

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

406

CA 21-01593

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

OF DOES 3-6, ET AL., PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL
DISTRICT, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JULIA M. HILLIKER OF COUNSEL), FOR
DEFENDANT-APPELLANT.

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

Appeal from an amended order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered May 7, 2021. The amended order denied the motion of defendant to preclude the use of certain deposition testimony.

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

Memorandum: Plaintiffs commenced this personal injury action pursuant to the Child Victims Act (see CPLR 214-g), alleging that they were sexually abused by a fifth grade teacher between 1963 and 1992, while attending school at the Herbert Hoover Elementary School within defendant. Defendant moved pretrial for an order determining that the teacher at issue is incompetent to testify due to dementia, and precluding any further use of that teacher's deposition testimony, and defendant now appeals from an amended order denying the motion. "Generally, an order denying a motion in limine, even when 'made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission' " (*Thome v Benchmark Main Tr. Assoc., LLC*, 125 AD3d 1283, 1285 [4th Dept 2015]; see *Innovative Transmission & Engine Co., LLC v Massaro*, 63 AD3d 1506, 1507 [4th Dept 2009]). Here, no appeal lies as of right from the amended order inasmuch as it "merely adjudicates the admissibility of evidence" and does not affect a substantial right (*Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224 [4th Dept 2003]; see CPLR 5701 [a] [2] [v]). Consequently, the appeal must be dismissed (see *Shahram v St. Elizabeth School*, 21 AD3d 1377, 1378 [4th Dept 2005]).

Entered: April 22, 2022

Ann Dillon Flynn
Clerk of the Court