL, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Cayuga County (Daniel J. Doyle, J.), rendered September 20, 2022. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, robbery in the first degree, assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [2]), robbery in the first degree (§ 160.15 [3]), assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the third degree (§ 265.02 [1]).

Even assuming, arguendo, that defendant validly waived his right to appeal, we agree with defendant that the waiver does not encompass his challenge to the severity of the enhanced sentence because County Court "failed to advise defendant of either the conduct that could result in the imposition of an enhanced sentence before defendant waived his right to appeal . . . or the potential periods of incarceration for an enhanced sentence" (*People v Semple*, 23 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 6 NY3d 852 [2006] [internal quotation marks omitted]). We nevertheless conclude that the enhanced sentence is not unduly harsh or severe.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**321.1**
**CA 23-01144**
PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

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ANTHONY P. GALLO, III, PLAINTIFF-RESPONDENT,

V ORDER

GERALD D. OTTEN, ELBERT VELDJESGRAAF,
ADMIRAL-MERCHANTS MOTOR FREIGHT, INC.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (DENNIS P. MESCALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 14, 2022. The order, inter alia, granted plaintiff's motion for summary judgment on the issue of the negligence of defendants Gerald D. Otten, Elbert Veldjesgraaf, and Admiral-Merchants Motor Freight, Inc., and seeking dismissal of those defendants' affirmative defenses based on plaintiff's alleged culpable conduct and assumption of the risk.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**321**

**CA 23-00540**

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

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ANTHONY P. GALLO, III, PLAINTIFF-RESPONDENT,

V ORDER

GERALD D. OTTEN, ELBERT VELDJESGRAAF, ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., STATE LINE PILOT CAR & PERMIT SERVICE, LLC, DEFENDANTS-RESPONDENTS, 2528388 ONTARIO LTD, RALPH J. BETTS AND AMY F. BETTS, DEFENDANTS-APPELLANTS.

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HURWITZ FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (DENNIS P. MESCALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GERALD D. OTTEN, ELBERT VELDJESGRAAF, AND ADMIRAL-MERCHANTS MOTOR FREIGHT, INC.

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Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 29, 2023. The order denied the cross-motion of defendants 2528388 Ontario LTD, Ralph J. Betts and Amy F. Betts for summary judgment dismissing the complaint and all cross-claims against them.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**328**

**CA 23-01504**

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

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LAJUAN ROWE, AS ADMINISTRATOR OF THE ESTATE OF DAWN JOHNSON, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

NICOLE L. JORDAN, DEFENDANT,
CITY OF LOCKPORT, CITY OF LOCKPORT POLICE DEPARTMENT AND DANIEL L. KAUFMAN, DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

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NICOLE L. JORDAN, PLAINTIFF-RESPONDENT,

V

CITY OF LOCKPORT, DEFENDANT-APPELLANT.
(ACTION NO. 2.)

---

AVIANNA JORDAN, PLAINTIFF-RESPONDENT

V

CITY OF LOCKPORT, DEFENDANT-APPELLANT.
(ACTION NO. 3.)

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WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE BARNES FIRM, BUFFALO (ROBERT J. SCHRECK OF COUNSEL), FOR PLAINTIFF-RESPONDENT LAJUAN ROWE, AS ADMINISTRATOR OF THE ESTATE OF DAWN JOHNSON, DECEASED.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (EMILY M. COBB OF COUNSEL), FOR PLAINTIFF-RESPONDENT NICOLE L. JORDAN.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS NICOLE L. JORDAN AND AVIANNA JORDAN.

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Appeal from an order of the Supreme Court, Niagara County (Edward Pace, J.), entered August 4, 2023. The order, insofar as appealed from, denied in part the motion of defendants City of Lockport, City of Lockport Police Department and Daniel L. Kaufman for summary judgment.

Now, upon reading and filing the stipulation of discontinuance

signed by the attorneys for the parties on March 14, 15 and 18, 2024,

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**332**

**KA 21-01387**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ISIAH AUTRY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

ISIAH AUTRY, DEFENDANT-APPELLANT PRO SE.

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

---

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 11, 2021. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a firearm.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on February 28, 2024 and by the attorneys for the parties on March 11, 2024,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**333**

**KA 22-01428**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JULIAN N. BYER, DEFENDANT-APPELLANT.

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BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

BRITTANY GROME ANTONACCI, DISTRICT ATTORNEY, AUBURN, FOR RESPONDENT.

---

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 19, 2022. The judgment convicted defendant, upon his guilty plea, of robbery in the first degree.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**337**

**KA 21-01388**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ISIAH AUTRY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

ISIAH AUTRY, DEFENDANT-APPELLANT PRO SE.

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

---

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 11, 2021. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on February 28, 2024 and by the attorneys for the parties on March 11, 2024,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**342**

**CA 23-00276**

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

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FAUSTO PRATTICO, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

TITAN INSURANCE AND EMPLOYEE BENEFITS AGENCY, LLC, MICHAEL GUROWSKI, TAMMY GUROWSKI, MARISSA BENETT AND US RETIREMENT PARTNERS, DEFENDANTS-APPELLANTS-RESPONDENTS.

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GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BARCLAY DAMON LLP, BUFFALO (DAVID M. FULVIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

---

Appeal and cross-appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered February 8, 2023. The order denied the motion of defendants to dismiss the amended complaint and denied the cross-motion of plaintiff seeking, inter alia, an award of attorney's fees and costs.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**344**

**CA 23-00260**

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

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MELISSA SEIFTER, PLAINTIFF-APPELLANT,

V ORDER

MASSAGE ENVY FRANCHISING, LLC, MASSAGE ENVY, LLC, BKN ENTERPRISES, LLC, CCW GROUP, LLC, TME ASSOCIATES, LLC, VCC ASSOCIATES, LLC, HWGA AFFILIATES, LLC, RACHEL BANDYCH, DAVID BANDYCH, JANE NEWHOUSE, DEFENDANTS-RESPONDENTS. ET AL., DEFENDANTS.

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SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (CHRISTOPHER F. DEFRANCESCO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, UTICA (JOHN L. MURAD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MASSAGE ENVY FRANCHISING, LLC, AND MASSAGE ENVY, LLC.

MACKENZIE HUGHES LLP, SYRACUSE (JOSEPH G. FARRELL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BKN ENTERPRISES, LLC, CCW GROUP, LLC, TME ASSOCIATES, LLC, VCC ASSOCIATES, LLC, HWGA AFFILIATES, LLC, RACHEL BANDYCH, DAVID BANDYCH, AND JANE NEWHOUSE.

---

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered January 31, 2023. The order, among other things, granted the motion of defendants BKN Enterprises, LLC, CCW Group, LLC, TME Associates, LLC, VCC Associates, LLC, HWGA Affiliates, LLC, Rachel Bandych, David Bandych and Jane Newhouse for an order dismissing plaintiff's first, fifth, sixth, seventh, eighth and tenth causes of action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 25 and 27, 2024, and April 2, 2024,

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**359**

**CAF 22-01919**

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

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IN THE MATTER OF JOSEPH A. SOLOMON,
PETITIONER-APPELLANT,

V ORDER

TINA WHITLEY AND STORM A. COLEY,
RESPONDENTS-RESPONDENTS.

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BRIAN P. DEGNAN, BATAVIA, FOR PETITIONER-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR RESPONDENT-RESPONDENT TINA WHITLEY.

SUSAN E. GRAY, CANTONSVILLE, MARYLAND, ATTORNEY FOR THE CHILD.

---

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered September 20, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted joint custody of the subject child to respondents.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**376**

**CA 23-00819**

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

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MICHAEL HAYES, PLAINTIFF-RESPONDENT,

V ORDER

ALEC RICH, NOAH RICH, RHODA RICH, JUNEXA, LLC, FRED TURNER, CHAD DOUGLAS AND KIRSTEN MILLIRON, DEFENDANTS-APPELLANTS.

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CORNELL LAW SCHOOL FIRST AMENDMENT CLINIC, ITHACA (CAMERON MISNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

---

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered April 11, 2023. The order, inter alia, denied the motion of defendants insofar as it sought an award of attorney's fees and costs and punitive damages.

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

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**378**

**CA 23-01781**

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

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TIARA JOCKO, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF-RESPONDENT,

V ORDER

TJM SYRACUSE, LLC, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

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BOND, SCHOENECK & KING, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR DEFENDANT-APPELLANT.

VIRGINIA & AMBINDER, LLP, NEW YORK CITY (JAMES E. MURPHY OF COUNSEL), AND GATTUSO & CIOTOLI, PLLC, FAYETTEVILLE, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered June 9, 2023. The order, insofar as appealed from, granted the motion of plaintiff for summary judgment on liability and denied the motion of defendant TJM Syracuse, LLC insofar as it sought summary judgment dismissing plaintiff's first cause of action and to limit plaintiff's damages.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**382**

**CA 23-01817**

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

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DAVID NEHRBOSS, PLAINTIFF,

V ORDER

600 CAYUGA ROAD, INC., DEFENDANT.
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600 CAYGUA ROAD, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

PLASTIC BOTTLES, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

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NASH CONNORS, P.C., BUFFALO (ANDREW J. KOWALEWSKI OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), dated September 26, 2023. The order, insofar as appealed from, denied the motion of third-party defendant for summary judgment dismissing the third-party complaint and granted in part the cross-motion of defendant-third-party plaintiff for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**389**

**CAF 22-01791**

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

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IN THE MATTER OF JUDE THADDEUS DANAHY,
PETITIONER-APPELLANT,

V ORDER

CAROL CRAWFORD, RESPONDENT-RESPONDENT.

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CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

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

JENNIFER M. LORENZ, ORCHARD PARK, ATTORNEY FOR THE CHILDREN.

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Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered October 25, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

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

**393**

**CA 23-01602**

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

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UTICA FIRST INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V ORDER

COTE AGENCY INC., ET AL., DEFENDANTS,
BALDES PROTECTION AGENCY, INC., BALDES PROTECTION AGENCY, INC., DOING BUSINESS AS COTE AGENCY, AND BALDES PROTECTION AGENCY, INC., DOING BUSINESS AS COTE INSURANCE AGENCY, DEFENDANTS-APPELLANTS.

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SULLIVAN & KLEIN, LLP, NEW YORK CITY (ROBERT M. SULLIVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FARBER BROCKS & ZANA L.L.P., GARDEN CITY (LESTER CHANIN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 21, 2023. The order denied the motion of defendants Baldes Protection Agency, Inc., Baldes Protection Agency, Inc., doing business as Cote Agency, and Baldes Protection Agency, Inc., doing business as Cote Insurance Agency, to dismiss plaintiff’s sixth cause of action.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court

# SUPREME COURT OF THE STATE OF NEW YORK

*Appellate Division, Fourth Judicial Department*

**395**

**CA 23-01846**

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

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SAMSON LENDING LLC, PLAINTIFF-APPELLANT,

V ORDER

GREENFIELD MANAGEMENT LLC, GREENFIELD SENIOR LIVING, INC., GREENFIELD REFLECTIONS OF WOODSTOCK LLC, AND MATHEW P. PEPONIS, DEFENDANTS-RESPONDENTS.

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MURRAY LEGAL, PLLC, MINEOLA (CHRISTOPHER R. MURRAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OFFIT KURMAN P.A., NEW YORK CITY (ALBENA PETRAKOV OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Ontario County (Daniel J. Doyle, J.), entered September 6, 2023. The order, inter alia, granted defendants' motion to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: May 3, 2024

Ann Dillon Flynn
Clerk of the Court