SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 8, 2022

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED JULY 8, 2022

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_____	586	CAF 21 01129	ERIN M. SHEPHERD V THAD A. SHEPHERD, JR.

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

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CA 21-00492

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

ASHLEY M., AS PARENT AND NATURAL GUARDIAN OF
GABRIELLA M., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER MARCINKOWSKI AND JEFFREY MARCINKOWSKI,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 24, 2021. The order granted the motion of plaintiff for leave to renew and, upon renewal, denied the prior cross motion of defendants to quash subpoenas and for a protective order.

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

Memorandum: This discovery dispute stems from plaintiff's action seeking damages for injuries sustained by plaintiff's infant after she was allegedly attacked by defendants' dog. Plaintiff subpoenaed the dog's veterinary records from two non-party veterinary hospitals. After defendants opposed the release of those records, plaintiff moved for an order compelling defendants to sign authorizations permitting plaintiff to obtain the records. Defendants cross-moved for a protective order precluding plaintiff from obtaining the records on the ground that they are protected under Education Law § 6714, an order quashing the subpoenas pursuant to CPLR 2304, and a protective order pursuant to CPLR 3103. Supreme Court denied the motion and cross motion as premature and directed the parties to engage in further discovery. After deposing defendants, plaintiff moved for leave to renew the prior motions. The court granted plaintiff's motion for leave to renew and, upon renewal, denied defendants' cross motion to quash the subpoenas and for a protective order. The court further determined that, based upon its denial of defendants' cross motion, plaintiff's motion to compel had been rendered moot. Defendants now appeal, and we affirm.

Contrary to defendants' contention, the court did not abuse its

discretion in granting plaintiff's motion for leave to renew. As relevant here, a party may move for leave to renew a previous motion "based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]). The movant must provide "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). Here, plaintiff's motion for leave to renew is based upon new facts not offered on the prior motion, specifically transcripts of depositions of defendants that had not been completed at the time of the initial motion, and plaintiff established that the new facts would change the prior determination (*see* CPLR 2221 [e] [2]). Thus, the court did not abuse its discretion in granting plaintiff's motion for leave to renew (*see Nationstar Mtge., LLC v Goodman*, 187 AD3d 1635, 1636 [4th Dept 2020]).

We further conclude that, upon renewal, the court did not err in denying defendants' cross motion (*see generally University Sq. San Antonio, Tx. LLC v Mega Furniture Dezavala, LLC*, 198 AD3d 1284, 1286 [4th Dept 2021]). "Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof' " (*Brennan v Demydyuk*, 196 AD3d 1113, 1114 [4th Dept 2021]). The words " 'material and necessary' " are "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see Brennan*, 196 AD3d at 1114). Here, the contested veterinary records are material and necessary to the prosecution of plaintiff's action because, at the very least, they " 'may contain information reasonably calculated to lead to relevant evidence' " (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008]).

Contrary to defendants' contention, Education Law § 6714 does not prohibit the release of veterinary records pursuant to a subpoena. In matters of statutory interpretation, "our primary consideration is to discern and give effect to the . . . intention of the enactor of the statute" (*Makinen v City of New York*, 30 NY3d 81, 85 [2017] [internal quotation marks omitted]; *see Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019]). "Inasmuch as [the] text of a statute is the clearest indicator of such legislative intent, where the disputed language is unambiguous, we are bound to give effect to its plain meaning" (*Makinen*, 30 NY3d at 85 [internal quotation marks omitted]). "[A] statute must be construed as a whole and . . . its various sections must be considered together and with reference to each other" (*Walsh*, 34 NY3d at 524 [internal quotation marks omitted]). "Where the statutory language is unambiguous, a court need not resort to legislative history" (*id.*).

Education Law § 6714 (1) provides that, "[u]pon written request from the owner of an animal which has received treatment from or under the supervision of a veterinarian, such veterinarian shall provide to such owner within a reasonable time period a copy of all records

relating to the treatment of such animal. For the purposes of this section, the term 'records' shall mean all information concerning or related to the examination or treatment of the animal kept by the veterinarian in the course of his or her practice. A veterinarian may impose a reasonable charge for providing copies of such records. A veterinarian may make available to the owner either the original or a copy of such record or document including x-rays, electrocardiograms and other diagnostic tests and may impose a reasonable fee for the reproduction of such copies."

Nothing in the plain language of that statute prohibits a veterinarian from providing a copy of treatment records pursuant to a subpoena. Had the legislature intended to create such an exemption, it could have done so using language similar to that found in Education Law § 6527 (3), which provides that "records relating to performance of a medical or a quality assurance review function . . . shall [not] be subject to disclosure under article thirty-one of the [CPLR] except as hereinafter provided or as provided by any other provision of law" (*see generally Walsh*, 34 NY3d at 526-527; *Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale*, 87 NY2d 410, 419-420 [1995]). Education Law § 6714, however, contains no such prohibition.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 20-01564

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

DANIEL J. BECK AND DEBRA BECK,
PLAINTIFFS-RESPONDENTS,

V ORDER

CITY OF NIAGARA FALLS, ET AL., DEFENDANTS,
AND SIMFALL, LLC, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, ATTORNEYS AND COUNSELORS AT LAW, BUFFALO (CAREY C. BEYER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 6, 2020. The order denied the motion of defendant Simfall, LLC, for summary judgment.

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

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00571

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

IN THE MATTER OF ROBERT W. HURLBUT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LEO M. BEAN FUNERAL HOME, INC., DOING
BUSINESS AS LEO M. BEAN AND SONS FUNERAL
HOME, RESPONDENT,
AND CHRISTINE OWEN, RESPONDENT-APPELLANT.

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

LAW OFFICES OF PULLANO & FARROW PLLC, ROCHESTER (MALLORY K. SMITH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered April 12, 2021. The order, insofar as appealed from, denied the motion of respondent Christine Owen insofar as it sought dismissal of the petition against her.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the petition against respondent Christine Owen is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to Public Health Law § 4201 seeking a determination with respect to the disposition of the remains of his deceased mother (decedent), who was also the mother of Christine Owen (respondent). After respondent filed an answer and objections in point of law, Supreme Court (Piampiano, J.) determined that there was an issue of fact requiring a fact-finding hearing, i.e., with respect to whether the decedent had the requisite mental capacity in September 2017 to execute a document designating respondent as her agent to control the disposition of her remains. Respondent thereafter filed a motion seeking, inter alia, leave to reargue and renew with respect to that determination and dismissal of the petition. Respondent now appeals from an order (Doyle, J.) that, inter alia, granted her motion insofar as it sought leave to reargue and renew and, upon reargument and renewal, adhered to the prior determination of the court.

We agree with respondent that the court, upon reargument and renewal, should have dismissed the petition against her. "Every dispute relating to the disposition of the remains of a decedent shall

be resolved . . . pursuant to a special proceeding" (Public Health Law § 4201 [8]). Upon the return date of the petition in a special proceeding, "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised," and "may make any orders permitted on a motion for summary judgment" (CPLR 409 [b]; *see Matter of Izzo v Lynn*, 271 AD2d 801, 802 [3d Dept 2000]). "[E]very hearing of a special proceeding is equivalent to the hearing of a motion for summary judgment" (*Matter of Buckley v Zoning Bd. of Appeals of City of Geneva*, 189 AD3d 2080, 2081 [4th Dept 2020] [internal quotation marks omitted]). Furthermore, as relevant here, "[t]he burden of proving mental incompetence is on the party asserting it" (*Smith v Comas*, 173 AD2d 535, 535 [2d Dept 1991], *lv denied* 80 NY2d 754 [1992]; *see Matter of Rose S.*, 293 AD2d 619, 620 [2d Dept 2002]). Even assuming, arguendo, that the heightened contractual capacity standard is applicable in this case (*cf. Matter of Alibrandi*, 104 AD3d 1175, 1175-1176 [4th Dept 2013]; *see generally Rose S.*, 293 AD2d at 620; *Smith*, 173 AD2d at 535), we conclude that petitioner failed to establish that the decedent was incapable "of comprehending and understanding the nature of the transaction at issue" (*Smith*, 173 AD2d at 535; *see Wagner v Wagner*, 156 AD2d 963, 964 [4th Dept 1989]; *see generally Ortelere v Teachers' Retirement Bd. of City of N.Y.*, 25 NY2d 196, 202-203 [1969]). Although petitioner submitted evidence establishing that the decedent had been diagnosed with dementia in 2014, "there is no presumption that a person suffering from dementia is wholly incompetent" (*Matter of Mildred M.J.*, 43 AD3d 1391, 1392 [4th Dept 2007]; *see also Alibrandi*, 104 AD3d at 1175-1176). "Rather, it must be demonstrated that, *because of the affliction*, the individual was incompetent at the time of the challenged transaction" (*Mildred M.J.*, 43 AD3d at 1392 [emphasis added and internal quotation marks omitted]; *Matter of Waldron*, 240 AD2d 507, 508 [2d Dept 1997]). Here, petitioner failed to set forth any evidence that the decedent was without capacity to execute the designating document in September 2017 (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Feldmeier v Feldmeier Equip., Inc.*, 164 AD3d 1093, 1097 [4th Dept 2018]).

We further agree with respondent that the court erred in refusing to summarily dismiss petitioner's claim of undue influence. "With respect to undue influence, the burden of proof generally lies with the party asserting undue influence" (*Matter of DelGatto*, 98 AD3d 975, 977 [2d Dept 2012]). Here, petitioner failed to establish that a confidential relationship existed (*see Mildred M.J.*, 43 AD3d at 1393; *see also Matter of Kotsones*, 185 AD3d 1473, 1475 [4th Dept 2020], *affd* 37 NY3d 1154 [2022]). Further, petitioner failed to establish that respondent's alleged influence "amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the [decedent] to do that which was against [her] free will and desire, but which [she] was unable to refuse or too weak to resist" (*Matter of Bush*, 85 AD2d 887, 888-889 [4th Dept 1982] [internal quotation marks omitted]). We therefore reverse the order insofar as appealed from and dismiss the

petition against respondent.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

188

CA 21-00994

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

DAVID R. MARKIEWICZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KATHRYN M. JONES, DEFENDANT-APPELLANT.

BARTH CONDREN LLP, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered January 11, 2021. The order, insofar as appealed from, granted in part the cross motion of plaintiff for partial summary judgment and denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that plaintiff sustained a serious injury to his left knee, lumbar spine, and left hip, and that plaintiff sustained a serious injury under the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d), and by denying the cross motion in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when his left foot was run over by a vehicle operated by defendant. Plaintiff alleged that, as a result of the accident, he suffered a serious injury under the fracture, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury as defined in Insurance Law § 5102 (d). Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, and plaintiff cross-moved for summary judgment on the issues of serious injury and negligence. Defendant now appeals from an order that denied her motion, denied the cross motion with respect to the issue of serious injury, and granted the cross motion with respect to the issue of negligence.

Initially, with respect to the cross motion, we agree with defendant that there is a triable issue of fact regarding the

emergency doctrine and that Supreme Court thus erred in granting plaintiff's cross motion with respect to the issue of negligence. We therefore modify the order accordingly. "Under the emergency doctrine, when [a driver] is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the [driver] to be reasonably so disturbed that [he or she] must make a speedy decision without weighing alternative courses of conduct, the [driver] may not be negligent if the actions taken are reasonable and prudent in the emergency context[,] . . . provided the [driver] has not created the emergency" (*Dalton v Lucas*, 96 AD3d 1648, 1648 [4th Dept 2012] [internal quotation marks omitted]; *see Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). The doctrine recognizes that a "person in such an emergency situation cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though later it appears that the actor made the wrong decision" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991], *rearg denied* 77 NY2d 990 [1991] [internal quotation marks omitted]). Here, we conclude that "[t]he existence of an emergency and the reasonableness of [defendant's] response thereto . . . constitute issues of fact" for the jury to determine (*Dalton*, 96 AD3d at 1649).

We also agree with defendant that, as plaintiff correctly concedes, plaintiff abandoned any claim of serious injury under the 90/180-day category by failing to oppose defendant's motion with respect to that category (*see generally Burns v Kroening*, 164 AD3d 1640, 1641 [4th Dept 2018]). We therefore further modify the order accordingly.

Contrary to the contention of defendant, the court properly denied her motion with respect to plaintiff's allegations that he suffered a serious injury to his left foot and ankle under the fracture, permanent consequential limitation of use, and significant limitation of use categories. With respect to the fracture category, defendant failed to establish her prima facie entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In an affirmed report submitted in support of the motion, defendant's expert physician "acknowledged that his review of the emergency room records shows that the hospital clinically diagnosed plaintiff with a [fracture of the left talus], thereby raising issues of fact" (*Lavy v Zaman*, 95 AD3d 585, 585 [1st Dept 2012]).

With respect to the permanent consequential limitation of use and significant limitation of use categories, "[w]hether a limitation of use . . . is significant or consequential relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002], *rearg denied* 98 NY2d 728 [2002] [internal quotation marks omitted]; *see generally Gamblin v Nam*, 200 AD3d 1610, 1612-1613 [4th Dept 2021]; *Habir v Wilczak*, 191 AD3d 1320, 1322 [4th Dept 2021]). Here, although defendant established her prima facie entitlement to

judgment as a matter of law with respect to plaintiff's left foot and ankle injury under those categories (*see generally Pommells v Perez*, 4 NY3d 566, 574 [2005]), plaintiff raised a triable issue of fact in opposition (*see generally Jacobson v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Zuckerman*, 49 NY2d at 562). Plaintiff submitted objective evidence that he sustained a crush injury to his left foot and ankle, as well as the opinion of his podiatrist that the injury was "significant, permanent, and causally related to the accident" (*Carter v Patterson*, 197 AD3d 857, 859 [4th Dept 2021]).

However, we agree with defendant that the court erred in denying her motion with respect to plaintiff's allegations that he sustained serious injury to his left knee, and we therefore further modify the order accordingly. Defendant met her burden on her motion with respect to that issue by submitting the affirmed report of her expert physician, who opined that plaintiff's left knee had a "possible contusion," which had resolved, and that there was no evidence of a fracture, which was the sole injury alleged by plaintiff with respect to the left knee. The expert further noted that the records of plaintiff's orthopedic surgeon did not include a finding of a fracture (*see generally Woodward v Ciamaricone*, 175 AD3d 942, 943-944 [4th Dept 2019]; *Heatter v Dmowski*, 115 AD3d 1325, 1326 [4th Dept 2014]). Contrary to plaintiff's assertion, his medical records do not raise a question of fact whether he sustained a fracture to his left kneecap. The statement in the medical records of a reviewing physician that an X ray revealed "[s]erpiginous curvilinear lucency traversing the anterior central aspect of the patella" that "could conceivably represent a nondisplaced fracture line" but that there was "[n]o additional evidence of fracture" is speculative and does not raise a triable issue of fact (*see generally Kwitek v Seier*, 105 AD3d 1419, 1421 [4th Dept 2013]; *Brackenbury v Franklin*, 93 AD3d 423, 423 [1st Dept 2012]).

Defendant is similarly entitled to summary judgment with respect to plaintiff's allegations that he sustained serious injury to his lumbar spine and left hip, and we therefore further modify the order accordingly. Defendant met her initial burden with respect to those injuries with the opinion of her expert physician, who concluded that plaintiff's lower back and hip pain were the result of underlying degenerative disc disease of the lumbar spine with no evidence of any injury caused by the accident, and who determined that plaintiff had almost full range of motion of his lumbar spine and left hip (*see French v Symborski*, 118 AD3d 1251, 1251-1252 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]; *see generally Palivoda v Sluberski*, 275 AD2d 1036, 1036-1037 [4th Dept 2000]). In response, plaintiff submitted his medical records, which stated, inter alia, that plaintiff had mild lower lumbar degenerative disc and facet disease. Plaintiff also submitted a narrative report prepared by his chiropractor, but that unsworn report "did not constitute proof in admissible form" (*McCarthy v Hameed*, 191 AD3d 1462, 1464 [4th Dept 2021]). Moreover, even if that report was in admissible form, it does not provide any "objective evidence" of plaintiff's alleged limitations in range of motion (*Paternosh v Wood*, 151 AD3d 1733, 1734

[4th Dept 2017]). Nor did plaintiff's chiropractor address the defense expert physician's conclusion–or the medical records that support such a conclusion–that plaintiff's lower back injury is degenerative in nature (*see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00064

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

IN THE MATTER OF 1640 STATE ROUTE 104, LLC,
AND AARON PRESTON,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF ONTARIO PLANNING BOARD, BRIAN SMITH,
AS CODE ENFORCEMENT OFFICER OF THE TOWN OF
ONTARIO, AND TOWN OF ONTARIO ZONING BOARD,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

BOYLAN CODE, LLP, ROCHESTER (ROBERT J. MARKS OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

ANTHONY J. VILLANI, P.C., LYONS (ANTHONY J. VILLANI OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered December 22, 2020 in a hybrid CPLR article 78 proceeding. The judgment, inter alia, denied and dismissed the amended petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating and granting the amended petition-complaint insofar as it sought to annul the determination of respondent-defendant Town of Ontario Planning Board to repeal and delete condition No. 2 of the November 14, 2018 Town of Ontario Planning Board resolution and as modified the judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff Aaron Preston owns petitioner-plaintiff 1640 State Route 104, LLC, which operates a nursery and landscaping business. In 2017, Preston submitted a site plan application with respect to the business to respondent-defendant Town of Ontario Planning Board (Planning Board). In 2018, the Planning Board, by resolution, approved that application, with certain conditions, including that, as relevant here, "[t]he applicant may store wood stumps, limbs and clippings, to be regularly processed for landscape mulch," on a certain part of the parcel in question (condition No. 2). Subsequently, Preston submitted a new site plan application seeking to reconfigure the property in an effort to grow the business. Following a determination that the mulching operation required a special permit pursuant to the Code of the Town of Ontario (Town Code), Preston submitted an application for a special permit to

the Planning Board and, in 2020, the Planning Board denied that application and repealed and deleted condition No. 2 of the 2018 resolution.

In this hybrid CPLR article 78 proceeding and action under, inter alia, 42 USC § 1983, petitioners-plaintiffs (petitioners) seek in effect to annul the 2020 determinations of the Planning Board denying the application for a special permit to conduct mulching operations on the property and repealing and deleting condition No. 2 of the 2018 resolution. After petitioners filed an amended petition-complaint, respondents-defendants (respondents) answered the amended petition-complaint and cross-petitioned for an injunction enjoining petitioners from conducting mulching operations on the property.

In its oral decision, Supreme Court determined that the Planning Board's determination to deny the application for a special permit was "neither arbitrary nor capricious," but also determined that the Planning Board could not "modify the 2018 plan approval" by repealing and deleting condition No. 2 of that resolution. The court thus concluded that the Planning Board's determination to "repeal[] and delete[]" condition No. 2 of the 2018 resolution was "invalid." Petitioners now appeal from a judgment that, inter alia, incorporated therein the court's oral decision, but thereafter "denied and dismissed" petitioners' "[amended] [p]etition and [c]omplaint" in its entirety, and enjoined petitioners from using their property for wood mulching.

Preliminarily, to the extent that respondents contend that the appeal should be dismissed because the notice of appeal is defective, we reject that contention. Although the notice of appeal inaccurately refers to the operative pleading of petitioners that was denied and dismissed by the court as the "[p]etition and [c]omplaint," instead of the *amended* petition-complaint (*see generally Basile v Riley*, 188 AD3d 1607, 1608 [4th Dept 2020]), we conclude that, absent prejudice to respondents, that defect should be disregarded (*see* CPLR 2001; *Caudill v Rochester Inst. of Tech.*, 125 AD3d 1392, 1393 [4th Dept 2015]; *Green v Associated Med. Professionals of NY, PLLC*, 111 AD3d 1430, 1432 [4th Dept 2013]).

As a further preliminary matter, although we agree with the court, for the reasons discussed below, that the Planning Board's determination to deny the special use permit was not arbitrary or capricious and that respondents are entitled to a permanent injunction prohibiting petitioners from conducting wood mulching operations on their property, we nevertheless conclude that there is an inconsistency between the court's oral decision and its judgment insofar as it concerns the Planning Board's determination to repeal and delete condition No. 2 of the 2018 resolution. It is axiomatic that, where a decision and an order or judgment conflict, the decision controls (*see Matter of Benderson Dev. Co., LLC v Zoning Bd. of Appeals of City of Utica*, 68 AD3d 1814, 1815 [4th Dept 2009]; *see also Austin Harvard LLC v City of Canandaigua*, 141 AD3d 1158, 1159 [4th Dept 2016]). Here, the court determined in its oral decision that the

Planning Board's determination to repeal and delete condition No. 2 of the 2018 resolution should be annulled. In its judgment, however, the court "denied and dismissed" the "[amended] [p]etition and [c]omplaint" in its entirety. We therefore modify the judgment accordingly.

We reject petitioners' contention that the determination denying the application for a special permit was arbitrary and capricious. As noted above, condition No. 2 of the Planning Board's 2018 resolution provided that petitioners could "store wood stumps, limbs and clippings" on a certain section of their property, "to be regularly processed for landscape mulch." Believing that the provision entitled them to conduct mulching operations, petitioners began conducting commercial mulching operations on their property. When Preston thereafter filed a new site plan application, the Town of Ontario Planning Review Committee determined that the mulching operation constituted a " '[l]ight [m]anufacturing' use, . . . requiring a [s]pecial [p]ermit" in accordance with the Town Code. Petitioners did not challenge that determination; instead, Preston filed a special permit application seeking "a special permit to operate a mulch service." The Planning Board, in denying that application, found that the application did not comply with the relevant general and specific requirements of the Town Code.

Initially, we conclude that the Planning Board's interpretation of its 2018 resolution, which the Planning Board was charged to enforce, is entitled to " 'great weight and judicial deference' " inasmuch as it is " 'neither irrational, unreasonable nor inconsistent with the governing statute' " (*Matter of Parkway Vil. Equities Corp. v Board of Stds. & Appeals of City of N.Y.*, 279 AD2d 299, 299 [1st Dept 2001], *lv denied* 96 NY2d 711 [2001], quoting *Matter of Trump-Equitable Fifth Ave. Co. v Gliedman*, 62 NY2d 539, 545 [1984]; *see generally Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). As a result, we conclude that the Planning Board's interpretation that the 2018 resolution did not permit petitioners to conduct a mulching operation on their property should be upheld.

Furthermore, we note that, although "[t]he inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood" (*Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston*, 30 NY2d 238, 243 [1972]; *see Matter of George Eastman House, Inc. v Morgan Mgt., LLC*, 130 AD3d 1552, 1554 [4th Dept 2015], *lv denied* 26 NY3d 910 [2015]), "there is no automatic entitlement to a special use permit" (*Matter of Monro Muffler/Brake v Town Bd. of Town of Perinton*, 222 AD2d 1069, 1069 [4th Dept 1995]). Rather, petitioners were required to establish that the contemplated use conformed to the conditions or standards imposed by the Town Code (*see George Eastman House, Inc.*, 130 AD3d at 1554; *Monro Muffler/Brake*, 222 AD2d at 1069). The " '[f]ailure to meet any one of the conditions set forth in the ordinance' provides a rational basis for denying an application for a special use permit" (*Matter of Rex v Zoning Bd. of Appeals of Town of Sennett*, 195 AD3d 1398, 1399 [4th Dept 2021], quoting *Matter of*

Wegmans Enters. v Lansing, 72 NY2d 1000, 1001 [1988]; *see Matter of Frittita v Pax*, 251 AD2d 1077, 1077 [4th Dept 1998]). Here, we conclude that, contrary to petitioners' contention, the Planning Board rationally determined that the special permit application failed to comply with the specific and general conditions imposed by the Town Code.

In light of our determination, we further conclude that the court did not err in granting respondents' cross petition insofar as it sought to enjoin petitioners from conducting mulching operations on their property. "The law is by now well settled that an injunction is an appropriate remedy to prevent continuing violations of zoning laws" (*Town of Solon v Clark*, 97 AD2d 602, 602 [3d Dept 1983]). "Where a town seeks to enforce its building and zoning laws, it is entitled to a permanent injunction upon demonstrating that the party sought to be enjoined is acting in violation of the applicable provisions of local law" (*Town of N. E. v Vitiello*, 159 AD3d 766, 766 [2d Dept 2018]; *see Incorporated Vil. of Sea Cliff v Larrea*, 106 AD3d 876, 877 [2d Dept 2013]). Inasmuch as the 2018 resolution did not permit mulching operations and petitioners were properly denied a special use permit, their mulching operation was in violation of the Town Code (*cf. Village of Fayetteville v Shaheen*, 38 AD3d 1251, 1251 [4th Dept 2007]; *Town of Mentz v Crandall*, 288 AD2d 841, 842 [4th Dept 2001]; *Town Bd. of Town of Ellicott v Lee*, 241 AD2d 958, 958-959 [4th Dept 1997]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00058

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

JAMES PICKARD AND ANN MARIE PICKARD,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
AND CUSTOM BUILDERS OF WNY, LLC,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD CAMPBELL AND ROSEMARY CAMPBELL,
INDIVIDUALLY AND AS HUSBAND AND WIFE,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (FRANK J. JACOBSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LONG AND PAULO-LEE, PLLC, WILLIAMSVILLE (OLIVIA T. PAULO-LEE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered December 18, 2020. The order, insofar as appealed from, denied that part of the motion of defendants seeking to dismiss the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the motion seeking dismissal of the complaint is granted and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action asserting causes of action for breach of contract, quiet title, promissory estoppel, fraudulent representation and misrepresentation, unjust enrichment, fraud, and an injunction. Defendants made a pre-answer motion seeking, among other things, to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), on the grounds that, inter alia, documentary evidence established that the breach of contract and quiet title causes of action are barred by the merger doctrine and that the promissory estoppel and unjust enrichment causes of action are barred by the existence of the contract, and the remainder of the complaint should be dismissed for failure to state a cause of action. Defendants appeal, as limited by their brief, from an order insofar as it denied that part of the motion seeking dismissal of the complaint. We reverse the order insofar as appealed from.

Defendants are the owners of several acres of vacant land, including a subdivided part thereof. Plaintiffs James and Ann Marie

Pickard (Pickards) intended to purchase the subdivided parcel for the purpose of constructing a home, and had contracted with plaintiff Custom Builders of WNY, LLC (Custom Builders), which would construct the home. In October 2019, the Pickards and defendants entered into a contract for the sale of property. The contract listed, inter alia, the address and approximate size, and noted that the Pickards intended to construct a single-family home.

The Pickards and defendants closed on the contract in early December 2019. A deed was recorded, which contained, inter alia, a metes and bounds description of the property (property). Shortly thereafter, the Pickards reached the conclusion that the metes and bounds description of the property did not match the dimensions purportedly agreed to under the contract—i.e., the deed conveyed only a portion of the subdivided lot and did not include an additional parcel of land abutting the northern boundary of the property (additional parcel) that was necessary to construct a home on the site. Defendants refused the Pickards' request that defendants issue a corrective deed conveying the additional parcel, but offered to sell the additional parcel to the Pickards. Plaintiffs allege that defendants knew, at all relevant times, that the Pickards needed the additional parcel to construct a home and that they attempted to extort money from the Pickards above the contract's purchase price for the additional parcel.

It is well settled that, in the context of a motion to dismiss the complaint pursuant to CPLR 3211, 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]). A motion pursuant to CPLR 3211 (a) (7) will be granted if the plaintiffs do not have a cause of action (*see id.* at 88), and a motion 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]).

At the outset, we conclude that Supreme Court erred in denying defendants' motion insofar as it sought to dismiss the complaint with respect to Custom Builders. Accepting the allegations as true, providing plaintiffs with the benefit of every favorable inference, and giving the complaint a liberal construction, as we must (*see* CPLR 3026; *Leon*, 84 NY2d at 87-88), we conclude that the complaint does not state any claim on behalf of Custom Builders. None of the causes of action asserted in the complaint alleges that defendants caused any damage to Custom Builders, which was neither a party to the contract, nor mentioned anywhere in the deed as an owner of the property. To that end, there are no allegations that Custom Builders was in privity with defendants, that defendants owed any duty to Custom Builders, or that they made any representations to Custom Builders that would be actionable under any of the causes of action in the complaint. We reject plaintiffs' argument that any defects in pleading with respect

to Custom Builders did not prejudice defendants (*see generally Catli v Lindenman*, 40 AD2d 714, 715 [2d Dept 1972], *affd* 33 NY2d 1002 [1974]). We conclude that defendants are prejudiced because, based on the complaint, it is impossible to tell what claims *Custom Builders* has asserted against defendants, or how defendants are alleged to have caused harm to Custom Builders (*see generally Joffe v Rubenstein*, 24 AD2d 752, 752 [1st Dept 1965], *appeal dismissed* 21 NY2d 721 [1968]; *Shapolsky v Shapolsky*, 22 AD2d 91, 91 [1st Dept 1964]). Although complaints should be liberally construed, we are not required to read into them causes of action that plaintiffs did not attempt to assert (*see generally Halkedis v Two E. End Ave. Apt. Corp.*, 137 AD2d 452, 453 [1st Dept 1988], *affd* 72 NY2d 933 [1988]).

Addressing the Pickards' causes of action, we agree with defendants that the court erred in denying the motion with respect to the breach of contract and quiet title causes of action. Those causes of action are barred by the merger doctrine. "It is settled law that, where a contract for the sale of land has been executed by a conveyance, the terms of the contract concerning the nature and extent of property conveyed merge into the deed and any inconsistencies between the contract and the deed are to be explained and governed solely by the deed, which is presumed to contain the final agreement of the parties" (*Village of Warsaw v Gott*, 233 AD2d 864, 865 [4th Dept 1996] [internal quotation marks omitted]; *see Sicignano v Dixey*, 124 AD3d 1301, 1303 [4th Dept 2015]; *Gately v Gately*, 117 AD3d 1490, 1490 [4th Dept 2014]). Exceptions to the merger doctrine include "where the parties have expressed their intention that [a] provision shall survive delivery of the deed" (*Sicignano*, 124 AD3d at 1304 [internal quotation marks omitted]), where the deed is ambiguous with respect to the land conveyed (*see De Paulis Holding Corp. v Vitale*, 66 AD3d 816, 817-818 [2d Dept 2009]), and where there exists a valid fraud cause of action (*see Sicignano*, 124 AD3d at 1304).

Here, the merger doctrine applies to bar the breach of contract and quiet title causes of action. The deed contained an unambiguous description of the property being conveyed by defendants, which did not include the additional parcel that the Pickards assert was contemplated by the contract (*cf. De Paulis Holding Corp.*, 66 AD3d at 818). The cases relied on by plaintiffs are inapposite because they involved deeds that contained ambiguous language describing the land to be conveyed (*see id.*; *Leaman v McNamee*, 58 AD3d 918, 920 [3d Dept 2009]; *Eliopoulous v Lake George Land Conservancy, Inc.*, 50 AD3d 1231, 1232-1233 [3d Dept 2008]). There is no ambiguity in the language of the deed in this case, and therefore there is no need to resort to the language in the contract. Regardless, the description in the contract would not aid plaintiffs here inasmuch as it contained only an approximate indication of size and did not indicate that the additional parcel was part of the intended conveyance. Further, the contract contained no expression of intent that the contract's description would survive the closing (*see Sicignano*, 124 AD3d at 1304; *Gately*, 117 AD3d at 1490). Thus, we conclude that "there was no clear intent evidenced by the parties that a particular provision would survive delivery of the deed," and therefore the provisions of

the contract "merged in the deed" (*Marino v Dwyer-Berry Constr. Corp.*, 146 AD2d 751, 751 [2d Dept 1989]; *see Rojas v Paine*, 101 AD3d 843, 846-847 [2d Dept 2012]). Additionally, the fraud exception to the merger doctrine does not apply here because, as discussed below, the Pickards do not have a valid fraud cause of action (*cf. Sicignano*, 124 AD3d at 1304).

We also agree with defendants that the court erred in denying the motion with respect to the promissory estoppel and unjust enrichment causes of action. It is well settled that those causes of action cannot stand when there is a contract between the parties (*see ID Beauty S.A.S. v Coty Inc. Headquarters*, 164 AD3d 1186, 1186 [1st Dept 2018]; *Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1008-1009 [2d Dept 2017]; *Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]). Promissory estoppel and unjust enrichment causes of action are "predicated on a theory of implied contract or quasi-contract [and are] not viable where there is an express agreement that governs the subject matter underlying the action" (*Gym Door Repairs, Inc. v Astoria Gen. Contr. Corp.*, 144 AD3d 1093, 1097 [2d Dept 2016] [internal quotation marks omitted]). It is undisputed here that there was an express agreement between the Pickards and defendants. Indeed, on those causes of action, the Pickards seek recovery on the subject matter of the contract. In short, those causes of action are indistinguishable from the breach of contract cause of action (*see generally IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009]; *Badding v Inglis*, 112 AD3d 1329, 1331 [4th Dept 2013]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]).

Additionally, we agree with defendants that the court erred in denying the motion with respect to the fraudulent representation/misrepresentation and fraud causes of action. It is well settled that "[n]o cause of action to recover damages for fraud will arise when the only fraud alleged relates to a breach of contract" (*Bella Maple Group, Inc. v Attias*, 78 AD3d 1092, 1093 [2d Dept 2010]; *see Bibbo v 31-30, LLC*, 105 AD3d 791, 794 [2d Dept 2013]; *Fantigrossi v Brannon Homes, Inc.*, 77 AD3d 1413, 1414 [4th Dept 2010]). Here, the Pickards' fraud and fraudulent representation/misrepresentation causes of action arise out of the same essential facts as the breach of contract cause of action—i.e., that defendants falsely suggested that the conveyance would include the additional parcel necessary for the construction of the home. We conclude that those causes of action are actually causes of action to recover damages for breach of contract "[i]nasmuch as the alleged falsity was a provision of the contract of sale" (*Marcantonio v Picozzi*, 70 AD3d 655, 656 [2d Dept 2010]). Further, to the extent that the Pickards' allegations of fraud amount to a claim that defendants entered into the contract intending not to convey the additional parcel, we conclude that such allegations "are insufficient to support a cause of action . . . for fraud" because they concern "representations . . . that are not statements of existing fact but are merely expressions of future expectations or that are promissory

in nature" (*Beason v Kleine*, 96 AD3d 1611, 1615 [4th Dept 2012] [internal quotation marks omitted]; *see generally New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155 [4th Dept 2005]).

Finally, "[a]lthough it is permissible to plead a cause of action for a permanent injunction . . . , permanent injunctive relief is, at its core, a remedy that is dependent on the merits of the substantive claims asserted" (*Town of Macedon v Village of Macedon*, 129 AD3d 1639, 1641 [4th Dept 2015] [internal quotation marks omitted]; *see Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 368 [2d Dept 2010], *mod on other grounds* 18 NY3d 777 [2012], *rearg denied* 19 NY3d 937 [2012]). Consequently, "injunctive relief is simply not available when the plaintiff does not have any remaining substantive cause of action" (*Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58 [1st Dept 2012]; *see Town of Macedon*, 129 AD3d at 1641). Thus, in light of our conclusion that the other causes of action should be dismissed, the Pickards' request for an injunction should also be dismissed, despite being styled as a separate cause of action.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00602

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

JAMES R. GUIDA AND KIMBERLEE GUIDA,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RIVERA INVESTIGATIONS, INC., MIGUEL A. RIVERA, JR., 435 CREEKSIDE DRIVE, LLC,
DEFENDANTS,
AND ALEX G. HODGES, JR., DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

STAMM LAW FIRM, WILLIAMSVILLE (BRIAN G. STAMM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 23, 2021. The order, insofar as appealed from, denied that part of the motion of defendant Alex G. Hodges, Jr. seeking summary judgment dismissing the amended complaint and all cross claims against him.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the amended complaint and all cross claims are dismissed against defendant Alex G. Hodges, Jr.

Memorandum: James R. Guida (plaintiff) and Alex G. Hodges, Jr. (defendant) were employed as armored car guards for nonparty Loomis Armored, US, LLC (Loomis). As a condition of their employment with Loomis, and in order to fulfill New York State licensing requirements, plaintiff and defendant were required to attend a firearms training course every year. While sitting at a table in a classroom awaiting the beginning of a firearms training course arranged for employees by Loomis, defendant took his gun out of the holster and attempted to disassemble it on the table. The gun accidentally discharged, and the bullet went through the table and struck plaintiff in the left leg, thereby causing injury. Plaintiff subsequently applied for, was approved for, and received workers' compensation benefits from Loomis's insurer as a result of the accident.

Plaintiffs commenced this action alleging, in relevant part, that defendant was negligent in taking the loaded gun out before the training course and "negligently took out his loaded firearm, which

inadvertently and unexpectedly discharged, thereby shooting . . . plaintiff in his left leg." Defendant moved for leave to amend his answer to assert the affirmative defense that workers' compensation benefits were plaintiffs' exclusive remedy and for summary judgment dismissing the amended complaint and all cross claims against him on the ground that the action was barred by the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6). Supreme Court granted that part of the motion seeking leave to amend the answer but denied that part of the motion seeking summary judgment. Defendant contends on appeal that, contrary to the court's determination, he met his initial burden on the motion of establishing that both he and plaintiff were acting within the scope of their employment at the time of the accident and plaintiff failed to raise a triable issue of fact in opposition, and that the court thus erred in denying that part of his motion seeking summary judgment. We agree.

The Workers' Compensation Law is "designed to insure that an employee injured in course of employment will be made whole and to protect a coemployee who, acting within the scope of . . . employment[,] caused the injury" (*Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 544 [1980]). In that regard, Workers' Compensation Law § 29 (6) provides, in pertinent part, that "[t]he right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ" (*see Macchirole v Giamboi*, 97 NY2d 147, 149 [2001]). "An employee's acceptance of workers' compensation payments does not alone trigger the statute's exclusivity provision[; i]nstead, the Workers' Compensation Law immunizes a fellow employee from suit, and becomes a plaintiff's exclusive remedy, only when both plaintiff and defendant are in the same employ" (*id.* at 149-150). Thus, "[w]orkers' compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as coemployees, at the time of injury" (*id.* at 150). "Parties are coemployees in 'all matters arising from and connected with their employment' " (*id.*, quoting *Heritage v Van Patten*, 59 NY2d 1017, 1019 [1983]). Nonetheless, "the words 'in the same employ' as used in the Workers' Compensation Law are not satisfied simply because both plaintiff and defendant have the same employer; a defendant, to have the protection of the exclusivity provision, must . . . have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort" (*Maines*, 50 NY2d at 543; *see Macchirole*, 97 NY2d at 150).

Here, we conclude that defendant met his initial burden on the motion of establishing that the claims against him were barred by the exclusivity provision of the Workers' Compensation Law by showing that he and plaintiff were coemployees, that both he and plaintiff were acting within the scope of their employment at the time of the injury, and that plaintiff collected workers' compensation benefits for that injury (*see Correa v Anderson*, 122 AD3d 1134, 1135-1136 [3d Dept 2014]).

It is undisputed that plaintiff and defendant were both employed

as armored car guards by Loomis and, in that capacity, each was required to carry a firearm and had a valid pistol permit and an armored car guard license (*see Macchirole*, 97 NY2d at 150-151). At the time of the incident, plaintiff and defendant were attending a state-mandated annual firearms training as a condition of their continued employment with Loomis (*see* General Business Law § 89-ttt [1] [a]). Indeed, consistent with its typical practice, Loomis arranged with defendant Rivera Investigations, Inc. (Rivera Investigations) for plaintiff and defendant to attend the subject firearms training class. Loomis agreed to pay Rivera Investigations for each employee to attend, and, also consistent with Loomis's typical practice, both defendant and plaintiff were to be paid by Loomis for the time they spent attending the training course. Contrary to plaintiff's assertion and as defendant correctly contends, the fact that Loomis ultimately did not pay defendant, plaintiff, or Rivera Investigations because the class was cancelled following the shooting is irrelevant to the course of employment analysis. Moreover, although the class had not yet begun at the time of the accident due to a weather-related delay in the start time, defendant's submissions established, contrary to plaintiff's contention, that he and plaintiff were already in the course of their employment because they were present at the training class as required by Loomis at the scheduled time (*see generally Matter of Rosen v First Manhattan Bank*, 202 AD2d 864, 864 [3d Dept 1994], *affd* 84 NY2d 856 [1994]; *Matter of Lawton v Eastman Kodak Co.*, 206 AD2d 813, 813-814 [3d Dept 1994]).

Plaintiff nonetheless asserts, and the court agreed, that there is a triable issue of fact whether defendant acted outside the scope of his employment by violating a training safety rule that prohibited firearms from being taken out and handled in the classroom. We reject that assertion. The record establishes that firearms were permitted in the classroom and that trainees would generally keep the weapons in a holster or a gun box but were prohibited from taking out and handling firearms in the classroom. Defendant was thus attending a mandatory firearms training course at which he was required to have the pistol for which he was seeking certification, the training was directly related to his job duties that involved carrying a firearm, he was permitted to have the firearm in the classroom, and he simply violated a safety rule by handling the firearm in the classroom, thereby causing it to accidentally discharge. Defendant's violation of the safety provision "was not, in these circumstances, of such type or magnitude as to take . . . defendant out of the scope of his employment" (*Bagley v Gilbert*, 76 AD2d 955, 956 [3d Dept 1980]; *see generally Matter of Merchant v Pinkerton's Inc.*, 50 NY2d 492, 496 [1980]). In other words, defendant's conduct constituted a simple lack of reasonable care, i.e., negligence (*see Moakler v Blanco*, 47 AD2d 614, 614 [1st Dept 1975]), and "[t]he Workers' Compensation Law . . . offers the only remedy for injuries caused by the coemployee's negligence" (*Tikhonova v Ford Motor Co.*, 4 NY3d 621, 624 [2005]).

We further agree with defendant that the cases involving "horseplay" relied on by the court and plaintiff are inapposite inasmuch as defendant did not engage in any intentional conduct, commonly practiced on the job or condoned by the employer, directed

toward plaintiff or any other person that constituted an attempted prank or an activity wholly unrelated to his job duties (*cf. Johnson v Del Valle*, 98 AD3d 1290, 1291 [4th Dept 2012]; *Shumway v Kelley*, 60 AD3d 1457, 1458-1459 [4th Dept 2009]; *Cloutier v Longo*, 288 AD2d 942, 942 [4th Dept 2001]; *Briger v Toys R Us*, 236 AD2d 683, 683-684 [3d Dept 1997]; *Le Doux v City of Rochester*, 162 AD2d 1049, 1049 [4th Dept 1990]; *Christey v Gelyon*, 88 AD2d 769, 770 [4th Dept 1982]). The court's reliance on *Hajdaj v Zubin* (147 AD3d 1362, 1362-1363 [4th Dept 2017]) is also misplaced. There, the defendant's very presence as the driver of the vehicle involved in an accident that injured her coworker may have been outside the scope of her employment because, in the absence of a scheduled client meeting, her travel was not authorized by the employer. Here, by contrast, there is no dispute that defendant was authorized, indeed required as a condition of employment, to be present and attend the training course (*cf. id.*).

Plaintiffs failed to raise a triable issue of fact in opposition (*see Power v Frasier*, 131 AD3d 461, 462 [2d Dept 2015]), and the court therefore erred in denying that part of defendant's motion seeking summary judgment dismissing the amended complaint and all cross claims against him on the ground that the action was barred by the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00377

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

THE PASQUALE CONDOMINIUM BOARD OF MANAGERS
AND THE PASQUALE HOMEOWNERS ASSOCIATION,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

1094 GROUP, LLC, 10 ELLICOTT SQUARE COURT
CORPORATION, DEFENDANTS-RESPONDENTS,
CONCEPT CONSTRUCTION CORP. AND R.E. KRUG CORP.,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT CONCEPT CONSTRUCTION CORP.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (AARON W. KNIGHTS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT R.E. KRUG CORP.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM ELMER BRUECKNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 1, 2021. The order granted the motion of defendants 1094 Group, LLC, and 10 Ellicott Square Court Corporation to dismiss the complaint against them and granted in part and denied in part the motions of defendants Concept Construction Corp. and R.E. Krug Corp. to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of defendants 1094 Group, LLC and 10 Ellicott Square Court Corporation in part and reinstating the second cause of action against those defendants, and as modified the order is affirmed without costs.

Memorandum: These consolidated appeals arise from a construction project at a residential condominium building in Buffalo. In 2014, defendants 1094 Group, LLC, and 10 Ellicott Square Court Corporation (collectively, Ellicott defendants) commenced an action against defendants Concept Construction Corp. (Concept) and R.E. Krug Corp.

(Krug), which was settled by a 2015 settlement agreement that involved all of the parties to this litigation. Plaintiffs then commenced this action against the Ellicott defendants, Concept and Krug, asserting causes of action for breach of contract arising from the settlement agreement, negligence, and unjust enrichment. All defendants moved to dismiss the complaint against them. In appeal No. 1, Concept and Krug appeal, and plaintiffs cross-appeal, from an order granting the Ellicott defendants' motion in its entirety, and granting Concept's and Krug's motions with respect to the negligence and unjust enrichment causes of action but denying their motions with respect to the breach of contract cause of action. The Ellicott defendants also moved to dismiss the cross claims filed against them by Concept and Krug. In appeal No. 2, Concept and Krug appeal from a further order granting that motion and dismissing their cross claims.

In appeal No. 1, we conclude on plaintiffs' cross appeal that Supreme Court erred in dismissing the negligence cause of action against the Ellicott defendants, and we therefore modify the order in that appeal accordingly. In determining a motion pursuant to CPLR 3211, we must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The negligence cause of action alleges that the Ellicott defendants breached a duty separate from the settlement agreement, and inasmuch as a negligence cause of action may lie based on such allegations (*see generally Connecticut N.Y. Light. Co. v Manos Bus. Mgt. Co., Inc.*, 171 AD3d 698, 699-700 [2d Dept 2019]), and the cause of action adequately states such a claim, that cause of action survives the motion to dismiss (*cf. Barrett v Grenda*, 154 AD3d 1275, 1278 [4th Dept 2017]; *see generally Vassenelli v City of Syracuse*, 138 AD3d 1471, 1473-1474 [4th Dept 2016]).

We affirm the remainder of the order in appeal No. 1 for reasons stated in the court's email decision dated February 16, 2021, and we affirm the order in appeal No. 2 for reasons stated in the court's email decision dated August 2, 2021.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

298

CA 21-01184

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

THE PASQUALE CONDOMINIUM BOARD OF MANAGERS
AND THE PASQUALE HOMEOWNERS ASSOCIATION,
PLAINTIFFS,

V MEMORANDUM AND ORDER

1094 GROUP, LLC, 10 ELLICOTT SQUARE COURT
CORPORATION, DEFENDANTS-RESPONDENTS,
R.E. KRUG CORP. AND CONCEPT CONSTRUCTION CORP.,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR DEFENDANT-APPELLANT CONCEPT CONSTRUCTION CORP.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (AARON W. KNIGHTS OF COUNSEL), FOR DEFENDANT-APPELLANT R.E. KRUG CORP.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM ELMER BRUECKNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

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

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 5, 2021. The order granted the motion of defendants 1094 Group, LLC, and 10 Ellicott Square Court Corporation to dismiss the cross claims filed against them by defendants Concept Construction Corp. and R.E. Krug Corp.

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

Same memorandum as in *The Pasquale Condominium Bd. of Mgrs. v 1094 Group, LLC* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

312

CA 21-01022

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

IN THE MATTER OF THE ESTATE OF
WILLIAM Z. REICH, DECEASED.

ERIC REICH AND JUSTIN REICH,
PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

CATHARINE M. VENZON, EXECUTOR OF THE
ESTATE OF WILLIAM Z. REICH, DECEASED,
RESPONDENT-APPELLANT.

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

LIPPES MATHIAS LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered June 16, 2021. The order denied the motions of respondent to dismiss the claims of petitioners and dismissed the statute of limitations affirmative defenses.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the first affirmative defense in each answer is reinstated, the motions of respondent are granted and the claims of petitioners are dismissed.

Memorandum: William Z. Reich (decedent) and his sons, petitioners, formed a corporate entity together. In 2011, decedent removed funds from the corporate entity, and he later acknowledged that some of those funds belonged to petitioners. Decedent died in 2018 without returning the funds owed to petitioners. Decedent's Last Will and Testament was admitted to probate and provided that his entire estate was to be distributed to his wife, Catharine M. Venzon (respondent), who was named as executor of the estate. In 2019, petitioners each filed a claim against the estate seeking to recover his share of the funds that decedent had removed from the corporate entity. According to petitioners, they stated claims for unjust enrichment and money had and received. Respondent filed answers raising various affirmative defenses, including that the claims were barred by the statute of limitations, and later moved to dismiss the claims pursuant to CPLR 3211 (a) (5) on that basis. Surrogate's Court denied respondent's motions and dismissed the statute of limitations defenses. The Surrogate determined that, while petitioners' claims

were subject to a six-year statute of limitations, decedent had acknowledged in sworn deposition testimony in 2014 that he owed petitioners the funds and that this acknowledgment restarted the running of the statute of limitations. The Surrogate concluded that because the claims were filed within the statute of limitations, measured from decedent's acknowledgment in 2014, the claims were timely. Respondent appeals, and we reverse.

Initially, respondent contends that the allegations in petitioners' claims do not state a claim for unjust enrichment. We reject that contention (*see generally Van Scoter v Porter*, 193 AD3d 1401, 1402 [4th Dept 2021]). We agree with respondent, however, that the Surrogate erred in denying the motions. Respondent had the initial burden of establishing that petitioners' claims were barred by the statute of limitations (*see* SCPA 102; CPLR 3211 [a] [5]; *see also U.S. Bank N.A. v Brown*, 186 AD3d 1038, 1039 [4th Dept 2020]). "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed" (CPLR 203 [a]). Thus, respondent was required to establish, inter alia, when petitioners' claims accrued (*see generally U.S. Bank N.A.*, 186 AD3d at 1039).

Regarding the claims for unjust enrichment, we conclude that, even assuming, arguendo, that those claims were each subject to a six-year statute of limitations (*see* CPLR 213 [1]; *Matter of Trombley*, 137 AD3d 1641, 1642-1643 [4th Dept 2016]; *Boardman v Kennedy*, 105 AD3d 1375, 1376 [4th Dept 2013]), respondent established that the claims were not commenced within six years from the accrual date. The statute of limitations for an unjust enrichment claim "starts to run upon the occurrence of the wrongful act giving rise to a duty of restitution" (*Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 192 AD2d 501, 503 [2d Dept 1993]; *see Boardman*, 105 AD3d at 1376-1377). Here, that claim accrued when decedent removed the funds in 2011. Similarly, the claim for money had and received has a six-year statute of limitations, which also accrued on the date decedent withdrew the money in 2011 (*see County of Niagara v Town of Royalton*, 48 AD3d 1072, 1072 [4th Dept 2008]). Thus, the unjust enrichment and money had and received claims were time-barred by the time petitioners filed their claims in 2019.

Inasmuch as respondent met her initial burden, the burden shifted to petitioners to raise a question of fact whether the statute of limitations was tolled or otherwise inapplicable, or whether they actually commenced this proceeding within the applicable limitations period (*see U.S. Bank N.A.*, 186 AD3d at 1039; *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016], *lv denied* 28 NY3d 913 [2017]). Petitioners did not dispute that they failed to commence the claims within six years from the relevant accrual date, but rather asserted that the running of the statute of limitations started anew when decedent acknowledged the debt in 2014. The Surrogate accepted that argument and applied the principle that "[a]n acknowledgment will toll or restart the running of the applicable statute of limitations if it is in writing, recognizes the existence of the obligation and contains

nothing inconsistent with an intent to honor the obligation" (*Sullivan v Troser Mgt., Inc.*, 15 AD3d 1011, 1011-1012 [2005]; *see* General Obligations Law § 17-101).

The tolling provision that the Surrogate relied on is General Obligations Law § 17-101. That provision states, in pertinent part, that "[a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules." Here, petitioners did not allege that they had a contract with decedent; rather, they alleged claims sounding in quasi-contract, which is "not [a] contract[] at all" (*Bradkin v Leverton*, 26 NY2d 192, 196 [1970]; *see generally Sweetman v Suhr*, 159 AD3d 1614, 1615 [4th Dept 2018], *lv denied* 31 NY3d 913 [2018]; *Pelusio Canandaigua, LLC v Genesee Regional Bank*, 145 AD3d 1557, 1558 [4th Dept 2016]). Thus, General Obligations Law § 17-101, which applies only where there is "competent evidence of a new or existing contract," does not apply here. We therefore conclude that petitioners failed to raise a question of fact in opposition to respondent's motions.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

314

CA 21-00984

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

PHILLIP HANN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

S&J MORRELL, INC., DEFENDANT-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O'HARA OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELCH, DONLON & CZARPLES, PLLC, CORNING (MICHAEL A. DONLON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Kevin M. Nasca, J.), entered June 25, 2021. The order, insofar as appealed from, granted that part of plaintiff's cross motion seeking partial summary judgment against defendant.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the cross motion is denied in its entirety.

Memorandum: Plaintiff, who was employed as a framer by a subcontractor on a residential construction project of which defendant was the owner and general contractor, commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained when he allegedly fell while erecting an elevated exterior deck. Defendant contends on appeal that Supreme Court erred in granting plaintiff's cross motion insofar as it sought partial summary judgment on the issue of liability for violation of Labor Law § 240 (1). We agree.

"On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party' " (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' . . . and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action' " (*id.*). "A motion for summary judgment must be denied 'if there is any significant doubt as to the existence of a triable issue, or if there is even arguably such an issue' " (*Vanderwater v Sears*, 277 AD2d 1056, 1056 [4th Dept 2000]; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg*

denied 3 NY2d 941 [1957]).

"[I]n order to establish entitlement to judgment as a matter of law on the issue of liability under Labor Law § 240 (1), the plaintiff 'must establish that the statute was violated and that such violation was a proximate cause of his [or her] injury' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016]; *see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 [2003]). In a section 240 (1) case, "[s]ummary judgment is appropriate if plaintiff's account of the accident is uncontroverted or if defendant is unable to show, other than by speculation without factual support, that a bona fide issue [of fact] exists" (*Abramo v Pepsi-Cola Buffalo Bottling Co.*, 224 AD2d 980, 981 [4th Dept 1996]; *see Aman v Federal Express Corp.*, 247 AD2d 879, 880 [4th Dept 1998]).

Here, plaintiff met his initial burden on the cross motion with respect to the Labor Law § 240 (1) claim by establishing that defendant failed to provide appropriate safety devices such as a ladder or other fall protection, that he was working at an elevated work site, and that the statutory violation was a proximate cause of his injuries (*see Barker v Union Corrugating Co.*, 187 AD3d 1544, 1545-1546 [4th Dept 2020]). We reject defendant's contention that plaintiff's own submissions raise a material issue of fact regarding how the alleged accident occurred due to the discrepancy between plaintiff's account of a near complete collapse of the deck and the account of his coemployee foreman, i.e., his brother, who recalled a partial collapse or dislodging of the deck. Under either account of the degree of collapse, no safety devices were "so constructed, placed and operated as to give proper protection" to plaintiff (§ 240 [1]) and, thus, "despite the minor variations in the witnesses' accounts, 'there is no view of [plaintiff's] evidence here which could lead to the conclusion that the violation of Labor Law § 240 (1) was not [a] proximate cause of the accident' " (*Villeneuve v State of New York*, 274 AD2d 958, 958 [4th Dept 2000]; *see Anderson v International House*, 222 AD2d 237, 237 [1st Dept 1995]; *see also Sarata v Metropolitan Transp. Auth.*, 134 AD3d 1089, 1092 [2d Dept 2015]).

We nonetheless agree with defendant that, viewing the evidence in the appropriate light (*see Vega*, 18 NY3d at 503), its submissions, particularly when coupled with portions of the deposition testimony of plaintiff and the foreman, raise a triable issue of fact whether the alleged accident—a fall resulting from the collapse or dislodging of the deck—occurred at all. Defendant's project supervisors both testified at their depositions that, when they inspected and photographed the deck on the morning after the purported accident, they did not observe any evidence that the deck structure had failed, i.e., there was no indication that a joist had fallen, that the ledger board had dropped three or four feet, or that the deck had ever fallen down. The supervisors further testified that no workers from plaintiff's employer were on the site that morning. The supervisors' testimony and post-accident photographs contradicted the foreman's recollection that he and his remaining crew returned to the work site

on the morning after the alleged accident to repair the collapsed deck—a job that the foreman estimated would have taken a full day to complete. The foreman's later representation in his deposition that it was possible that the purported repair occurred on the day of the accident while plaintiff was at the hospital conflicted with his earlier recollection, and the foreman's assertion that a repair occurred was called into doubt by his admission that there was no visible evidence in the post-accident photographs that the ledger board had been reattached as he had described. In sum, the observations of defendant's supervisors on the morning following the accident that no one from plaintiff's employer was present and that there was no evidence that a collapse or dislodging of the deck had occurred, coupled with the foreman's contradictory statements about when the deck was purportedly repaired, his estimation that any such repair would have taken a full day, and his confirmation that the post-accident photographs were not indicative of a repair having occurred, raise an issue of fact whether the deck collapsed or dislodged in the first place, and thus whether the accident occurred at all in the manner alleged by plaintiff and the foreman (*see Manning v Johnson Bldg. Co.*, 303 AD2d 929, 929-930 [4th Dept 2003], *appeal dismissed* 100 NY2d 556 [2003]; *see also Perez v Folio House, Inc.*, 123 AD3d 519, 519-520 [1st Dept 2014]; *Duran v Kijak Family Partners, L.P.*, 63 AD3d 992, 994 [2d Dept 2009]). Indeed, defendant's submissions raise an issue of credibility regarding the testimony of plaintiff and the foreman about the accident, and a factfinder could reject that testimony entirely (*see Martin v Hoar*, 158 AD2d 998, 998 [4th Dept 1990]; *see also Militello v Landsman Dev. Corp.*, 133 AD3d 1378, 1379 [4th Dept 2015]).

Contrary to plaintiff's contention and the court's determination, the assertion of defendant that an accident resulting from a collapse or dislodging of the deck as described by plaintiff and the foreman may not have occurred at all is not based on "speculation without factual support" (*Abramo*, 224 AD2d at 981). Rather, defendant's assertion is based on the supervisors' firsthand observations of an intact deck on the morning after the alleged accident, coupled with the testimony of the foreman, which calls into question whether a repair of the deck could have been made before the supervisors' inspection, from which a factfinder could permissibly draw the inference that the alleged collapse did not occur at all (*cf. Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]; *Bombard v Christian Missionary Alliance of Syracuse*, 292 AD2d 830, 830-831 [4th Dept 2002]; *Morris v Mark IV Constr. Co.*, 203 AD2d 922, 923 [4th Dept 1994]).

Based on the foregoing, we conclude that defendant's submissions "raise bona fide questions of fact with respect to how the [purported] accident occurred and whether [plaintiff's] injuries were proximately caused by defendant['s] alleged violation of Labor Law § 240 (1)" (*Laisney v Zeller*, 234 AD2d 906, 906 [4th Dept 1996]). In light of our determination, we need not address defendant's remaining

contention.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

315

CA 21-00291

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

ABLA MOHAMED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HANI ABUHAMRA, ET AL., DEFENDANTS,
AND SHAKER ABUHAMRA, DEFENDANT-APPELLANT.

LIPPES MATHIAS LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered February 3, 2021. The order, among other things, denied the motion of defendant Shaker Abuhamra to dismiss the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking the language "306-b and" from the first ordering paragraph and vacating the third ordering paragraph and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In January 2018, plaintiff commenced this RPAPL article 15 action. In November 2020, Shaker Abuhamra (defendant) moved to dismiss the complaint against him, contending that he was never properly served with the complaint pursuant to CPLR 306-b (*see* CPLR 3211 [a] [8]). In opposing the motion, plaintiff's attorney asserted that she had delivered copies of the summons and complaint to defendant's then-attorney, who accepted service on defendant's behalf, and that defendant had been personally present at the time.

Responding to a contention that was presumably raised in documents not submitted to this Court, plaintiff's attorney further opposed the motion insofar as it purportedly sought dismissal of the complaint based on plaintiff's failure to move for a default judgment within one year after a default, as required by CPLR 3215 (c). According to counsel, she had reached an agreement with defendant's current attorney pursuant to which he would not challenge service and she would not move for a default judgment. Plaintiff also cross-moved for an extension of the time for service under CPLR 306-b. Supreme Court denied the motion and the cross motion. Defendant appeals.

As a preliminary matter, we note that defendant failed to include in the record on appeal the operative complaint and its attached exhibits. Contrary to plaintiff's contention, we need not dismiss the appeal, however, inasmuch as meaningful appellate review of *some* of the legal issues is not "impossible" (*Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]; *cf. BL Doe 2 v Fleming*, 199 AD3d 1419, 1419 [4th Dept 2021]).

Addressing the issues concerning default judgment first, we conclude that the court properly determined that dismissal pursuant to CPLR 3215 (c) was not warranted. "If [a] plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed" (*id.*). " 'The one exception to the otherwise mandatory language of CPLR 3215 (c) is that the failure to timely seek a default on an unanswered complaint . . . may be excused if sufficient cause is shown why the complaint should not be dismissed' " (*U.S. Bank, N.A. v Reamer*, 187 AD3d 1650, 1650 [4th Dept 2020]). Sufficient cause exists where " '(1) the failure to seek a default judgment within one year after the default is excusable[,] and (2) the cause of action is meritorious' " (*Fuentes v Hoffman*, 118 AD3d 1324, 1325 [4th Dept 2014]).

Here, contrary to defendant's contention, plaintiff's failure to seek a default judgment within one year of defendant's default is excusable under the facts of this case. With respect to "whether plaintiff established that [she] had a potentially meritorious claim" (*U.S. Bank, N.A.*, 187 AD3d at 1651), we note that defendant failed to submit a sufficient record for us to review that issue, and defendant, " 'as the appellant, . . . must suffer the consequences' of submitting an incomplete record" (*Matter of Rodriguez v Ward*, 43 AD3d 640, 641 [4th Dept 2007]; *see Curto v Zittel's Dairy Farm*, 106 AD3d 1482, 1484 [4th Dept 2013]).

With respect to the issue of service, we conclude that the court erred in denying defendant's motion without first holding a hearing. Although defendant does not dispute that plaintiff's attorney served the summons and complaint on defendant's then-attorney, he contends that he had not designated the attorney to accept service (*see* CPLR 308 [3]; *see generally Broman v Stern*, 172 AD2d 475, 476 [2d Dept 1991]; *Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135, 148 [2d Dept 1986]) and denies that he was personally present at the time of service (*see* CPLR 308 [1]; *Manocchio v Narain*, 144 AD2d 1022, 1022 [4th Dept 1988]; *see generally Espy v Giorlando*, 85 AD2d 652, 652-653 [2d Dept 1981], *affd* 56 NY2d 640 [1982]). In addition, there is an issue of fact whether defendant's attorney reached an agreement with plaintiff's attorney pursuant to which he would not raise any challenges to service of the complaint.

We conclude that "defendant's submissions raised a genuine question on the issue whether service was properly effected" (*Garvey v Global Asset Mgt. Solutions, Inc.*, 192 AD3d 1597, 1598 [4th Dept 2021]

[internal quotation marks omitted]; *see generally Cach, LLC v Ryan*, 158 AD3d 1193, 1194-1195 [4th Dept 2018]) and the issue whether defendant waived his challenge to a defect in service (*see Midamerica Fed. Sav. Bank v Gaon*, 242 AD2d 610, 611 [2d Dept 1997]; *see generally Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718-721 [1997]). We further conclude that, because resolution of those issues "turns upon a question of credibility, a hearing should be held" (*Rosemark Contrs., Inc. v Ness*, 149 AD3d 1115, 1116 [2d Dept 2017]; *see generally Hallston Manor Farm, LLC v Andrew*, 60 AD3d 1330, 1331 [4th Dept 2009]).

We therefore modify the order accordingly, and we remit the matter to Supreme Court for a hearing on the issue of service, a new determination of defendant's motion to dismiss under CPLR 306-b, and, if necessary, a determination on plaintiff's cross motion seeking an extension of time for service.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

316

CA 21-00706

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

IN THE MATTER OF THE APPLICATION OF
ALL AMERICA INSURANCE COMPANY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TENNILLE WILSON, RESPONDENT-RESPONDENT.

SELTZER & ASSOCIATES, PLLC, NEW YORK CITY (JOSHUA L. SELTZER OF COUNSEL), FOR PETITIONER-APPELLANT.

STEVE FOLEY LAW FIRM, BUFFALO (KEVIN ARTHUR LANE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered April 9, 2021 in a proceeding pursuant to CPLR article 75. The order denied the petition seeking a permanent stay of arbitration.

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

Memorandum: Respondent sustained injuries when the motor vehicle she was driving was struck by another motor vehicle. The vehicle that respondent was driving had been rented by another individual from a car dealership. Following the accident, respondent recovered the full policy limit from the insurer of the vehicle that had collided with the one she was operating. Thereafter, she submitted a claim for supplemental uninsured/underinsured motorist (SUM) benefits pursuant to a commercial garage policy issued to the car dealership by petitioner. Petitioner disclaimed coverage on the ground that respondent did not qualify as an insured under the policy's SUM endorsement. Respondent demanded arbitration with respect to her claim for SUM coverage. Petitioner commenced this proceeding under CPLR article 75 seeking a permanent stay of arbitration or, alternatively, a temporary stay of arbitration pending a framed-issue hearing. Supreme Court denied the petition. Petitioner appeals, and we affirm.

Contrary to petitioner's contention, the court properly denied the petition inasmuch as it was not supported by evidence in admissible form (*see Matter of Global Liberty Ins. Co. v Abdelhaq*, 36 AD3d 909, 910 [2d Dept 2007]; *Matter of Atlantic Mut. Ins. Co. v Cooper*, 247 AD2d 209, 209 [1st Dept 1998]; *see generally Matter of*

Progressive Advanced Ins. Co. v Jordan, 171 AD3d 1553, 1553-1554 [4th Dept 2019]). Petitioner attached to the petition what it purported to be the commercial garage policy issued to the car dealership that contained the SUM endorsement at issue in this proceeding. However, the policy that petitioner attached to the petition was not certified or otherwise authenticated, and was therefore not in admissible form (*cf. Calhoun v Midrox Ins. Co.*, 165 AD3d 1450, 1451 [3d Dept 2018]; *see generally County of Erie v Gateway-Longview, Inc.*, 193 AD3d 1336, 1337 [4th Dept 2021]). The affirmation of petitioner's attorney does not render the policy admissible, inasmuch as the relevant portion of the affirmation is not based on the attorney's personal knowledge (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 210 [2d Dept 2019]; *see generally Deronde Prods. v Steve Gen. Contr.*, 302 AD2d 989, 990 [4th Dept 2003]). Petitioner attempted to cure that evidentiary defect in its reply by attaching a certified copy of a policy issued by petitioner to the car dealership, but that policy differs from the policy that had been attached to the petition (*cf. County of Erie*, 193 AD3d at 1337; *Calhoun*, 165 AD3d at 1451 n). Under the circumstances of this case, we do not consider the evidence submitted by petitioner for the first time in reply (*cf. Matter of Dusch v Erie County Med. Ctr.*, 184 AD3d 1168, 1169-1170 [4th Dept 2020]; *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-382 [1st Dept 2006]).

In light of our conclusion, petitioner's remaining contentions are academic.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01296

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

JENNIFER S. STROH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBERLY M. KROMER AND MATTHEW R. KROMER,
DEFENDANTS-APPELLANTS.

BURGIO, CURVIN & BANKER, BUFFALO (STEPHANIE MESSINA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAW OFFICE OF DAVID W. POLAK, WEST SENECA (DAVID W. POLAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered June 2, 2021. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained when her vehicle collided with a vehicle owned by defendant Kimberly M. Kromer and operated by defendant Matthew R. Kromer. In the complaint, as amplified by the bill of particulars, plaintiff alleged that, as a result of the accident, she suffered a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury that was causally related to the accident. Supreme Court granted the motion with respect to the 90/180-day category, and defendants now appeal from those parts of the order that denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories. We agree with defendants that the court erred in denying their motion with respect to those categories of serious injury.

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant[s] bear[] the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury

caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]). Defendants met their initial burden on the motion "by submitting medical records and reports constituting 'persuasive evidence that plaintiff's alleged pain and injuries were related to . . . preexisting condition[s]' " rather than the instant accident (*Spanos v Fanto*, 63 AD3d 1665, 1666 [4th Dept 2009]; *see Green v Repine*, 186 AD3d 1059, 1060-1061 [4th Dept 2020]; *French v Symborski*, 118 AD3d 1251, 1251 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]). In particular, defendants submitted the affirmation and report of a physician who reviewed plaintiff's pre- and post-accident medical records and conducted a medical examination of plaintiff. The physician opined that plaintiff did not sustain a serious injury in the accident at issue, that any continuing pain that plaintiff experienced is related to her preexisting back condition, and that any injuries are degenerative in nature and are not attributable to the accident.

The burden thus shifted to plaintiff "to come forward with evidence addressing defendant[s'] claimed lack of causation" (*Pommells v Perez*, 4 NY3d 566, 580 [2005]). Plaintiff, however, failed to raise a question of fact inasmuch as her submissions in opposition to the motion "failed to address the manner in which plaintiff's physical injuries were causally related to the accident in light of [her] past medical history" (*Smith v Besanceney*, 61 AD3d 1336, 1337-1338 [4th Dept 2009]; *see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]). Plaintiff's expert chiropractor did not address plaintiff's pre-accident medical records, and thus failed to account for plaintiff's decreased level of back pain post-accident compared to her pre-accident level of pain, and failed to assess plaintiff's pre- and post-accident qualitative limitations (*see Overhoff v Perfetto*, 92 AD3d 1255, 1256 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

319

CA 21-00979

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

ARISTA DEVELOPMENT, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLEARMIND HOLDINGS, LLC, DOING BUSINESS AS
DIRT CHEAP TV, DEFENDANT-RESPONDENT.

SHELBY, BAKSHI & WHITE, WILLIAMSVILLE (JUSTIN S. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 25, 2021. The order, insofar as appealed from, denied that part of the motion of plaintiff seeking summary judgment on the first cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking summary judgment on the first cause of action is granted.

Memorandum: Plaintiff, a commercial landlord, commenced this action against defendant, a tenant that operated a retail store for low priced electronics on premises rented pursuant to a lease, asserting causes of action for breach of contract and for attorneys' fees. As limited by its brief, plaintiff appeals from an order insofar as it denied that part of its motion seeking summary judgment on the first cause of action, for breach of contract.

Supreme Court determined that there are triable issues of fact whether defendant's nonpayment of rent during the COVID-19 pandemic was permissible pursuant to the casualty clause of the lease. We agree with plaintiff that the court erred in that regard. It is well settled that the elements of a breach of contract cause of action are " 'the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages' " (*Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, plaintiff established as a matter of law, and defendant does not dispute, that the lease existed, that plaintiff performed under the lease, that defendant did not pay rent for the months of April 2020 through September 2020, except for a good faith payment of $2,000

toward the April 2020 rent, and that plaintiff thus did not receive $22,000 for those months pursuant to the rental rate under the lease. The only question on appeal regarding an element of this cause of action is whether defendant's failure to pay rent constituted a breach of the lease or whether the casualty clause should be interpreted to permit defendant's nonpayment during the relevant period.

"Interpreting a contract 'is the process of determining from the words and other objective manifestations of the parties what must be done or forborne by the respective parties in order to conform to the terms of their agreements' " (*Tomhannock, LLC v Roustabout Resources, LLC*, 33 NY3d 1080, 1082 [2019], quoting 11 Richard A. Lord, Williston on Contracts § 30:1 [4th ed May 2019 update]). " 'The best evidence of what parties to a written agreement intend is what they say in their writing' " (*id.*, quoting *Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). "Under long-standing rules of contract interpretation, '[w]here the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole' " (*id.*, quoting *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). Stated differently, a contract "must be read as a whole in order to determine its purpose and intent, and . . . single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract of which they are a part" (*Eighth Ave. Coach Corp. v City of New York*, 286 NY 84, 88 [1941]). "Words considered in isolation may have many and diverse meanings. In a written document the word obtains its meaning from the sentence, the sentence from the paragraph, and the latter from the whole document, all based upon the situation and circumstances existing at its creation" (*id.* at 89). " 'The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning' " (*Ellington*, 24 NY3d at 244).

Here, interpreting the lease as a whole without considering any isolated phrases out of context, and giving the words their plain meaning (*see Eighth Ave. Coach Corp.*, 286 NY at 88-89), we conclude that plaintiff established as a matter of law that defendant was not entitled to a rent abatement under the section of the lease providing that defendant was "not required to pay [r]ent when the [r]ental [s]pace [was] unusable" as a result of "damage" caused by a "fire or other casualty." "That [section] of the lease refers to singular incidents causing physical damage to the premises and does not contemplate loss of use due to a pandemic or resulting government lockdown" (*Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021]). Indeed, the text and structure of that section—which refers in several instances to a "fire or other casualty" causing "damage" occurring "in" or "to" the "[r]ental [s]pace," defined as the 4,000-square-foot retail premises at the subject address, and which describes in detail the "repair" obligations of the parties in the event such damage occurs—"leave no doubt that 'casualty' refers to singular incidents, like fire, which have a physical impact in or to the premises[,] and does not encompass a pandemic, occurring over a period of time, outside the property, or

the government lockdowns resulting from it" (*Gap Inc. v Ponte Gadea NY LLC*, 524 F Supp 3d 224, 232 [SD NY 2021]; *see Gap, Inc.*, 195 AD3d at 577; *A/R Retail LLC v Hugo Boss Retail, Inc.*, 72 Misc 3d 627, 638-639 [Sup Ct, NY County 2021]). To the extent that *188 Ave. A Take Out Food Corp. v Lucky Jab Realty Corp.* (2020 NY Slip Op 34311[U], *5-6 [Sup Ct, NY County 2020]) holds otherwise, that case is unpersuasive inasmuch as it resorted to extra-contractual sources to define the term "casualty" without giving that term its plain meaning within the context of the other language used in that part of the lease (*cf. Eighth Ave. Coach Corp.*, 286 NY at 88-89; *see generally Gap, Inc.*, 195 AD3d at 577).

Additionally, in light of our interpretation of the casualty clause, we conclude that "[t]he force majeure doctrine is no more helpful to defendant" (*General Elec. Co. v Metals Resources Group*, 293 AD2d 417, 418 [1st Dept 2002]). Here, as plaintiff correctly contends and contrary to defendant's contention, the lease "contain[s] no force majeure provision, much less one specifying the occurrence that defendant would now have treated as a force majeure, and, accordingly, there is no basis for a force majeure defense" (*id.*; *see Fives 160th, LLC v Qing Zhao*, 204 AD3d 439, 440 [1st Dept 2022]; *see generally Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902-903 [1987]; Robert L. Haig, Commercial Litigation in New York State Courts § 148:31 [5th ed 2 West's NY Prac Series Oct. 2021 update]).

Defendant asserts that, even if its nonpayment of rent was not permitted under the casualty clause of the lease, the court did not err in denying that part of plaintiff's motion seeking summary judgment on the breach of contract cause of action because there are questions of fact with respect to the defenses of frustration of purpose and unclean hands that defendant raised below. Initially, "[a]lthough the court did not address th[ose] issue[s] in its decision, defendant properly raises [them] on appeal as . . . alternative ground[s] for affirmance" (*Melgar v Melgar*, 132 AD3d 1293, 1294 [4th Dept 2015]; *see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]; *Summers v City of Rochester*, 60 AD3d 1271, 1273 [4th Dept 2009]). We nonetheless reject defendant's alternative grounds for affirmance on the merits.

"In order to invoke the doctrine of frustration of purpose, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Warner v Kaplan*, 71 AD3d 1, 6 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010] [internal quotation marks omitted]; *see Shmaltz Brewing Co., LLC v Dog Cart Mgt. LLC*, 202 AD3d 1349, 1352 [3d Dept 2022]; *Arons v Charpentier*, 36 AD3d 636, 637 [2d Dept 2007]; *see generally 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 282 [1968]). Here, contrary to defendant's contention, we conclude that the temporary pandemic-related governmental restrictions on defendant's business operations were insufficient to invoke the defense because "[t]he doctrine of frustration of purpose does not apply as a matter of law where, as here, the tenant was not 'completely deprived of the benefit of its bargain' " (*Gap, Inc.*, 195

AD3d at 577; *see e.g. Gap, Inc. v 44-45 Broadway Leasing Co. LLC*, — AD3d —, —, 2022 NY Slip Op 03980, *1 [1st Dept 2022]; *Fives 160th, LLC*, 204 AD3d at 439-440; *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480, 480 [1st Dept 2022]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 561-562 [1st Dept 2021], *appeal dismissed* 37 NY3d 1040 [2021]; *see generally Rockland Dev. Assoc. v Richlou Auto Body, Inc.*, 173 AD2d 690, 691 [2d Dept 1991]).

The doctrine of unclean hands applies when the complaining party shows that the offending party "is guilty of immoral, unconscionable conduct and even then only 'when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct' " (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15-16 [1966], quoting *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]; *see Kopsidas v Krokos*, 294 AD2d 406, 407 [2d Dept 2002]). Here, contrary to defendant's contention, there is no triable issue of fact on its unclean hands defense because, even if defendant had made genuine attempts to procure another tenant, plaintiff was under no contractual obligation to seek or approve a sublease with a third party for the relatively short period remaining on the commercial lease, and there is nothing immoral or unconscionable about plaintiff's decision to seek the unpaid rent that defendant was contractually obligated to pay (*see Bank of Smithtown v 264 W. 124 LLC*, 105 AD3d 468, 469 [1st Dept 2013]).

Based on the foregoing, we reverse the order insofar as appealed from and grant that part of plaintiff's motion seeking summary judgment on the first cause of action, for breach of contract.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

320

CA 21-00576

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

RHONDA L. ANASTASI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GARY R. ANASTASI, DEFENDANT-APPELLANT.

JAMES P. RENDA, BUFFALO, FOR DEFENDANT-APPELLANT.

NICHOLAS J. NARCHUS, LOCKPORT, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered March 29, 2021 in a divorce action. The judgment, inter alia, directed defendant to pay maintenance and child support.

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

Memorandum: In this matrimonial action, defendant appeals from those parts of a judgment of divorce that established his maintenance and child support obligations. He contends that Supreme Court abused its discretion in setting the amount and duration of maintenance and erred in failing to articulate a proper basis for applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap (*see* Domestic Relations Law § 240 [1-b] [c] [2], [3]).

"[A]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Mehlenbacher v Mehlenbacher*, 199 AD3d 1304, 1307 [4th Dept 2021] [internal quotation marks omitted]), although "the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*Reed v Reed*, 55 AD3d 1249, 1251 [4th Dept 2008]). Where, as here, the trial court gave appropriate consideration to the factors enumerated in Domestic Relations Law § 236 (B) (former [6] [a]), "this Court will not disturb the determination of maintenance absent an abuse of discretion" (*Mayle v Mayle*, 299 AD2d 869, 869 [4th Dept 2002] [internal quotation marks omitted]; *see Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015]).

Contrary to defendant's contention, the record supports the court's determination that plaintiff was " 'unable to work to support herself financially,' now or at any point in the future" (*Knope v Knope*, 103 AD3d 1256, 1257 [4th Dept 2013]). Plaintiff testified

concerning her diagnosis of multiple sclerosis and its debilitating effects, and submitted voluminous medical records corroborating her testimony (*see Murphy v Murphy*, 175 AD3d 1540, 1541-1542 [2d Dept 2019]; *cf. Knope*, 103 AD3d at 1257-1258). Under the circumstances, and considering that defendant never disputed plaintiff's diagnosis and medical condition, plaintiff was not required to call an expert medical witness at trial to establish her inability to work.

Contrary to defendant's remaining contentions concerning the amount and duration of the maintenance award, we conclude that the court considered the relevant factors in Domestic Relations Law § 236 (B) (former [6] [a]). Considering plaintiff's " 'reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors' " (*Wilkins*, 129 AD3d at 1618, quoting *Hartog v Hartog*, 85 NY2d 36, 52 [1995]), we conclude that the court's maintenance award did not constitute an abuse of discretion (*see Murphy*, 175 AD3d at 1541-1542; *Repetti v Repetti*, 147 AD3d 1094, 1096-1097 [2d Dept 2017]; *cf. Zufall v Zufall*, 109 AD3d 1135, 1136-1137 [4th Dept 2013], *lv denied* 22 NY3d 859 [2014]). We note that plaintiff has not worked outside the home since 1998 and that the parties enjoyed a lifestyle commensurate with a substantial income during the marriage.

We reject defendant's contention that the court erred in determining his income for the purpose of calculating the amount of maintenance. It is well settled that "[i]ncome may be imputed based on a party's earning capacity, as long as the court articulates the basis for imputation and the record evidence supports the calculations" (*Johnson v Johnson*, 172 AD3d 1654, 1656 [3d Dept 2019] [internal quotation marks omitted]; *see Sharlow v Sharlow*, 77 AD3d 1430, 1431 [4th Dept 2010]). Here, the court articulated its basis for determining defendant's annual income, which included averaging the last eight years of self-reported income from the business that he ran with his brother as well as taking into account that the profitable business paid for many items for defendant, such as a motor vehicle, meals, and country club membership.

Finally, we reject defendant's contention that the court erred in failing to articulate a proper basis for ordering child support in excess of the CSSA statutory cap (*see* Domestic Relations Law § 240 [1-b] [c] [2], [3]; *see generally Martin v Martin*, 115 AD3d 1315, 1316 [4th Dept 2014]). The court relied upon the factors set forth in Domestic Relations Law § 240 (1-b) (f) when it determined that application of the CSSA's statutory income cap would be "inequitable" because it would not afford to the child the same standard of living that the child would have enjoyed had the marriage not been dissolved (*see* § 240 [1-b] [f] [3]). Moreover, we conclude that the court's application of the CSSA formula to an income level for defendant that was above the statutory cap but below the income imputed to him for the purpose of calculating the amount of maintenance is supported by the record (*see Evans v Evans*, 186 AD3d 1684, 1685 [2d Dept 2020]; *cf. Bandyopadhyay v Bandyopadhyay*, 141 AD3d 1099, 1100 [4th Dept 2016]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

322

CA 21-01082

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

ROBERT CUMMINS, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD MIDDAUGH, DEFENDANT-APPELLANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICE OF ROBERT D. BERKUN, LLC, BUFFALO (MICHAEL C. LANCER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered July 26, 2021. The order granted in part and denied in part the motion of defendant seeking, inter alia, summary judgment dismissing the complaint and the preclusion of certain photographs.

It is hereby ORDERED that said cross appeal from the order insofar as it granted that part of the motion to preclude the introduction of certain photographs at trial is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he slipped and fell "due to an unreasonable accumulation of moss, algae and/or other flora" on an exterior ramp at an apartment building owned by defendant. Defendant moved for summary judgment dismissing the complaint and for an order precluding plaintiff from introducing certain photographs at trial and imposing sanctions for spoliation. Defendant appeals from those parts of an order that denied his motion insofar as he seeks summary judgment dismissing the complaint on the ground that he lacked constructive notice of the allegedly dangerous condition and the ground that he was an out-of-possession landlord, and denied his request for sanctions for spoliation. Plaintiff cross-appeals from those parts of the order that granted defendant's motion insofar as defendant seeks summary judgment on the issue whether defendant created the allegedly dangerous condition and granted defendant's request to preclude plaintiff from introducing certain photographs at trial.

Defendant contends that Supreme Court erred in denying that part of his motion seeking summary judgment dismissing the complaint on the ground that he was an out-of-possession landlord and therefore was not

liable for plaintiff's injuries. We reject that contention. "An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct" (*Villareal v CJAM Assoc., LLC*, 125 AD3d 644, 645 [2d Dept 2015]; *see Balash v Melrod*, 167 AD3d 1442, 1442 [4th Dept 2018]). In determining whether a landowner has relinquished control, we consider "the parties' course of conduct—including, but not limited to, the landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011], *rearg denied* 19 NY3d 856 [2012]). In support of his motion, defendant submitted his own deposition testimony in which he stated that he, his employees and his brother would check the exterior of the building on a daily basis. Defendant also stated in his deposition testimony, and his brother averred in his affidavit in support of the motion, that they would perform maintenance tasks to the exterior of the building. Thus, inasmuch as defendant's own evidentiary submissions create an issue of fact whether he relinquished control of the premises, defendant failed to establish that his status as an out-of-possession landlord absolves him of liability (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Contrary to defendant's further contention, we conclude that the documentary evidence submitted by defendant does not establish as a matter of law that he was not contractually obligated to maintain the ramp (*see Rainey v Bonanno*, 178 AD3d 1394, 1394-1395 [4th Dept 2019]; *see generally Mancuso v J & Velco Co., L.P.*, 58 AD3d 577, 578 [1st Dept 2009]).

We reject defendant's contention that the court erred in denying his motion with respect to the issue whether he had constructive notice of the allegedly dangerous condition. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Even assuming, arguendo, that defendant met his initial burden on his motion with respect to constructive notice, plaintiff raised a triable issue of fact by submitting the affidavit of a tenant of the property, who averred that the allegedly dangerous condition was visible and apparent and had existed for over a month prior to the accident (*see Knight v Sawyer*, 306 AD2d 849, 849 [4th Dept 2003]).

With respect to plaintiff's cross appeal, we conclude that the cross appeal from the order insofar as it granted defendant's request to preclude the introduction of certain photographs at trial must be dismissed. " 'An evidentiary ruling made before trial is generally reviewable only in the context of an appeal from the judgment rendered after trial,' and thus no appeal lies from [those parts of] the order" (*Crewell v Albany Med. Ctr. Hosp.*, 52 AD3d 1233, 1233 [4th Dept 2008]). In light of our determination, defendant's contention on appeal that the court erred in denying his request for sanctions for

spoliation arising from plaintiff's failure to preserve evidence related to those photographs is academic.

We reject plaintiff's contention on his cross appeal that the court erred in granting that part of defendant's motion seeking summary judgment dismissing the complaint insofar as it alleged that defendant created the allegedly dangerous condition. It is well settled that where, as here, a defendant moves for summary judgment, a " 'court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint' as amplified by the bill of particulars" (*Stewart v Dunkleman*, 128 AD3d 1338, 1341 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]). Here, plaintiff did not allege in his complaint or in his bill of particulars that defendant created the allegedly dangerous condition, and thus the court did not err in granting that part of defendant's motion.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00205

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

PAPE VENTURES, INC., A NEBRASKA CORPORATION,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMERICAN SPORTS MEDIA, L.L.C., A NEW YORK
LIMITED LIABILITY COMPANY, SIMPLECIRC, L.L.C.,
A NEW YORK LIMITED LIABILITY COMPANY, AND
DAVID K. AULTMAN, AN INDIVIDUAL,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEFFREY F. ALLEN OF OCUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 14, 2021. The order, insofar as appealed from, granted in part defendants' motion to partially dismiss plaintiff's complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety and the second through fifth causes of action are reinstated.

Memorandum: Plaintiff, a corporation that designs proprietary software used by publishers to track and manage their customers' subscriptions, commenced this action to recover damages as a result of defendants' alleged reverse engineering of plaintiff's proprietary software, which they repackaged and sold as their own, in violation of the terms of service for use of the software. In the verified complaint, plaintiff asserted six causes of action: (1) breach of contract; (2) misappropriation of trade secrets; (3) tortious interference "with contracts and/or business relationships or expectancies"; (4) deceptive trade practices; (5) civil conspiracy; and (6) unjust enrichment. Defendants moved, inter alia, to dismiss the second through fifth causes of action in the complaint pursuant to CPLR 3211 (a) (5). Plaintiff appeals from an order insofar as it granted the motion to that extent.

In moving to dismiss the second through fifth causes of action on

statute of limitations grounds, defendants had "the initial burden of establishing prima facie that the time in which to sue ha[d] expired . . . and thus w[ere] required to establish, inter alia, when the . . . cause[s] of action accrued" (*Larkin v Rochester Hous. Auth.*, 81 AD3d 1354, 1355 [4th Dept 2011] [internal quotation marks omitted]; *see Wendover Fin. Servs. v Ridgeway*, 137 AD3d 1718, 1719 [4th Dept 2016]). A statute of limitations does not begin to "run until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *see City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp.*, 113 AD3d 718, 719 [2d Dept 2014]). "Generally, tort claims accrue upon an injury being sustained, not upon the defendant's wrongful act or the plaintiff's discovery of the injury" (*City Store Gates Mfg. Corp.*, 113 AD3d at 719; *see Kronos, Inc.*, 81 NY2d at 94).

Here, defendants did not meet their initial burden on that part of the motion based on CPLR 3211 (a) (5) because they did not establish in their moving papers the relevant accrual date of plaintiff's second through fifth causes of action and, therefore, could not show that the applicable limitations period had expired with respect to those causes of action (*see Chaplin v Tompkins*, 173 AD3d 1661, 1662 [4th Dept 2019]; *Larkin*, 81 AD3d at 1355). Consequently, Supreme Court erred in granting defendants' motion insofar as it sought to dismiss the second through fifth causes of action on statute of limitations grounds. Because defendants did not satisfy their initial burden on that part of the motion, the burden never " 'shift[ed] to . . . plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether . . . plaintiff actually commenced the action within the applicable limitations period' " (*U.S. Bank N.A. v Gordon*, 158 AD3d 832, 835 [2d Dept 2018]; *cf. Carrington v New York State Off. for People With Dev. Disabilities*, 170 AD3d 1495, 1496 [4th Dept 2019]).

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

345

CA 21-00723

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

PAPE VENTURES, INC., A NEBRASKA CORPORATION,
PLAINTIFF-APPELLANT,

V ORDER

AMERICAN SPORTS MEDIA, L.L.C., A NEW YORK LIMITED LIABILITY COMPANY, SIMPLECIRC, L.L.C., A NEW YORK LIMITED LIABILITY COMPANY, AND DAVID K. AULTMAN, AN INDIVIDUAL, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

BOND, SCHOENECK & KING, PLLC, ROCHESTER (JEFFREY F. ALLEN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 30, 2021. The order denied plaintiff's motion for leave to reargue its opposition to defendants' motion to partially dismiss plaintiff's complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01365

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

YVONNIA C. PORTIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS D. YATES, WAYNE COUNTY SHERIFF AND COUNTY OF WAYNE, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, ROCHESTER (PATRICK B. NAYLON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Wayne County (Richard M. Healy, A.J.), entered May 26, 2021. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when the vehicle she was driving was involved in a collision with a marked patrol vehicle operated by defendant Nicholas D. Yates, a deputy sheriff (deputy), who was at the time responding to a radio dispatch of an armed robbery in progress. The collision occurred when the deputy attempted to pass plaintiff's vehicle on the left, while plaintiff was at the same time attempting to make a left turn. Defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion, and defendants now appeal.

Initially, we note that there is no dispute that the deputy was operating an authorized emergency vehicle at the time of the accident (*see* Vehicle and Traffic Law § 101). Furthermore, we conclude that the deputy was involved in an emergency operation as contemplated by Vehicle and Traffic Law § 114-b (*see Criscione v City of New York*, 97 NY2d 152, 158 [2001]; *Lacey v City of Syracuse*, 144 AD3d 1665, 1666 [4th Dept 2016], *lv denied* 32 NY3d 913 [2019]; *Allen v Town of Amherst*, 8 AD3d 996, 997 [4th Dept 2004]), and that he was engaged in privileged conduct (*see* § 1104 [a], [b]; *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). Thus, "the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence" (*Lacey*, 144 AD3d at 1666; *see Kabir*, 16 NY3d at 220). However, we conclude that defendants failed to meet their initial

burden on their motion of establishing as a matter of law that the deputy's actions did not rise to the level of reckless disregard for the safety of others inasmuch as their own submissions raised triable issues of fact with respect to the speed at which the deputy's vehicle was traveling at the time of the accident, whether that speed was reckless under the circumstances, and whether or when he activated his emergency lights and siren (*see Sanicola v Wantagh Fire Dist., Inc.*, 187 AD3d 1232, 1232-1233 [2d Dept 2020]; *Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243 [4th Dept 2013]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Thus, the court properly denied the motion regardless of the sufficiency of plaintiff's opposing papers (*see generally Winegrad*, 64 NY2d at 853).

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

358

CA 21-01096

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

BRIANNA D'ANGELO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

THE BARNES FIRM, P.C., ROCHESTER (MARTHA PIGOTT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 5, 2021. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating the complaint and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to supplemental uninsured/underinsured motorist coverage from defendant,

and as modified the order is affirmed without costs.

Memorandum: This action arises from an accident that occurred when plaintiff, who was operating her personal motor vehicle while performing work for her employer, was rear-ended by another vehicle. As a result, plaintiff suffered an alleged serious injury within the meaning of Insurance Law § 5102 (d). Because the insurance policy on the other vehicle had a limit of only $100,000 per person, plaintiff informed her employer that she would be filing a claim for supplemental uninsured/underinsured motorist (SUM) benefits with defendant, her employer's insurance company. Approximately 14 months after receiving notice of plaintiff's claim, defendant disclaimed coverage, and plaintiff commenced the instant action seeking a judgment declaring that defendant's disclaimer is invalid and that plaintiff is entitled to SUM benefits. Supreme Court granted defendant's motion for summary judgment dismissing the complaint.

At the outset, we reject plaintiff's contention that the court was required to deny the motion based on defendant's failure to submit

its answer with its initial moving papers. Defendant's answer was submitted in its reply papers, was before the court when it decided the motion, and is part of the record on appeal (*see* CPLR 2001; *Miller v Howard*, 134 AD3d 1537, 1537 [4th Dept 2015]; *Dale v Gentry*, 66 AD3d 1469, 1469 [4th Dept 2009]).

Contrary to plaintiff's contention, defendant met its initial burden of establishing that plaintiff was not an insured under defendant's policy, and plaintiff failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the court properly determined that defendant's disclaimer was based on a lack of coverage rather than a policy exclusion and that timely disclaimer pursuant to Insurance Law § 3420 (d) was not required (*see Progressive Northeastern Ins. Co. v Farmers New Century Ins. Co.*, 83 AD3d 1519, 1520 [4th Dept 2011]; *Konstantinou v Phoenix Ins. Co.*, 74 AD3d 1850, 1852 [4th Dept 2010], *lv denied* 15 NY3d 712 [2010]; *see generally Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]). The court, however, erred in dismissing the complaint and in failing to declare the rights of the parties in this declaratory judgment action (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *Leo v New York Cent. Mut. Fire Ins. Co.*, 136 AD3d 1333, 1333 [4th Dept 2016], *lv denied* 28 NY3d 902 [2016]). We therefore modify the order accordingly.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

359

CAE 21-00851

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

IN THE MATTER OF DONALD MAZZULLO, AS AN ENROLLED CONSERVATIVE PARTY MEMBER, REGISTERED VOTER RESIDING IN MONROE COUNTY, AND AS CHAIRMAN OF THE MONROE COUNTY CONSERVATIVE PARTY, AND THE MONROE COUNTY CONSERVATIVE PARTY, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TED BARNETT, CHRISTINE BROWN, CURRAN BROWN, EVELYN CHAFFER, EMMA FERRANTE, ANNA FIORUCCI, ERIK GYSEL, LORI GYSEL, POLLY HANNA, BRUCE HELLMAN, LINDA HELLMAN, YONG BOM KIM-FREDELL, PATRICIA KRAUS, ROBERT KRAUS, BRENDAN RAYMOND, ERIC SMUTZ, LESLIE SMUTZ, KYLE TRACY, RYAN TRAVERS, JAMES CHAIZE, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.

JAMES OSTROWSKI, BUFFALO, FOR RESPONDENTS-APPELLANTS.

GALLO & IACOVANGELO LLP, ROCHESTER (JOHN M. OWENS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order (denominated judgment) of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered June 10, 2021 in a proceeding pursuant to Election Law article 16. The order, among other things, granted the petition and directed respondents Monroe County Board of Elections and New York State Board of Elections to disenroll respondents Ted Barnett, Christine Brown, Curran Brown, Evelyn Chaffer, Emma Ferrante, Anna Fiorucci, Erik Gysel, Lori Gysel, Polly Hanna, Bruce Hellman, Linda Hellman, Yong Bom Kim-Fredell, Patricia Kraus, Robert Kraus, Camille Lavecchia, Brendan Raymond, Eric Smutz, Leslie Smutz, Kyle Tracy, Ryan Travers and James Chaize from the Conservative Party.

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

Memorandum: Petitioner Donald Mazzullo, the chairman of petitioner Monroe County Conservative Party, received a written complaint from an enrolled member of the Conservative Party in Monroe County requesting that Mazzullo hold a hearing pursuant to Election Law § 16-110 (2) to determine whether the enrollment of certain voters in the party, including respondents-appellants (respondents), should

be cancelled on the ground that those voters were not in sympathy with the principles of the party. The complaint alleged that respondents were from the same town, had newly registered in the Conservative Party close to the deadline for changing party registration, had largely been associated with the local Democratic Party, and had then designated three respondents as Conservative Party candidates for local office. The complaint further alleged that respondents had not joined the Conservative Party to endorse or express support for the party, but instead to further ulterior political purposes. Following an examination of the allegations in the complaint, Mazzullo sent a notice letter by mail to each respondent informing them that a hearing had been scheduled pursuant to Election Law § 16-110 (2). Certain respondents responded by submitting affidavits in lieu of attending the hearing, which were all sworn on the same day, were mostly notarized by the same notary public, and used similar language to explain that respondents were unable to attend the hearing and that they held particular conservative values. After a hearing that none of respondents attended, Mazzullo rendered a written determination in which he concluded that respondents were not in sympathy with the principles of the Conservative Party and should be disenrolled therefrom. In reaching that determination, Mazzullo considered, among several other things, that respondents had chosen not to attend the hearing, their affidavits largely ignored principles of the Conservative Party that Mazzullo listed as key components of the party's philosophy, and there was evidence of concerted activity on the part of respondents and certain local Democratic Party officials.

Petitioners thereafter commenced this proceeding pursuant to Election Law § 16-110 (2) seeking an order directing the cancellation of the Conservative Party enrollments of respondents, and respondents subsequently answered. Supreme Court, upon concluding that Mazzullo's determination was just, granted the petition, adjudged that respondents were not in sympathy with the Conservative Party, and directed the disenrollment of respondents from the party. Respondents appeal, and we now affirm.

Initially, we address respondents' procedural challenges. First, as raised in their answer, respondents contend that the notice letter was insufficient to provide them with notice of the subject matter of the hearing and any party principles that they had allegedly violated. We reject that contention. The statute requires only that "[w]here, as here, the chairperson of the county committee of a political party, or a subcommittee appointed by the chairperson, conducts hearings, pursuant to the procedures set forth in Election Law § 16-110 (2), to determine whether certain members of that party are not in sympathy with that party's principles, those members must receive notice of such hearings, in person or by mail, at least two days before the hearing" (*Matter of Walsh v Verdi*, 89 AD3d 740, 740 [2d Dept 2011]). Contrary to respondents' contention, the plain language of the statute does not, beyond the abovementioned notice requirements, prescribe that the notice include any particular substantive content related to the allegations, nor does the statute require that the chairperson provide a statement of principles, a document akin to a bill of particulars, or any other attachments (*see* § 16-110 [2]). Here, the

timely notices mailed to respondents were in compliance with the statute inasmuch as they apprised respondents that, based on a complaint pursuant to Election Law § 16-110 (2) challenging their enrollments in the Conservative Party, a hearing had been scheduled at a specified place and time to determine whether they were in sympathy with the principles of the Conservative Party. Second, to the extent that respondents contend that petitioners failed to show that respondent Ryan Travers properly received the required notice (*see generally Walsh*, 89 AD3d at 740-741), that contention is raised for the first time on appeal and is therefore not properly before us (*see Matter of Buttenschon v Salatino*, 164 AD3d 1588, 1589 [4th Dept 2018]).

On the merits, respondents contend that the court erred in failing to evaluate whether petitioners had sufficiently proved the principles of the Conservative Party to support the determination that respondents were not in sympathy therewith. We reject that contention. As the Court of Appeals has explained, "Election Law § 16-110 (2) assigns the task of determining whether a voter 'is . . . in sympathy with the principles' of his or her political party to a leader of that party—the County Committee Chair—and limits courts to deciding whether this determination is 'just' " (*Matter of Rivera v Espada*, 98 NY2d 422, 428 [2002]). "This division of responsibility reflects a legislative choice not to involve courts in determining party 'principles' " (*id.* at 428-429). "Thus, the court's role is to ensure that the County Committee Chair reaches a decision on the basis of sufficient evidence and does not consider inappropriate factors" (*id.* at 429). Contrary to respondents' assertions, the court was therefore not charged with determining the principles of the Conservative Party; instead, the limited role of the court was to ensure that Mazzullo "reache[d] a decision on the basis of sufficient evidence and d[id] not consider inappropriate factors," i.e., that the determination was just (*id.* at 429; *see* § 16-110 [2]).

We conclude that the court properly held that the determination was just and directed that respondents' enrollments in the Conservative Party be cancelled (*see Matter of Walsh v Abramowitz*, 78 AD3d 852, 853 [2d Dept 2010]; *Matter of Farrell v Morrissey*, 32 AD3d 1362, 1362-1363 [4th Dept 2006]). The court properly considered respondents' "failure to testify at [the] hearing[] held before [the chairperson] investigating whether [respondents] were in sympathy with the Conservative Party's principles, which gave rise to a presumption that [respondents] were not in sympathy with those principles" (*Walsh*, 78 AD3d at 853; *see Matter of Zuckman v Donahue*, 274 App Div 216, 218 [3d Dept 1948], *affd* 298 NY 627 [1948]; *Farrell*, 32 AD3d at 1362-1363). Contrary to respondents' assertion, the court did not treat their failure to appear at the hearing as dispositive. Instead, the court applied the presumption by determining that respondents' failure to attend the hearing would be held against them, which is what Mazzullo had done as well. Moreover, contrary to respondents' related contention, the court appropriately observed that the affidavits submitted in lieu of attending the hearing were largely similar in appearance and content, including the statements ostensibly espousing conservative principles, and properly determined that such

"[s]elf-serving declarations [were] not enough" to overcome the presumption and uncontested facts indicating that respondents were not in sympathy with the party (*Matter of Walsh v Abramowitz*, 34 Misc 3d 1228[A], 2009 NY Slip Op 52828[U], *7 [Sup Ct, Suffolk County 2009], *affd* 78 AD3d 852 [2d Dept 2010]).

With respect to those uncontested facts, the court properly concluded that there was sufficient evidence to support Mazzullo's determination that respondents had engaged in a concerted effort to infiltrate the Conservative Party with the ulterior motive of defeating party-endorsed candidates in the primary and helping elect local Democratic Party officials and those aligned therewith (*see Zuckman*, 274 App Div at 218-219*; Farrell*, 32 AD3d at 1362). As the court recognized, Mazzullo, in rendering his determination, appropriately considered that respondents had all enrolled in the Conservative Party in a relatively short period and close to the deadline for changing party affiliation, that three respondents thereafter petitioned to run as candidates for local office as members of the party, and that the designating petitions were signed by the other recently enrolled respondents and were witnessed, notarized, and submitted by others with connections to the local Democratic Party (*see Zuckman*, 274 App Div at 218-219; *Farrell*, 32 AD3d at 1362). While respondents are correct that Mazzullo's speculation about respondents also being motivated to interfere with the Conservative Party in an attempt to derail a proposed solar power project does not have sufficient support in the record, no single factor is controlling and, here, the combination of the other abovementioned relevant factors considered by Mazzullo were sufficient to support the determination that respondents lacked sympathy with the aims and purposes of the Conservative Party (*see Zuckman*, 274 App Div at 218-219).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01457

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

MARIE BROWN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMALL LAW FIRM, BUFFALO (BRIAN J. ALTERIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered October 5, 2021. The order, insofar as appealed from, denied the motion of defendant insofar as it sought to dismiss the second cause of action and granted the cross motion of plaintiff for leave to amend the complaint with respect to that cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, the second cause of action is dismissed, and the cross motion is denied.

Memorandum: Plaintiff commenced this action seeking, among other things, to collect supplemental uninsured/underinsured motorist (SUM) benefits under an insurance policy issued by defendant. On appeal, defendant contends that Supreme Court erred in denying its motion insofar as it sought dismissal of the cause of action in plaintiff's complaint alleging breach of the implied covenant of good faith and fair dealing and granting plaintiff's cross motion for leave to amend the complaint with respect to that cause of action. We agree.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). That covenant "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract' " (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995], quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]; *see Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 940 [4th Dept 2019]; *Gutierrez v Government Empls. Ins. Co.*, 136 AD3d 975, 976 [2d Dept 2016]). "While the duties of good faith and fair dealing do not imply obligations 'inconsistent

with other terms of the contractual relationship' . . . , they do encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included' " (*511 W. 232nd Owners Corp.*, 98 NY2d at 153; *see New York Univ.*, 87 NY2d at 318). "Even if a party is not in breach of its express contractual obligations, it may be in breach of the implied duty of good faith and fair dealing . . . when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit [or benefit] of its bargain" (*Paramax Corp.*, 175 AD3d at 940-941 [internal quotation marks omitted]). Thus, a cause of action for breach of the implied duty of good faith and fair dealing "is not necessarily duplicative of a cause of action alleging breach of contract" (*Gutierrez*, 136 AD3d at 976).

In the context of insurance contracts specifically, the implied covenant of good faith and fair dealing includes a duty on the part of the insurer " 'to investigate in good faith and pay covered claims' " (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 194 [2008], *rearg denied* 10 NY3d 890 [2008], quoting *New York Univ.*, 87 NY2d at 318; *see Gutierrez*, 136 AD3d at 976). "Breach of that duty can result in recoverable consequential damages, which may exceed the limits of the policy" (*Tiffany Tower Condominium, LLC v Insurance Co. of the Greater N.Y.*, 164 AD3d 860, 862 [2d Dept 2018]; *see Bi-Economy Mkt., Inc.*, 10 NY3d at 192-193; *Panasia Estates, Inc. v Hudson Ins. Co.*, 10 NY3d 200, 203 [2008]). "[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer's conduct constituted a 'gross disregard' of the insured's interests—that is, a deliberate or reckless failure to place on equal footing the interests of [the] insured with [the] insurer's own interests" (*Pavia v State Farm Mut. Auto. Ins. Co.*, 82 NY2d 445, 453 [1993], *rearg denied* 83 NY2d 779 [1994]; *see Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307-1308 [4th Dept 2015]; *Jonas v New York Cent. Mut. Fire Ins. Co.*, 244 AD2d 916, 917 [4th Dept 1997]).

Based on the foregoing principles, where "the cause of action to recover damages for breach of the policy and the cause of action to recover damages for breach of the implied covenant of good faith and fair dealing allege different conduct on the part of the defendant and seek different categories and/or types of damages, the cause of action seeking damages for breach of the implied covenant of good faith and fair dealing should not be dismissed as 'duplicative' of the cause of action alleging breach of contract" (*East Ramapo Cent. Sch. Dist. v New York Schs. Ins. Reciprocal*, 199 AD3d 881, 885 [2d Dept 2021]). Here, however, the allegations in plaintiff's complaint that defendant violated its duty of good faith and fair dealing are predicated solely upon the claim that defendant failed or refused to pay her the full amount of SUM coverage under the insurance policy, i.e., that defendant had breached the terms of the policy. Consequently, plaintiff failed to state a cause of action for breach of the implied duty of good faith and fair dealing (*see generally* CPLR 3211 [a] [7]), and the court should have granted defendant's motion insofar as it sought to dismiss that cause of action as duplicative of the breach of contract cause of action (*see Sue/Perior Concrete & Paving, Inc. v*

Lewiston Golf Course Corp., 109 AD3d 80, 92 [4th Dept 2013], *affd* 24 NY3d 538 [2014], *rearg denied* 25 NY3d 960 [2015]; *see also Paull v First UNUM Life Ins. Co.*, 295 AD2d 982, 984 [4th Dept 2002]; *cf. East Ramapo Cent. Sch. Dist.*, 199 AD3d at 885; *see generally New York Univ.*, 87 NY2d at 319-320).

In addition, the court abused its discretion in granting plaintiff's cross motion for leave to amend the complaint with respect to the cause of action alleging breach of the implied duty of good faith and fair dealing. "Although leave to amend a pleading should be freely granted absent prejudice or surprise . . . , leave to amend should be denied where . . . the proposed amendment is patently lacking in merit" (*Baker v Keller*, 241 AD2d 947, 947 [4th Dept 1997]; *see Christian v Brookdale Senior Living Communities, Inc.*, 199 AD3d 1450, 1451 [4th Dept 2021]; *Armstrong v Merrick*, 99 AD3d 1247, 1247 [4th Dept 2012]; *see generally* CPLR 3025 [b]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]). In accordance with that standard, "[a] court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327 [4th Dept 2010] [internal quotation marks omitted]; *see Great Lakes Motor Corp. v Johnson*, 156 AD3d 1369, 1370-1371 [4th Dept 2017]; *Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1593 [4th Dept 2016]; *Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013]). "[T]he decision whether to grant leave to amend a complaint is committed to the sound discretion of the court" (*Davis*, 26 NY3d at 580 [internal quotation marks omitted]; *see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

Here, while there is no prejudice or surprise to defendant flowing from the proposed amendment (*see Greco v Grande*, 160 AD3d 1345, 1346 [4th Dept 2018]), the proposed amendment is nonetheless palpably insufficient or devoid of merit (*see Christian*, 199 AD3d at 1451). The gravamen of the relevant cause of action in the proposed amended complaint is that defendant, during arbitration, unreasonably delayed the adjudication of her claim by failing to promptly provide a full copy of the policy until after the completion of an examination under oath (EUO) and a request by defendant for medical examinations of plaintiff, thereby causing the continuation of an arbitration that was not "allowed" by the policy and unspecified consequential damages to plaintiff.

As defendant correctly contends, however, the proposed amended complaint and plaintiff's own submissions establish that plaintiff demanded arbitration and, once the parties were in arbitration, there was no bad faith on the part of defendant in seeking to obtain a full copy of the policy inasmuch as defendant made continued efforts in that regard and the parties agreed that it was not industry practice for the full policy to be produced in arbitration (*cf. East Ramapo Cent. Sch. Dist.*, 199 AD3d at 884-885). Plaintiff's allegation that she suffered consequential damages on account of the EUO being conducted and the medical examinations being requested prior to the production of the full policy is likewise devoid of merit inasmuch as

any delay in producing the full policy could not have proximately caused damage to plaintiff given that she would have been subject to an EUO and medical examinations regardless of whether the parties continued with arbitration or promptly moved to litigation (*see generally Lefkara Group, LLC v First Am. Intl. Bank*, 150 AD3d 450, 451 [1st Dept 2017], *lv denied* 29 NY3d 916 [2017]; *Rodriguez v Metropolitan Prop. & Cas. Ins. Co.*, 7 AD3d 775, 776 [2d Dept 2004]). Plaintiff's proposed allegation that the policy did not allow her claim for SUM benefits to be resolved by way of arbitration is patently lacking in merit because plaintiff's own submissions demonstrate that, while the policy did not mandate arbitration, it did not prohibit arbitration either, and the parties were afforded the option of continuing with that process. The record further demonstrates that, contrary to plaintiff's proposed allegations, defendant, even while asserting its rights under the policy, continued to proceed with an investigation of plaintiff's claim (*see generally Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]). Finally, after the full copy of the policy was produced and it was discovered that arbitration was not mandated, plaintiff provided defendant with a list of reasons why litigation might be more favorable to her and indicated that she was contemplating opting out of arbitration. Therefore, as defendant correctly contends, it was plaintiff who first raised the prospect of moving to litigation for her benefit, thereby refuting her proposed allegation that the termination of arbitration constituted bad faith or unfair dealing. Based on the foregoing, we conclude that the proposed amendment was palpably insufficient or devoid of merit.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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TP 21-01514

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

IN THE MATTER OF MONRO, INC., DOING BUSINESS AS
MONRO MUFFLER BRAKE AND RANDY C. YORK,
PETITIONERS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

HEISMAN NUNES & HULL LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR PETITIONERS.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Mark A. Montour, J.], entered October 20, 2021) to review a determination of respondent. The determination, among other things, revoked an inspection station license.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: In this proceeding pursuant to CPLR article 78, petitioners, Monro, Inc., doing business as Monro Muffler Brake (Monro), and Randy C. York, seek to annul the determination of respondent following a hearing that, inter alia, revoked Monro's inspection station license for one of its facilities and York's certification to perform New York State inspections. Although this proceeding should not have been transferred to this Court inasmuch as petitioners' due process claims are dispositive and sufficient to "terminate" this proceeding within the meaning of CPLR 7804 (g), we nonetheless consider the merits in the interest of judicial economy (*see generally Matter of Moulden v Coughlin*, 210 AD2d 997, 997 [4th Dept 1994]; *Matter of Posh Bagel, Inc. v Board of Health of County of Westchester*, 75 AD2d 898, 899 [2d Dept 1980]).

We agree with petitioners that they were denied due process of law. Under the Vehicle and Traffic Law, "[n]o license or certificate shall be revoked or suspended . . . except upon notice to the licensee or certified inspector and after an opportunity to be heard" (§ 303

[f]). Here, petitioners submitted evidence on their administrative appeal that they did not receive notice of the relevant hearing (*cf. Matter of Khan Auto Serv., Inc. v New York State Dept. of Motor Vehs.*, 123 AD3d 1258, 1260 [3d Dept 2014]), but respondent produced no evidence to establish that either the statutory presumption of receipt of notice pursuant to Vehicle and Traffic Law § 214 or the presumption of mailing applied (*see generally Bank of Am. v Guillaume*, 169 AD3d 625, 626-627 [2d Dept 2019]; *Progressive Cas. Ins. Co. v Metro Psychological Servs., P.C.*, 139 AD3d 693, 694 [2d Dept 2016]; *Khan Auto Serv., Inc.*, 123 AD3d at 1260). We may not consider the affidavit of mailing submitted by respondent for the first time in this Court, inasmuch as the affidavit "was not part of the facts and record adduced before the agency" (*Khan Auto Serv., Inc.*, 123 AD3d at 1259 [internal quotation marks omitted]; *see Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110 [2005]; *see also Matter of Falbo v Fialo*, 108 AD3d 1228, 1229 [4th Dept 2013]). Contrary to respondent's assertion, the appropriate time to submit that evidence would have been when petitioners' administrative appeal was pending.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

374

CA 21-01437

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

NABELA NAGI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMRO AHMED, DEFENDANT-RESPONDENT.

HEGGE & CONFUSIONE, LLC, NEW YORK CITY (MICHAEL CONFUSIONE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GABRIELE LAW, PLLC, BUFFALO (VANESSA C. GABRIELE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Dennis E. Ward, J.), entered September 17, 2021. The order, inter alia, granted defendant's cross motion and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking to vacate in part an amended judgment of divorce entered in 2018 and to set aside the parties' property settlement agreement (agreement), which was incorporated but not merged into the amended judgment of divorce. The complaint alleges, among other things, that plaintiff signed the agreement due to "extraordinary duress and pressure" exerted on her by defendant, among other people, and that the terms of the agreement are so favorable to defendant as to render it unconscionable and thus unenforceable.

Following joinder of issue, plaintiff moved to compel discovery and defendant cross-moved for summary judgment on his affirmative defenses seeking to dismiss the complaint on the grounds of collateral estoppel and ratification. Supreme Court granted the cross motion, concluding that plaintiff was collaterally estopped from challenging the agreement because she sought similar relief by way of a motion she filed in July 2018 seeking to modify certain provisions of the agreement and to enforce others. The court did not address the affirmative defense of ratification. Plaintiff appeals, and we reverse.

" 'Collateral estoppel applies when (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair

opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits' " (*Lowes v Anas*, 195 AD3d 1579, 1580 [4th Dept 2021]; *see Alamo v McDaniel*, 44 AD3d 149, 153 [1st Dept 2007]). Here, the motion that plaintiff filed in July 2018 did not seek to vacate the amended judgment of divorce or to set aside the agreement. The issues in this action are not identical to those raised by plaintiff in her motion, and defendant thus failed to meet his initial burden on his cross motion of establishing that collateral estoppel precludes plaintiff from challenging the agreement (*see Lowes*, 195 AD3d at 1581-1582; *Nicotra v CNY Family Care, LLP*, 184 AD3d 1191, 1192-1193 [4th Dept 2020]).

To the extent that defendant contends, as an alternative ground for affirmance, that this action is barred by res judicata because plaintiff could have pursued her current claims in the 2018 motion, we reject that contention. A party seeking to set aside a settlement agreement must do so in a plenary action; " 'such relief cannot be obtained on motion' " (*Peroni v Peroni*, 189 AD3d 2058, 2059-2060 [4th Dept 2020]; *see Christian v Christian*, 42 NY2d 63, 72 [1977]; *Gaines v Gaines*, 148 AD2d 1048, 1048 [4th Dept 1992]). Moreover, although plaintiff did commence a plenary action in August 2018 to set aside the agreement on grounds of fraud, duress, and overreaching, she abandoned that action, and a final judgment was never entered on it. The doctrine of res judicata requires, among other things, "a valid final judgment" on a prior action between the parties (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]), which is lacking here. There has never been a determination on the merits of plaintiff's claims that she signed the agreement under duress and that the agreement is unconscionable.

Finally, we reject defendant's contention, raised as an alternative ground for affirmance, that the court properly granted the cross motion because plaintiff ratified the agreement by acquiescing in it and receiving the benefits under it for a considerable period of time (*see generally Beutel v Beutel*, 55 NY2d 957, 958 [1982]; *Korngold v Korngold*, 26 AD3d 358, 359 [4th Dept 2006], *lv dismissed* 7 NY3d 861 [2006]). "[A] divorce settlement tainted by duress is void *ab initio* (*Angeloff v Angeloff*, 56 NY2d 982 [1982]), not merely voidable, and is, therefore, not subject to ratification by the mere passage of time" (*Perl v Perl*, 126 AD2d 91, 96 [1st Dept 1987]). Moreover, we note that plaintiff received only meager benefits under the agreement, which awarded sole custody of the parties' children to defendant and awarded no maintenance to plaintiff despite a long-term marriage. Although plaintiff is not obligated to pay child support under the agreement, she was unemployed at the time of the divorce action, and thus her child support obligation would have been minimal. In return for her share of two family businesses and the marital residence, which was valued at $149,000 with no encumbrances, plaintiff received a lump sum payment of $15,000. The only other asset received by plaintiff through equitable distribution was a seven-year-old used motor vehicle.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

379

CA 21-00401

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

ROBERT MARION, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CA KAPLAN PARK DRIVE, LLC, RIDGE STREET WAREHOUSE, INC., MILLER TOWNHOUSE, DOING BUSINESS AS RIDGE STREET WAREHOUSE, CA KAPLAN REAL ESTATE, LORI KAPLAN AND CHARLES KAPLAN, ALSO KNOWN AS C.K. KAPLAN PARK DRIVE, LLC, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

ROBERT F. JULIAN, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (MARIA T. MASTRIANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered February 19, 2021. The order granted the motion of defendants for summary judgment, dismissed the complaint and denied the cross motion of plaintiff to amend the pleadings.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendants CA Kaplan Park Drive, LLC and Ridge Street Warehouse, Inc. insofar as it alleges that defendant CA Kaplan Park Drive, LLC had constructive notice of the allegedly dangerous condition at F-1, 100 Mustang Drive in Rome, New York on March 4, 2015 and that defendant Ridge Street Warehouse, Inc. created or had constructive notice of the allegedly dangerous condition at 1904 N. George Street in Rome, New York on March 12, 2015, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained in two separate incidents. On March 4, 2015, plaintiff slipped and fell on ice in a parking lot owned by defendant CA Kaplan Park Drive, LLC (Kaplan Park). On March 12, 2015, plaintiff slipped and fell on ice on a driveway owned by defendant Ridge Street Warehouse, Inc. (Ridge Street). Defendants moved for summary judgment dismissing the complaint against them. Plaintiff now appeals from an order that, inter alia, granted the motion, contending that he raised triable issues of fact whether defendants created or had actual or constructive notice of the alleged

icy conditions, and that Supreme Court thus erred in granting the motion.

We agree with plaintiff that the court erred in granting those parts of the motion seeking summary judgment dismissing the complaint against Kaplan Park and Ridge Street insofar as it alleges that they had constructive notice of the allegedly dangerous conditions on their respective properties, and we therefore modify the order accordingly. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *see Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1395 [4th Dept 2021]; *Eagan v Page 1 Props., LLC*, 171 AD3d 1452, 1454 [4th Dept 2019]). Here, assuming, arguendo, that defendants met their initial burden of establishing that Kaplan Park and Ridge Street lacked constructive notice of the alleged conditions on their respective properties, we conclude that plaintiff raised triable issues of fact whether the allegedly dangerous conditions were visible and apparent and existed for a sufficient length of time prior to the accidents to permit those defendants to correct them (*see Eagan*, 171 AD3d at 1454).

We agree with plaintiff that the court also erred in granting that part of the motion for summary judgment dismissing the complaint against Ridge Street insofar as it alleges that Ridge Street created the dangerous condition that was on its property at the time of the March 12 incident, and we therefore further modify the order accordingly. Assuming, arguendo, that defendants met their initial burden on the motion of establishing that Ridge Street did not create the alleged dangerous condition, we conclude that plaintiff raised an issue of fact whether Ridge Street created the dangerous condition through its snow removal efforts (*see generally Britt v Northern Dev. II, LLC*, 199 AD3d 1434, 1436 [4th Dept 2021]; *Nicosia v Bucky Demelas & Son Landscape Contrs., Inc.*, 194 AD3d 826, 828 [2d Dept 2021]; *Depczynski v Mermigas*, 149 AD3d 1511, 1512 [4th Dept 2017]).

We have considered plaintiff's remaining contentions and conclude that none warrants reversal or further modification of the order.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

383

CA 21-00603

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

ROBERT K. DRUGER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SYRACUSE UNIVERSITY, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

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

POWERS & SANTOLA, LLP, ALBANY (KELLY C. WOLFORD OF COUNSEL), THOMAS LEGAL COUNSELORS AT LAW, LLC, NEW YORK CITY, AND MANLY, STEWART & FINALDI, IRVINE, CALIFORNIA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Patrick F. MacRae, J.), entered March 25, 2021. The order, among other things, denied in part the motion of defendant Syracuse University to dismiss the amended complaint against it.

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

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that he was sexually abused in 1980 by a graduate student of defendant Syracuse University (SU) who was also employed by SU as a resident advisor (employee). SU and defendant Board of Trustees of Syracuse University thereafter filed a pre-answer motion to dismiss the amended complaint against them. SU appeals from an order that, inter alia, denied in part the motion insofar as it sought dismissal of the amended complaint against it. At the time of the alleged abuse, plaintiff was 17 years of age, i.e., the legal age of consent in New York (*see* Penal Law § 130.05 [3] [a]). Although we agree with SU that plaintiff was required to plead factual allegations related to his lack of consent in order to allege "*conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law*" (CPLR 214-g [emphasis added]), and for the claims in the amended complaint to thereby be "revived" for statute of limitations purposes (*cf. S.H. v Diocese of Brooklyn*, 205 AD3d 180, 187 [2d Dept 2022]), we conclude that "[t]he factual allegations . . . sufficiently establish the complainant's lack of consent within the meaning of Penal Law § 130.05" (*People v Hatton*, 26 NY3d 364, 370 [2015]; *see also* § 130.05 [2] [a]).

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

With respect to the claim for negligence, SU contends that plaintiff failed to allege that it owed him a duty of care. We reject that contention inasmuch as the allegations of the amended complaint provide a basis to find that SU had a duty to plaintiff (*see generally Luina v Katharine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2d Dept 2007]; *Ayeni v County of Nassau*, 18 AD3d 409, 410 [2d Dept 2005]; *cf. generally Bolster v Ithaca St. Ry. Co.*, 79 App Div 239, 241 [3d Dept 1903], *affd* 178 NY 554 [1904]).

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

We have reviewed SU's remaining contention and conclude that it lacks merit.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

384

CA 21-00927

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

NATHAN A. SHELEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KINGSFORT BUILDERS, INC., DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (AARON M. SCHIFFRIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered June 15, 2021. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained while using a nail gun to perform framing work on a residential construction project, alleging, as relevant here, that defendant, the general contractor on the work site, violated Labor Law § 241 (6) by failing to provide him with adequate eye protection equipment as required by 12 NYCRR 23-1.8 (a). Defendant moved for summary judgment dismissing the complaint and now appeals from an order that, inter alia, denied that part of its motion with respect to the Labor Law § 241 (6) cause of action. We affirm.

Defendant contends that it did not violate 12 NYCRR 23-1.8 (a) and that Supreme Court thus erred in denying the motion insofar as it sought summary judgment dismissing the Labor Law § 241 (6) cause of action. Specifically, defendant argues that, as a matter of law, it satisfied its duty under 12 NYCRR 23-1.8 (a) and that plaintiff's failure to wear available safety glasses constituted the sole proximate cause of the accident. As relevant on appeal, 12 NYCRR 23-1.8 (a) provides that "[a]pproved eye protection equipment suitable for the hazard involved shall be provided for and shall be used by all persons . . . while engaged in any . . . operation which may endanger the eyes." We have previously held—and the parties do not dispute on appeal—that "use of [a] nail gun clearly falls within" that sufficiently specific provision of the Industrial Code (*Quiros v Five Star Improvements, Inc.*, 134 AD3d 1493, 1494 [4th Dept 2015]; *see also*

Langer v MTA Capital Constr. Co., 184 AD3d 401, 402 [1st Dept 2020]; *Willis v Plaza Constr. Corp.*, 151 AD3d 568, 568 [1st Dept 2017]).

We conclude that the court properly denied defendant's motion because defendant did not meet its initial burden of establishing as a matter of law that it did not violate 12 NYCRR 23-1.8 (a) (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Quiros*, 134 AD3d at 1494-1495; *Baker v City of Buffalo*, 90 AD3d 1684, 1685-1686 [4th Dept 2011]). Although there is no dispute that safety glasses were present on the work site on the date of the accident, the deposition testimony submitted by defendant in support of its own motion raised questions of fact whether defendant complied with its obligation under 12 NYCRR 23-1.8 (a) to ensure not only that "[a]pproved eye protection equipment . . . be provided for" workers engaged in operations that may endanger their eyes, but also that the equipment actually "be *used* by all [such] persons" (12 NYCRR 23-1.8 [a] [emphasis added]; *see generally Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Although it is undisputed that defendant provided plaintiff with safety glasses on another work site at which defendant acted as the general contractor and at which plaintiff used a nail gun while he performed framing work, plaintiff testified that he was never told to keep the safety glasses for use on other projects or that the glasses belonged to him. Indeed, defendant failed to submit evidence establishing that it specifically instructed plaintiff to use safety glasses on the work site at which the accident occurred.

Instead, defendant argues that it fulfilled its duty to comply with 12 NYCRR 23-1.8 (a) in that regard by providing safety glasses for plaintiff when he worked on the prior work site and instructing plaintiff at that earlier time to use the safety glasses. Although a lapse of time does not automatically relieve a worker of the duty to follow specific instructions (*see generally Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588, 589 [1st Dept 2018]; *Baun v Project Orange Assoc., L.P.*, 26 AD3d 831, 835 [4th Dept 2006]), we conclude that there is an issue of fact whether defendant's instruction on the prior work site applied to the work site at which the accident occurred. For instance, although defendant's principal testified that he directed workers to wear safety equipment on all projects, he also stated that this was merely an "expectation"—i.e., that once he told workers what to do, they would understand that they should apply his directive to all future projects. Additionally, other deposition testimony submitted by defendant corroborated plaintiff's testimony that there was nothing in defendant's instructions on the prior work site "implying" that those instructions—including the use of safety glasses—would apply on future jobs.

Because defendant failed to meet its initial burden on the motion, the burden never shifted to plaintiff, and therefore denial of the motion "was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986];

see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). In light of our determination, we need not consider defendant's remaining contention.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

385

CA 21-00881

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

GEORGE ZIEMENDORF AND DENISE ZIEMENDORF,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

YONG B. CHI, M.D., YONG B. CHI, M.D., P.L.L.C.,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CONNORS LLP, BUFFALO (JOHN T. LOSS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MEYERS BUTH LAW GROUP, PLLC, ORCHARD PARK (PATRICK J. MALONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered June 7, 2021. The order denied the motion of defendants Yong B. Chi, M.D. and Yong B. Chi, M.D., P.L.L.C. for summary judgment dismissing the second amended complaint and any cross claims against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the second amended complaint and any cross claims against defendants Yong B. Chi, M.D. and Yong B. Chi, M.D., P.L.L.C. are dismissed.

Memorandum: Plaintiffs commenced this medical malpractice action after George Ziemendorf (plaintiff) suffered an epidural abscess that left him partially paralyzed, alleging, inter alia, that Yong B. Chi, M.D. and Yong B. Chi, M.D., P.L.L.C. (defendants) failed to timely diagnose and treat the condition. Defendants appeal from an order denying their motion for summary judgment dismissing the second amended complaint and any cross claims against them, and we reverse.

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

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

Even assuming, arguendo, that plaintiffs raised triable issues of fact with respect to whether defendants deviated from the accepted standard of care, we conclude that the opinion of plaintiffs' expert with respect to the issue of proximate cause was insufficient to defeat defendants' motion for summary judgment (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Simko v Rochester Gen. Hosp.*, 199 AD3d 1408, 1409-1410 [4th Dept 2021]). Where the plaintiff alleges that the defendant "negligently failed or delayed in diagnosing or treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby diminished [the patient's] chance of a better outcome" (*Clune v Moore*, 142 AD3d 1330, 1331 [4th Dept 2016] [internal quotation marks omitted]; *see Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015]). However, expert assertions that are "vague, conclusory, speculative, and unsupported by the medical evidence in the record" are insufficient to raise a triable issue of fact (*Occhino*, 151 AD3d at 1871 [internal quotation marks omitted]; *see Simko*, 199 AD3d at 1410; *Martingano v Hall*, 188 AD3d 1638, 1640 [4th Dept 2020], *lv denied* 36 NY3d 912 [2021]). Here, plaintiffs' expert failed to offer anything other than a conclusory assertion that defendants' deviation from accepted standards of medical care caused plaintiff's injuries; indeed, although it appears that plaintiffs' theory of causation is that defendants' alleged failure or delay in diagnosing plaintiff with a spinal cord issue diminished his chances of a better outcome, plaintiffs' expert never actually renders that opinion. Inasmuch as plaintiffs failed to raise a triable issue of fact regarding causation, the court erred in denying the motion (*see Martingano*, 188 AD3d at 1640; *see also Simko*, 199 AD3d at 1409-1410).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

386.1

CA 21-01354

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

SINATRA & COMPANY REAL ESTATE, LLC, AND
ELMWOOD RETAIL GROUP, LLC,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

1000 ELMWOOD ASSOCIATES, LLC, ET AL.,
DEFENDANTS.

KLW APPRAISAL GROUP, INC., AND S&T BANK,
NONPARTY APPELLANTS.

GOLDMAN ATTORNEYS PLLC, ALBANY (ERIKA C. BROWNE OF COUNSEL), FOR NONPARTY-APPELLANTS.

GOMEZ LAW, LLC, BUFFALO (RAFAEL O. GOMEZ OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio Colaiacovo, J.), entered September 10, 2021. The order denied the motion by nonparty appellants KLW Appraisal Group, Inc. and S&T Bank to quash a subpoena issued by plaintiffs.

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

Memorandum: Plaintiffs commenced this action against defendants asserting causes of action for, inter alia, breach of contract and fraud in connection with plaintiffs' purchase of certain properties from defendants in 2017. Nonparty S&T Bank (S&T) provided financing to plaintiffs in connection with that acquisition based in part on appraisals performed by nonparty KLW Appraisal Group, Inc. (KLW). After taking ownership of the properties, plaintiffs came to believe that defendants had misrepresented, among other things, the rent rolls and square footage areas associated with various tenancies, the good working order of the electrical systems, and the structural integrity of roofs at the properties.

In 2020, after this litigation was commenced, KLW's appraiser returned to further inspect the properties on behalf of S&T to provide updated appraisals. During that inspection, plaintiffs allegedly provided the appraiser with information about the properties that plaintiffs had not known in 2017. An attorney for plaintiffs subsequently contacted the appraiser, who stated that he would need

clearance from S&T to discuss his appraisals with the attorney. The attorney averred that the appraiser nevertheless indicated that, during his 2020 inspection of the properties, he saw issues that, if they had been identified in 2017, would have caused him to "appraise[] [one of the properties] entirely differently."

Plaintiffs served a subpoena on KLW seeking, inter alia, the 2020 appraisal reports. S&T objected to the disclosure, asserting, among other things, that the appraiser's work in 2020 was privileged because it was done in anticipation of litigation (*see* CPLR 3101 [d] [2]) and for the purpose of having the appraiser render an expert opinion to S&T. S&T and KLW moved to quash the subpoena, and they now appeal from an order denying their motion. We affirm.

"[T]o fall within the conditional privilege of CPLR 3101 (subd [d], par 2), the material sought must be prepared *solely* in anticipation of litigation . . . 'Mixed purpose reports are not exempt from disclosure under CPLR 3101 (subd [d], par 2)' " (*Zampatori v United Parcel Serv.*, 94 AD2d 974, 975 [4th Dept 1983]; *see Tenebruso v Toys 'R' Us-NYTEX*, 256 AD2d 1236, 1237-1238 [4th Dept 1998]). "When a party claims that particular records or documents are exempt or immune from disclosure, the burden is on the party asserting such immunity . . . This burden is imposed because of the strong policy in favor of full disclosure" (*Central Buffalo Project Corp. v Rainbow Salads*, 140 AD2d 943, 944 [4th Dept 1988]; *see Koump v Smith*, 25 NY2d 287, 294 [1969]), and it " 'cannot be satisfied with wholly conclusory allegations' " (*Madison Mut. Ins. Co. v Expert Chimney Servs., Inc.*, 103 AD3d 995, 996 [3d Dept 2013]).

We conclude that S&T and KLW failed to meet their burden on their motion inasmuch as their assertion of the conditional privilege afforded by CPLR 3101 (d) (2) was conclusory. S&T and KLW offered nothing more than their determination that the 2020 appraisal reports were prepared in anticipation of litigation. They failed to provide either to plaintiffs or to the court, in camera, copies of the engagement letters between S&T and KLW or any privilege log identifying the materials they claimed should be withheld (*see* CPLR 3122 [b]). "[A] court is not required to accept a party's characterization of material as privileged or confidential" (*John Mezzalingua Assoc., LLC v Travelers Indem. Co.*, 178 AD3d 1413, 1415-1416 [4th Dept 2019] [internal quotation marks omitted]).

We have reviewed S&T's and KLW's remaining contentions and conclude that they are without merit.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

388

KA 20-01652

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN B. EATMON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Brian D. Dennis, J.), rendered June 5, 2018. The judgment convicted defendant upon his plea of guilty of burglary in the second degree (three counts), attempted burglary in the second degree, grand larceny in the third degree and petit larceny (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 guilty plea of, inter alia, three counts of burglary in the second degree (Penal Law § 140.25 [2]), one count of attempted burglary in the second degree (§§ 110.00, 140.25 [2]), and one count of grand larceny in the third degree (§ 155.35 [1]). As defendant contends and the People correctly concede, defendant's purported waiver of the right to appeal is invalid inasmuch as County Court failed to fully explain the waiver to defendant until the time of his restitution hearing, which took place approximately two months after he completed the plea proceeding (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see generally People v Bradshaw*, 18 NY3d 257, 265 [2011]). "[T]o the extent that the purported waiver of the right to appeal was obtained at [the restitution hearing], it is not valid inasmuch as the court failed to obtain a knowing and voluntary waiver of that right at the time of the plea" (*People v Brown*, 148 AD3d 1562, 1562-1563 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

Defendant further contends that his plea was not knowingly, voluntarily, and intelligently entered because he was not informed, at the time he entered his plea, of the specific amount of restitution that he would have to pay. At the plea proceeding, defendant was informed that his sentence would include restitution, the amount of

which would be determined at a restitution hearing. At a hearing held after the entry of the plea, the People presented the testimony of a victim that, although she recovered some of the property that was stolen when defendant burglarized her home, she did not recover several pieces of jewelry with a total value of $135,225. The court found the witness's testimony regarding the value of the jewelry to be credible, determined that the People had sustained their burden of establishing the amount of restitution by a preponderance of the evidence (*see generally People v Consalvo*, 89 NY2d 140, 145 [1996]), and ordered defendant to pay restitution in the amount of $148,747.50, representing the total loss plus a 10% collection surcharge. Inasmuch as defendant did not move to withdraw his plea of guilty before the sentence was imposed on the basis of the amount of restitution, he failed to preserve for appellate review his contention that the lack of a specific amount of restitution in the terms of his plea agreement rendered the plea involuntary (*see People v Niedwieski*, 100 AD3d 1023, 1023 [2d Dept 2012], *lv denied* 21 NY3d 913 [2013]; *see generally People v DeScisciolo*, 109 AD3d 666, 666 [2d Dept 2013]).

Further, we reject defendant's contention that the court erred in determining the amount of restitution. The court properly "credit[ed] the testimony and documentation presented by the People and [determined] that the loss incurred was established by a preponderance of the evidence" (*People v Osborne*, 161 AD3d 1485, 1486 [3d Dept 2018]), and defendant failed " 'to offer evidence contradicting the People's calculation' " (*id.*).

We also reject defendant's contention that the court erred in failing to make an inquiry when he raised a complaint about defense counsel. "Even assuming, arguendo, that defendant's complaint[] about defense counsel suggested a serious possibility of good cause for a substitution of counsel requiring a need for further inquiry," we conclude that "the court afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit" (*People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions, and we conclude that they do not warrant modification or reversal of the judgment.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

390

KA 18-00148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASMEN T. LEONARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered March 22, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). The pleas were taken during one proceeding, and we agree with defendant in both appeals that he did not validly waive his right to appeal. As the People correctly concede, County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal, including characterizing it as an absolute bar to the taking of an appeal, and we thus conclude that the colloquy was insufficient to ensure that defendant's waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]).

Defendant contends with respect to appeal No. 1 that the court erred in failing to suppress the gun and his statements to the police. We reject that contention. The evidence at the suppression hearing established that the police responded to a 911 call that a parolee wanted on an outstanding warrant and who was known to possess guns was a passenger in a certain vehicle. The officers found a vehicle matching the description given by the 911 caller and followed it,

losing sight of the vehicle momentarily but then spotting it stopped on a curb with the passenger standing outside the vehicle. As one of the officers exited the police vehicle and began to approach the passenger, the passenger ran away while holding the left side of his waistband and the officer chased after him. As he was being chased, the passenger threw a black object, believed to be a handgun, over a fence. The passenger, identified as defendant, was apprehended, and a gun was recovered from where the officer saw defendant throw an object.

The court properly determined that the officers had at least an objective, credible reason to approach defendant and request information (*see People v Moore*, 6 NY3d 496, 500 [2006]; *People v Greaves*, 123 AD2d 445, 445 [2d Dept 1986], *lv denied* 69 NY2d 712 [1986]). Defendant's subsequent flight with his hand on his waistband from the approaching officer, combined with the 911 caller's report about a wanted violent parolee who was potentially armed, and the police officers' observations confirming the vehicle and suspect descriptions from the 911 call, provided the officers with reasonable suspicion to pursue defendant (*see People v Habeeb*, 177 AD3d 1271, 1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *People v Hillard*, 79 AD3d 1757, 1758 [4th Dept 2010], *lv denied* 17 NY3d 796 [2011]; *see generally Moore*, 6 NY3d at 500-501).

We respectfully disagree with our dissenting colleagues that the approaching officer's testimony was unclear whether he observed defendant grabbing his waistband before the officer pursued him and that the People therefore failed to meet their burden of establishing that the pursuit of defendant was justified. In our view, the testimony at the suppression hearing supports the conclusion that defendant fled either before or just as the officer exited his vehicle and that defendant grabbed his waistband at that same moment.

We reject defendant's further contention with respect to appeal No. 1 that he was denied effective assistance of counsel based on defense counsel not challenging the People's failure to produce the alleged arrest warrant at the suppression hearing. Defendant's arrest was not based solely on the alleged outstanding warrant, and thus the People's failure to produce that warrant at the hearing would not require the suppression of evidence arising from defendant's arrest (*cf. People v Dortch*, 186 AD3d 1114, 1114-1116 [4th Dept 2020]; *People v Searight*, 162 AD3d 1633, 1634 [4th Dept 2018]). It thus cannot be said that defendant was denied effective assistance of counsel because defense counsel's failure to raise that argument had little or no chance of success (*see People v Hasan*, 165 AD3d 1606, 1608 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant also contends with respect to appeal No. 1 that Judiciary Law § 21 was violated because the suppression hearing was heard before one Justice (Winslow, J.), who rendered a determination refusing to suppress the evidence at issue, and then a second Judge (Ciaccio, J.) reopened the suppression hearing to allow for further cross-examination of the sole witness at the hearing after the

People's belated disclosure of certain *Rosario* material. We reject that contention. "[W]here a judge or justice replaces another judge or justice in the midst of litigation," the primary question is " 'whether the replacement judge [or justice] will be asked to make factual determinations, as opposed to reaching legal conclusions, and overall fairness' " (*People v Massey*, 173 AD3d 1801, 1804 [4th Dept 2019], quoting *People v Hampton*, 21 NY3d 277, 285 [2013]). Under the circumstances of this case, we conclude that there was no violation of Judiciary Law § 21 (*see Massey*, 173 AD3d at 1804). The Justice who heard the initial hearing issued a determination denying defendant's request for suppression of evidence, and the successor Judge did not issue a decision on a hearing for which he was not present (*cf. People v Cameron*, 194 AD2d 438, 438 [1st Dept 1993]; *Michel v Michel*, 31 AD2d 313, 316 [4th Dept 1969]). The second Judge adopted the first Justice's findings of fact and determined that the additional cross-examination of the witness elicited no new facts that would provide any basis to overturn or call into question the previous denial of defendant's request for suppression.

With respect to both appeals, defendant contends that this Court should find mitigating circumstances to run the sentences concurrently. Pursuant to Penal Law § 70.25 (former [2-b]), the consecutive sentences here were mandatory unless the sentencing court, in the interest of justice, found mitigating circumstances. Defendant, however, never requested that the court find mitigating circumstances to run the sentences concurrently, and thus his contention is not preserved for our review (*see People v Dunbar*, 183 AD3d 1263, 1265 [4th Dept 2020], *lv denied* 35 NY3d 1044 [2020]; *People v Hamlet*, 227 AD2d 203, 204 [1st Dept 1996], *lv denied* 88 NY2d 1021 [1996]). As we held in *Dunbar*, "granting relief on defendant's unpreserved sentencing argument would frustrate the People's statutory right to 'an opportunity to present relevant information to assist the [sentencing] court in making th[e] determination' regarding mitigating circumstances" (183 AD3d at 1265). Simply put, "if the claim is not raised [before the sentencing court], then the sentences must be consecutive" (*Hamlet*, 227 AD2d at 204).

All concur except SMITH, J.P., and LINDLEY, J., who dissent and vote to reverse in accordance with the following memorandum: We agree with the majority that the judgment in appeal No. 2 should be affirmed. In appeal No. 1, however, we respectfully dissent because in our view the People failed to meet their burden of proof at the suppression hearing. More specifically, we conclude that the People failed to establish that the arresting officer's initial pursuit of defendant was lawful, i.e., based on " 'reasonable suspicion that defendant has committed or is about to commit a crime' " (*People v Riddick*, 70 AD3d 1421, 1422 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010]), as Supreme Court determined. We would therefore reverse the judgment, vacate the plea, grant those parts of defendant's omnibus motion seeking suppression of the firearm he discarded while running away from the officer and the statements defendant made to the police subsequent to his arrest, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

The evidence at the hearing established that an informant called 911 in Rochester and said: "My parole officer had wanted me to go over and see if this guy is over there and the guy is over here and he's not answering his phone, and I guess he's wanted. He's a guy with guns and all that." The informant also said that "the guy," who was dark-skinned and wearing a t-shirt and baseball hat, was in the passenger seat of a green Infiniti located on Hixon Street near Thomas Street. When the 911 operator asked whether the person in question "has been known to carry weapons," the informant responded, "I guess so. He told me he was very violent and needed him off the street like immediately. He's wanted. So, I don't even know the guy's name. All I know is that he's a passenger in the car and he's over there right now." The operator asked what the person was wanted for, to which the informant answered, "I don't have the slightest idea. I don't know -- they don't put information out there like that." Upon request of the operator, the informant identified himself by name, although it is unclear from the record whether the name given was the informant's real name, and provided the number from which he was calling. At the conclusion of the call the operator said that she would send an officer to the area.

The information provided by the informant was broadcast over police radio and heard by the arresting officer and his partner, who were on patrol in the general area. Upon arriving at Hixson Street, the officers did not observe a green Infiniti. The arresting officer then used his cell phone to call the informant at the number that he had given to the operator. During the ensuing conversation, the informant told the arresting officer that he was following the Infiniti, which was now near Joseph Place and Joseph Avenue. According to the arresting officer, the informant also said that he was a parolee himself and that he had seen the individual about whom he was calling on a wanted poster at the parole office.

The officers proceeded to Joseph Place where they encountered a green Infiniti traveling in the opposite direction. The arresting officer's partner yelled out of the police vehicle window for the driver of the Infiniti to stop, but the green Infiniti kept going. The officers turned around and pursued the vehicle. After briefly losing sight of the green Infiniti, the officers observed it stopped on the side of Laser Street. A dark-skinned man in a t-shirt and baseball hat, later identified as defendant, was standing outside the vehicle's front passenger door, which was open. The arresting officer exited his patrol vehicle and began walking toward defendant, who fled on foot. The arresting officer gave chase, and during the pursuit defendant, who was grabbing the front of his waistband as he ran, discarded a handgun. Defendant was soon arrested and charged with criminal possession of a weapon in the second degree, among other offenses.

The only witness to testify at the suppression hearing was the arresting officer. The People did not produce a warrant for defendant's arrest at the hearing, and no evidence was offered that defendant was even on parole at the time.

In our view, the information provided by the informant, standing alone, clearly did not provide reasonable suspicion to believe that defendant possessed a weapon or had committed any other crime. Indeed, violating parole, or having a parole warrant, is not a crime. The informant did not say that he saw defendant with a gun, nor did he say that his parole officer saw defendant with a gun. Instead, the informant merely said that his parole officer told him that defendant, whom the informant did not know, was very dangerous and known to carry weapons. Thus, the attempt by the officers to stop the green Infiniti was unlawful inasmuch as a vehicle stop must be supported by reasonable suspicion, which did not exist here. But the vehicle did not stop in response to the officer's request to do so, and thus the issue presented here is whether the arresting officer lawfully pursued defendant after defendant fled on foot.

The People assert that the court properly determined that the pursuit was justified because, in addition to the information provided by the informant, the arresting officer observed defendant grabbing the front of his pants while running away, as if he had a gun in his waistband. Although defendant's act of grabbing his waistband increased the degree of suspicion, perhaps even to the level required for pursuit, the evidence at the suppression hearing does not establish whether the arresting officer observed that conduct *before or after* he gave chase. If the observation was not made until after the officer had already started chasing defendant, the pursuit would be unlawful inasmuch as it would be based entirely only on the informant's hearsay information and defendant's flight, which together do not provide reasonable suspicion to believe that defendant had committed or was about to commit a crime. "Flight alone, . . . or even in conjunction with equivocal circumstances that might justify a police request for information . . . , is insufficient to justify pursuit because an individual has a right 'to be let alone' and refuse to respond to police inquiry" (*People v Holmes*, 81 NY2d 1056, 1058 [1993]; *see People v Jones*, 174 AD3d 1532, 1533 [4th Dept 2019], *lv denied* 34 NY3d 982 [2019]).

The relevant testimony from the arresting officer is as follows:

"Q. When you saw the person out of the vehicle, what did you do?

A. I then exited my patrol car and began to walk toward him.

Q. Now, the person that you saw outside of the green Infiniti, did you see that person get out of the green Infiniti?

A. No, I didn't.

Q. They were standing outside the green Infiniti when you arrived?

A. Yes.

Q. And after you started following that individual, where did

you follow that person to?

A. As soon as I exited my patrol car, the passenger started to run southbound through the back yards.

Q. Did you follow after that person?

A. Yes, I did.

Q. What, if anything, was that person doing while – was that person a male?

A. Yes, it was.

Q. What, if anything, was that person doing while he was running?

A. He was holding his left side of his waistband.

* * *

Q. Can you describe the placement of his hand as he was running?

A. He was holding his left hand in the area of his - - the front of his waistband.

Q. Was he holding it tight to his body, his hand?

A. Yes, it was.

* * *

Q. Once this person was running away from you, did you follow?

A. Yes, I did.

Q. Where did you follow him to?

A. I followed him to the fence that is on the border of 18 Joseph Place.

Q. And what happened once you got to the fence?

A. As he approached the fence, he glanced back at me quickly, and then I observed both of his hands reach up towards the top of the fence, and when he did this, I observed a black object, which I believed to be a handgun, go over the fence."

Based on our reading of the testimony, it is unclear whether, as the suppression court found, the officer observed defendant grabbing his waistband before the officer pursued him. On a motion to suppress evidence, of course, "the People bear the burden of going forward to show the legality of the police conduct in the first instance" (*People v Walls*, 37 NY3d 987, 988 [2021] [internal quotation marks omitted];

see People v Berrios, 28 NY2d 361, 367-368 [1971]). Here, given the ambiguity of the officer's testimony, we do not think that the People met their burden of establishing that the pursuit was justified based on the officer's belief that defendant may have possessed a weapon.

Even assuming, arguendo, that the pursuit was justified because the officer reasonably suspected that defendant had a parole warrant, we are precluded from affirming on that ground because the suppression court did not rely on it to deny defendant's motion (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 196 [2011]; *People v LaFontaine*, 92 NY2d 470, 474 [1998], *rearg denied* 93 NY2d 849 [1999]). Again, the court denied the motion on the ground that the pursuit was justified because the officer reasonably suspected that defendant had committed or was about to commit a crime, presumably criminal possession of a weapon.

Although credibility determinations of the suppression court are generally entitled to great deference (*see People v Daniels*, 147 AD3d 1392, 1392-1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]), the arresting officer's credibility is not at issue here. The question is whether the officer's testimony, accepted as true, established that he had reasonable suspicion to pursue defendant, and we are no less able than the suppression court to make that determination. We therefore conclude that the judgment should be reversed and those parts of the omnibus motion seeking suppression granted.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

395

KA 18-00149

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASMEN T. LEONARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered March 22, 2017. The judgment convicted defendant upon a plea of guilty of attempted 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 Leonard* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

401

CA 21-00718

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

PAUL SHANTZ AND BONNIE SHANTZ, INDIVIDUALLY
AND AS HUSBAND AND WIFE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

BARRY STEEL FABRICATION, INC., UNILAND
CONSTRUCTION COMPANY, CANISIUS COLLEGE AND
UNITED RENTALS, INC.,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

DOLCE FIRM, BUFFALO (SEAN COONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered April 19, 2021. The order and judgment granted in part and denied in part the motion of plaintiffs seeking partial summary judgment and granted in part and denied in part the cross motion of defendants seeking summary judgment dismissing the complaint.

It is hereby ORDERED that the appeal of defendant United Rentals, Inc. is unanimously dismissed and the order and judgment so appealed from is modified on the law by denying that part of plaintiffs' motion seeking summary judgment on the Labor Law § 240 (1) claim and vacating all the language in the first decretal paragraph following the words "as defined by Labor Law § 240 (1)," and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this common-law negligence and Labor Law action against defendants, seeking to recover damages for injuries that Paul Shantz (plaintiff) allegedly sustained while working on a construction project. Plaintiff was injured when a scissors lift, which he was unloading from a truck bed using an inclined ramp, pinned him between the top of the lift and the upper part of the loading dock's door frame. Defendants appeal and plaintiffs cross-appeal from an order and judgment that, inter alia, granted that part of plaintiffs' motion seeking summary judgment on their Labor Law § 240 (1) claim against defendants Barry Steel Fabrication, Inc., Uniland Construction Company and Canisius College,

and granted those parts of defendants' cross motion seeking summary judgment dismissing the Labor Law §§ 200 and 241 (6) claims and the negligence cause of action against all defendants and dismissing the complaint against defendant United Rentals, Inc.

At the outset, we conclude that the appeal of United Rentals, Inc. must be dismissed. Supreme Court granted defendants' motion insofar as it sought summary judgment dismissing all causes of action against that defendant, and it is therefore not aggrieved by the order and judgment (*see generally Matter of Kowal v Bargnesi*, 194 AD3d 1489, 1489 [4th Dept 2021], *lv denied* 36 NY3d 913 [2021]).

The remaining defendants, i.e., Barry Steel Fabrication, Inc., Uniland Construction Company, and Canisius College, contend that the court erred in denying that part of the cross motion seeking dismissal of the Labor Law § 240 (1) claim against them. We reject that contention. In determining whether a plaintiff is entitled to recover under Labor Law § 240 (1), the "inquiry . . . does not depend upon the precise characterization of the device employed or upon whether the injury resulted from a fall, either of the worker or of an object upon the worker. Rather, the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide . . . protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Here, defendants failed to meet their initial burden on their cross motion for summary judgment with respect to the section 240 (1) claim inasmuch as they failed to establish as a matter of law that plaintiff's injuries were not " 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*Horton v Board of Educ. of Campbell-Savona Cent. Sch. Dist.*, 155 AD3d 1541, 1542 [4th Dept 2017]). Contrary to the remaining defendants' further contentions, defendants also failed to establish as a matter of law that no safety device of the kind enumerated in the statute would have prevented the accident under the circumstances (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]), and although the elevation differential was "only one or two feet . . . , in light of the weight of the [scissors lift], as well as the potential harm that it could cause, it cannot be said that the elevation differential was de minimis" (*DiPalma v State of New York*, 90 AD3d 1659, 1660 [4th Dept 2011]).

Nevertheless, we agree with the remaining defendants that plaintiffs are not entitled to "summary judgment on the issue of liability on the Labor Law § 240 (1) [claim] inasmuch as [plaintiffs] submitted evidence raising a triable issue of fact whether plaintiff's conduct[, i.e., his improper operation of the lift,] was the sole proximate cause of the accident" (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]). We therefore modify the order and judgment accordingly.

We reject plaintiffs' contention on their cross appeal that the court erred in granting the part of the cross motion seeking summary judgment dismissing the Labor Law § 241 (6) claim. Contrary to

plaintiffs' contention, "[t]he court properly determined that [one] of the regulations relied upon by plaintiffs, i.e., [12 NYCRR] 23-9.2 (b), [is] not sufficiently specific to support a cause of action under Labor Law § 241 (6)" (*Webber v City of Dunkirk*, 226 AD2d 1050, 1051 [4th Dept 1996]; *see Nicola v United Veterans Mut. Hous. No. 2, Corp.*, 178 AD3d 937, 940 [2d Dept 2019]; *Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520, 521 [1st Dept 2012]). Although 12 NYCRR 23-9.8 (e) is sufficiently specific (*see Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1268 [4th Dept 2019]), even assuming, arguendo, that the regulation applies to scissors lifts based on " 'the manner in which the equipment is used rather than its name or label' " (*St. Louis v Town of N. Elba*, 16 NY3d 411, 415 [2011]), defendants established in support of the cross motion that the accident at issue did not occur as the result of the lift "upsetting" (12 NYCRR 23-9.8 [e]), and thus met their burden on the cross motion of establishing "that the regulation[is] not applicable to the facts of this case" (*Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1348 [4th Dept 2003]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

403

CA 21-00854

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

MAKEYIA HUNT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DOLGENCORP OF NEW YORK, INC., AND
9274 GROUP, INC., DEFENDANTS-RESPONDENTS.

THE TARANTINO LAW FIRM, LLP, BUFFALO (JACOB A. PIORKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (THOMAS J. DEBERNARDIS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered June 2, 2021. The order granted the motion of defendants 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 damages for injuries she sustained when she slipped and fell on a clear liquid while walking down an aisle in a Dollar General Store owned by defendant 9274 Group, Inc., which leased the premises to defendant Dolgencorp of New York, Inc. Following discovery, defendants moved for summary judgment dismissing the complaint, contending, inter alia, that they did not create the dangerous condition that caused plaintiff's accident and lacked actual or constructive notice of it. Supreme Court granted the motion, and plaintiff appeals. We affirm.

The only disputed issue on appeal is whether defendants had constructive notice of the dangerous condition in the store. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, defendants met their initial burden of establishing the lack of constructive notice as a matter of law through the affidavit of the assistant store manager, who stated that she inspected the premises every 30 minutes to check for safety hazards, and that she walked down the aisle in question approximately 15 minutes before plaintiff fell and did not see anything on the floor. The assistant manager offered deposition testimony that is generally consistent with her affidavit. The burden thus shifted to plaintiff

to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and plaintiff failed to meet that burden.

In opposition to the motion, plaintiff relied largely on footage from surveillance cameras inside the store that, according to plaintiff, call into question the assistant manager's assertions that she inspected the area 15 minutes before the accident. Based on our review of the relevant footage, which does not capture the area where plaintiff fell, we conclude that it neither confirms nor refutes the sworn assertions of the assistant manager with respect to her inspection of that area, and that the court therefore properly concluded that plaintiff failed to raise an issue of fact sufficient to defeat defendants' motion for summary judgment.

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

405

CA 21-00235

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

GERALDINE CLARK AND MOSES CLARK,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STEPHAN J. RACHFAL, M.D., DEFENDANT,
JOHN CUCINOTTA, M.D., CROUSE RADIOLOGY
ASSOCIATES, LLP, DEFENDANTS-APPELLANTS,
CROUSE HOSPITAL EMERGENCY MEDICINE DEPARTMENT,
CROUSE HEALTH HOSPITAL, INC. AND KRISTA J.
KANDEL, M.D., DEFENDANTS-RESPONDENTS.

ROBERT E. LAHM & ASSOCIATES, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GALE, GALE & HUNT, LLC, FAYETTEVILLE (MINLA KIM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CROUSE HOSPITAL EMERGENCY MEDICINE DEPARTMENT AND CROUSE HEALTH HOSPITAL, INC.

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

Appeals from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered February 2, 2021. The order denied the motion of defendants John Cucinotta, M.D., and Crouse Radiology Associates, L.L.P. for summary judgment and granted the motions of defendant Krista J. Kandel, M.D. and defendants Crouse Hospital Emergency Medicine Department and Crouse Health Hospital, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motions of defendant Krista J. Kandel, M.D. and defendants Crouse Health Hospital, Inc. and Crouse Hospital Emergency Medicine Department and reinstating the complaints against those defendants, and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice action, plaintiffs and defendants John Cucinotta, M.D. and Crouse Radiology Associates, LLP (radiology defendants) appeal from an order that, inter alia, granted the motions of defendants Krista J. Kandel, M.D., Crouse Health

Hospital, Inc. and Crouse Hospital Emergency Medicine Department (hospital defendants) seeking summary judgment dismissing the complaints against them, and denied the radiology defendants' motion for summary judgment dismissing the complaint against them.

On October 27, 2017, Geraldine Clark (plaintiff) woke at 3 a.m. with symptoms including seeing flashing lights and having difficulty thinking and speaking. When those symptoms continued into the afternoon, she traveled to Crouse Hospital Emergency Medicine Department, where she was admitted shortly after 4 p.m. Although plaintiff was no longer experiencing symptoms of stroke and was assessed a "0" on the stroke scale by defendant Stephan J. Rachfal, M.D., her admitting doctor, Dr. Rachfal nevertheless ordered that she undergo several scans, and at 8:32 p.m. a brain MRI was administered. At 11 p.m., although the MRI had not yet been reviewed, Dr. Kandel discharged plaintiff from the hospital. Dr. Cucinotta, a general radiologist, performed a preliminary review of plaintiff's brain MRI later that evening and found no evidence of stroke. However, when a neuroradiologist performed a final review of the brain MRI the following morning, he found an acute infarct, i.e., a stroke. Plaintiff returned to the hospital the morning of October 28 exhibiting new symptoms including facial droop and weakness in her extremities.

Plaintiffs commenced this action seeking damages for injuries that plaintiff allegedly sustained as a result of Dr. Kandel's and Dr. Cucinotta's negligence in failing to diagnose and treat a stroke that plaintiff suffered while under their care, and alleged that the other defendants are vicariously liable for that negligence.

We agree with plaintiffs on their appeal that the court erred in granting the hospital defendants' motions, and we therefore modify the order accordingly. On a motion seeking summary judgment dismissing a medical malpractice cause of action, " 'a defendant has the burden of establishing, prima facie, that he or she did not deviate from [the] good and accepted standard[] of . . . care, or that any such deviation was not a proximate cause of the plaintiff's injuries' " (*Culver v Simko*, 170 AD3d 1599, 1600 [4th Dept 2019]; *see Kubera v Bartholomew*, 167 AD3d 1477, 1479 [4th Dept 2018]). Once such 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 met the prima facie burden" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; *see Bristol v Bunn*, 189 AD3d 2114, 2116 [4th Dept 2020]).

We conclude that the hospital defendants met their initial burden on their motions with respect to both deviation and causation by submitting evidence establishing that Dr. Kandel did not "deviate or depart from the applicable standard of care and that any alleged departure did not cause any injury to plaintiff" (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]).

We agree with plaintiffs, however, that, by submitting the

affidavit of their expert, they raised an issue of fact on the issue whether Dr. Kandel deviated from the standard of care (*see generally Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Dr. Kandel permitted plaintiff to leave the hospital before her brain MRI had undergone a final review by a neuroradiologist. Plaintiffs' expert opined that discharging plaintiff before a final review of the scans was complete constituted a deviation from the standard of care in light of plaintiff's medical history, which indicated a significant stroke risk.

We further conclude that plaintiffs raised a question of fact with respect to causation in opposition to the motions of the hospital defendants. The hospital defendants relied upon the affirmation of Dr. Kandel's medical expert, who opined that any alleged negligence is not the proximate cause of plaintiff's injuries inasmuch as plaintiff suffered a stroke at or before 3 a.m. on October 27, and that the window in which to administer tPA, an anti-clot medication, had closed long before plaintiff arrived at the hospital for treatment approximately 13 hours later. In opposition, plaintiffs submitted an expert affidavit asserting, inter alia, that the symptoms plaintiff experienced on the morning of October 27 were the result of a transient ischemic attack (TIA), which results in temporary stroke-like symptoms but does not result in a blockage, and that she did not experience the actual blockage until sometime later in the day, around the time of her brain MRI. Plaintiffs' expert further opined that, had plaintiff stayed at the hospital overnight and had the MRI been read correctly, tPA could have been administered when plaintiff's new symptoms presented. We therefore conclude that the conflicting expert opinions present issues of fact whether the hospital defendants' actions led to plaintiff's injuries (*see generally Hatch v St. Joseph's Hosp. Health Ctr.*, 174 AD3d 1404, 1406 [4th Dept 2019]).

For the same reasons, we agree with the radiology defendants that they met their initial burden on their motion with respect to causation (*see generally Occhino*, 151 AD3d at 1871), but conclude that the affirmation of plaintiffs' expert raised a triable issue of fact in opposition (*see generally Mason*, 159 AD3d at 1439), and we therefore reject the radiology defendants' contention on their appeal that the court erred in denying their motion. We note that, assuming, arguendo, that the radiology defendants met their initial burden with respect to deviation from the standard of care, they do not challenge the court's determination that plaintiffs raised a triable issue of fact with respect to deviation and thus have abandoned any contention with respect thereto (*see Ciesinksi v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to defendants' contentions, this is not a case in which plaintiffs' expert "misstate[d] the facts in the record," nor is the affidavit " 'vague, conclusory, speculative, [or] unsupported by the medical evidence in the record' " (*Occhino*, 151 AD3d at 1871; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). The record establishes that plaintiff's symptoms did appear to resolve between the time that she traveled to the hospital and the time that she was admitted as a patient, and the radiology defendants submitted

the deposition testimony of a physician who stated that the resolution of plaintiff's symptoms was consistent with a TIA, and may be a warning sign of an upcoming stroke. Instead, this presents a "a classic battle of the experts that is properly left to a jury for resolution" (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018] [internal quotation marks omitted]; *see Mason*, 159 AD3d at 1439).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

409

CA 21-01301

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

IN THE MATTER OF JUN WANG, M.D.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

LETITIA JAMES, ATTORNEY GENERAL OF THE
STATE OF NEW YORK, RESPONDENT-RESPONDENT.

GALE, GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 11, 2021 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: This CPLR article 78 proceeding arises out of a medical malpractice action. Petitioner is a pathologist who is purported to have rendered a misdiagnosis upon reviewing a biopsy sample taken from an inmate in the custody of the Department of Corrections and Community Supervision (DOCCS). DOCCS had initially referred the inmate to a general surgeon who provided medical services to inmates of the prison where the inmate was incarcerated, pursuant to a contract with DOCCS. The general surgeon performed a biopsy on the inmate at Cortland Regional Medical Center (CRMC), and the biopsy sample was sent to petitioner's pathology laboratory services practice group for analysis.

After the inmate was subsequently diagnosed with Hodgkin's lymphoma, the inmate commenced an action against, inter alia, CRMC and the general surgeon, seeking damages for injuries caused by their failure to timely diagnose his cancer. In turn, CRMC commenced a third-party action against petitioner and his practice group, seeking indemnification and contribution. Thereafter, petitioner informed respondent of the third-party action, and sought defense and indemnification pursuant to Public Officers Law § 17 and Correction Law § 24-a. Respondent denied petitioner's application, concluding, inter alia, that DOCCS had not directly requested that petitioner

undertake services to treat the inmate, and therefore the protections afforded under Public Officers Law § 17 and Correction Law § 24-a did not apply. Petitioner commenced this proceeding, seeking, inter alia, to annul pursuant to CPLR 7803 (3) respondent's determination that he was not entitled to defense and indemnification under Public Officers Law § 17 and Correction Law § 24-a. Petitioner appeals from a judgment denying the petition. We affirm.

"[J]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis" (*Matter of Green Thumb Lawn Care, Inc. v Iwanowicz*, 107 AD3d 1402, 1403 [4th Dept 2013], *lv denied* 22 NY3d 866 [2014]; *see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]), and such a determination is entitled to great deference (*see Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059 [4th Dept 2005], *lv denied* 5 NY3d 713 [2005]). A determination is arbitrary and capricious when it is made " 'without sound basis in reason or regard to the facts' " (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014], quoting *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). A court "must sustain the determination even if the court concludes that it would have reached a different result," so long as "the determination is supported by a rational basis" (*Peckham*, 12 NY3d at 431).

Public Officers Law § 17 (2) (a) and (3) (a) provide that the state shall defend and indemnify an "employee" in a civil action arising out of any alleged act or omission that occurred while the employee was acting within the scope of his or her public employment or duties (*see also Matter of LoRusso v New York State Off. of Ct. Admin.*, 229 AD2d 995, 995-996 [4th Dept 1996]). As relevant here, Correction Law § 24-a applies Public Officers Law § 17 "to any person holding a license to practice a [specified] profession . . . , who is rendering or has rendered professional services authorized under such license while acting at the request of [DOCCS] or a facility of [DOCCS] in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities, . . . without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility."

Here, there is no dispute that petitioner's licensed profession is covered by Correction Law § 24-a. Rather, respondent's determination denying defense and indemnification to petitioner hinged on respondent's conclusion that petitioner did not "render[ ] professional services . . . while acting at the *request of* [*DOCCS*]" (Correction Law § 24-a [emphasis added]). We conclude that respondent's determination that Correction Law § 24-a does not apply to petitioner is entitled to judicial deference because the relevant "question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [internal quotation marks omitted]). Specifically, respondent's determination

that Correction Law § 24-a applies only where DOCCS has expressly requested the services of a particular health care provider "is a reasonable one" that "courts should not second-guess" (*O'Brien*, 7 NY3d at 242). Here, there is no evidence in the record supporting the conclusion that DOCCS ever expressly requested that petitioner perform pathology services on the biopsy sample (*see generally id.* at 243). Instead, petitioner's pathology services here were retained by CRMC, without any input from DOCCS. We reject petitioner's contention that the language in Correction Law § 24-a requiring that the professional services be rendered "at the request of [DOCCS]" in order to entitle the service provider to defense and indemnification also applies where DOCCS has impliedly requested a particular health care service.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

423

CA 21-01447

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

SHIRLEY VANLOAN, PLAINTIFF-RESPONDENT,

V ORDER

CARRIESUE ROSIE ROE, DAVID PAUL JACKSON,
VW CREDIT LEASING, LTD., DEFENDANTS,
AND COLLEEN ANN BOHEN, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (EMILY M. COBB OF COUNSEL), FOR DEFENDANT-APPELLANT AND DEFENDANT VW CREDIT LEASING, LTD.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (WILLIAM P. MOORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF ROTHENBERG & BURNS, GARDEN CITY (MITCHELL E. PAK OF COUNSEL), FOR DEFENDANTS CARRIESUE ROSIE ROE AND DAVID PAUL JACKSON.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 1, 2021. The order denied the motion of defendants Colleen Ann Bohen and VW Credit Leasing, Ltd., insofar as it sought summary judgment dismissing the complaint and all cross claims against defendant Colleen Ann Bohen.

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

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

426

TP 21-01573

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

IN THE MATTER OF VANESSA VEGA, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

JAMES S. HINMAN, ROCHESTER, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Daniel J. Doyle, J.], entered October 5, 2021) to review a determination of respondent. The determination denied petitioner's application to amend the indicated report of maltreatment with respect to her daughter to an unfounded report.

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 to review a determination, made after a fair hearing, denying her request to amend an indicated report of maltreatment with respect to her daughter to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [c] [ii]). "At an administrative expungement hearing, a report of child . . . maltreatment must be established by a fair preponderance of the evidence" (*Matter of Reynolds v New York State Off. of Children & Family Servs.*, 101 AD3d 1738, 1738 [4th Dept 2012] [internal quotation marks omitted]), and "[o]ur review . . . is limited to whether the determination was supported by substantial evidence in the record on the petitioner[']s] application for expungement" (*Matter of Mangus v Niagara County Dept. of Social Servs.*, 68 AD3d 1774, 1774 [4th Dept 2009], *lv denied* 15 NY3d 705 [2010] [internal quotation marks omitted]). Here, testimony from a Monroe County Child Protective Services caseworker established that petitioner coached the child to fabricate allegations of abuse against the child's father and his girlfriend, thereby causing the child to be subjected to unnecessary professional examinations and interviews and harming the child's physical, mental, or emotional well-being. We thus conclude that, on the record before us, substantial evidence supports the determination of the Administrative Law Judge (ALJ) that

it was established by a preponderance of the evidence that petitioner maltreated the child (*see Matter of Kern v New York State Cent. Register of Child Abuse & Maltreatment*, 174 AD3d 1434, 1435 [4th Dept 2019], *lv denied* 34 NY3d 906 [2019]; *Matter of Daniel D.*, 57 AD3d 444, 444 [1st Dept 2008], *lv dismissed* 12 NY3d 906 [2009]).

Moreover, the evidence at the hearing established that petitioner failed to acknowledge that her behavior was harmful to the child and failed to appreciate the seriousness of her conduct, and we therefore conclude that substantial evidence supports the ALJ's determination that petitioner's maltreatment of the subject child was likely to recur (*see Matter of Warren v New York State Cent. Register of Child Abuse & Maltreatment*, 164 AD3d 1615, 1617 [4th Dept 2018]) and was reasonably related to her employment working with children with disabilities (*see id.*; *Matter of Garzon v New York State Off. of Children & Family Servs.*, 85 AD3d 1603, 1604 [4th Dept 2011]; *Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, 1062 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]).

Finally, we reject petitioner's contentions that she was deprived of a fair hearing when the ALJ denied her request for an adjournment after the hearing was underway (*see Matter of Frederick G. v New York State Cent. Register of Child Abuse & Maltreatment*, 53 AD3d 1075, 1076 [4th Dept 2008]) and that the ALJ demonstrated bias and hostility (*see Matter of Sherwood v New York State Dept. of Motor Vehs.*, 153 AD3d 1022, 1025 [3d Dept 2017]; *Matter of Maglione v New York State Dept. of Health*, 9 AD3d 522, 523 [3d Dept 2004]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

442

CA 21-00569

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

RYAN WEAVER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DERONDE TIRE SUPPLY, INC., DERONDE CASINGS, LTD., DERONDE TIRE COMPANY, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (JAMES M. SPECYAL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 14, 2021. The order, insofar as appealed from, denied the motion of defendants DeRonde Tire Supply, Inc., DeRonde Casings, Ltd., and DeRonde Tire Company for summary judgment.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for personal injuries he sustained while unloading tires from a truck in the course of his employment. Defendants DeRonde Tire Supply, Inc., DeRonde Casings, Ltd., and DeRonde Tire Company (collectively, defendants) appeal from that part of an order that denied their motion for summary judgment dismissing the complaint against them.

Contrary to defendants' contention, we conclude that, although defendants met their initial burden on their motion by submitting evidence establishing as a matter of law that they were not negligent (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), plaintiff raised a triable issue of fact in opposition in that regard (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to plaintiff's opposition papers, defendants contend that Supreme Court erred in considering, inter alia, the affidavit and amended affidavit of a nonparty witness because, among other things, plaintiff's responding papers were untimely, and plaintiff failed to disclose the identity of the nonparty witness in question during the discovery process. Defendants failed to preserve for our review the latter contention, which is actually a contention that the court should have sanctioned plaintiff for a discovery violation by refusing to consider the affidavit and amended affidavit, inasmuch as a

"request for the imposition of a penalty pursuant to CPLR 3126 is improperly made for the first time on appeal" (*Rivera v City of New York*, 90 AD3d 735, 736 [2d Dept 2009]; *see Matter of Rulinsky v West*, 107 AD3d 1507, 1510 [4th Dept 2013]; *see also McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865 [4th Dept 1997], *lv denied* 89 NY2d 817 [1997]). Furthermore, contrary to defendants' contention, the court did not abuse its discretion in considering plaintiff's responding papers despite the minimal delay in submitting them, inasmuch as courts have the "discretion to overlook late service where[, as here,] the [ ]moving party sustains no prejudice" (*Matter of Jordan v City of New York*, 38 AD3d 336, 338 [1st Dept 2007]; *see* CPLR 2004, 2214 [c]; *Bucklaew v Walters*, 75 AD3d 1140, 1141 [4th Dept 2010]). We have reviewed defendants' remaining contentions concerning plaintiff's submissions, and we conclude that those contentions lack merit.

Contrary to defendants' final contention, they failed to establish as a matter of law that the acts of one of plaintiff's coworkers constituted an intervening, superseding cause of plaintiff's injuries that relieved defendants of liability (*see Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1267 [4th Dept 2019]; *see generally Hain v Jamison*, 28 NY3d 524, 529 [2016]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

443

CA 21-00351

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

JANET STEPANIAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BED, BATH, & BEYOND, INC., DOING BUSINESS AS
BED, BATH, & BEYOND, ET AL., DEFENDANTS,
UNION CONSUMER IMPROVEMENTS, LLC, AND
DLC MANAGEMENT CORPORATION,
DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. KRUPPA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered February 25, 2021. The order granted the motion of plaintiff for leave to amend her complaint to add as defendants Union Consumer Improvements, LLC and DLC Management Corporation.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for personal injuries she allegedly sustained when she tripped and fell while attempting to enter a store located in a shopping plaza. Plaintiff originally named in the complaint the following defendants: Bed, Bath, & Beyond, Inc., doing business as Bed, Bath, & Beyond (BBB), the owner and operator of the store; DDR MDT Union Consumer Square, LLC (Square), the alleged owner of the plaza; and DLC Management Group, Inc. (Group), the alleged property manager of the plaza. After expiration of the statute of limitations applicable to an action to recover damages for personal injuries (*see* CPLR 214 [5]), plaintiff moved for leave to amend the complaint to add as defendants Union Consumer Improvements, LLC (Improvements) and DLC Management Corporation (Corporation) (collectively, appellants), entities that may have been the actual owners/operators of the plaza, on the ground that her claims against appellants related back to her claims against the originally named defendants. Supreme Court granted the motion and, inter alia, ordered that appellants had the right to later challenge the amendment of the complaint following the completion of discovery. Appellants appeal, and we now reverse.

We agree with appellants that the court erred in granting the motion because plaintiff failed to meet her burden of establishing the applicability of the relation back doctrine (*see Johanson v County of Erie*, 134 AD3d 1530, 1530-1531 [4th Dept 2015]; *see generally Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193 [4th Dept 2013]). In order for the relation back doctrine to apply, a plaintiff must establish that "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant[s], and by reason of that relationship can be charged with such notice of the institution of the action that [it] will not be prejudiced in maintaining [its] defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against [it] as well" (*Buran v Coupal*, 87 NY2d 173, 178 [1995] [internal quotation marks omitted]; *see* CPLR 203 [b]; *Johanson*, 134 AD3d at 1531). Only the second prong is in dispute here. "In [the] context [of this case], unity of interest means that the interest of the parties in the [subject matter] is such that they stand or fall together and that judgment against one will similarly affect the other . . . Although the parties might share a multitude of commonalities, . . . the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand . . . Indeed, unless the original defendant[s] and new [defendants] are vicariously liable for the acts of the other[,] . . . there is no unity of interest between them" (*Johanson*, 134 AD3d at 1531 [internal quotation marks omitted]; *see Verizon N.Y., Inc. v LaBarge Bros. Co., Inc.*, 81 AD3d 1294, 1296 [4th Dept 2011]).

Here, we agree with appellants that, contrary to the assertion in plaintiff's motion papers, the relation back doctrine does not apply as between Corporation and Group. "[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a *codefendant* for [s]tatute of [l]imitations purposes where the *two defendants* are united in interest" (*Moran v JRM Contr., Inc.*, 145 AD3d 1584, 1585 [4th Dept 2016] [emphasis added and internal quotation marks omitted]). Group, however, "was not a codefendant" when plaintiff moved for leave to amend the complaint because the court had already granted Group's motion for summary judgment seeking dismissal of the complaint against it on the ground that it was a similarly named, but unrelated entity mistakenly sued by plaintiff that conducted a different business in a different state and never had any relationship to the subject plaza (*id.* at 1586).

We also agree with appellants that, contrary to the assertion in plaintiff's motion papers, there is no unity of interest between Improvements and BBB. " '[U]nity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other,' " and a "landlord and tenant" relationship alone, without more, is insufficient to establish such unity of interest (*Regina v Broadway-Bronx Motel Co.*, 23 AD3d 255, 255 [1st Dept 2005]; *see Harris v City of New York*, 122 AD3d 906, 908 [2d Dept 2014]).

As appellants correctly contend, plaintiff also failed to meet her burden of establishing that appellants were united in interest with Square. The record, including plaintiff's own submissions, indicates that appellants and Square are " 'separate and distinct business entities which have no jural relationship' " (*Quine v Burkhard Bros.*, 167 AD2d 683, 684 [3d Dept 1990]), and plaintiff "failed to come forward with evidence that there is any type of interrelationship between them that would give rise to vicarious liability and entitle [her] to rely upon the relation back doctrine" (*Stokes v Komatsu Am. Corp.*, 117 AD3d 1152, 1155 [3d Dept 2014]; *see Zehnick v Meadowbrook II Assoc.*, 20 AD3d 793, 797 [3d Dept 2005], *lv dismissed in part and denied in part* 5 NY3d 873 [2005]). Contrary to the assertion in plaintiff's motion papers, even if appellants and Square had the same insurance carrier, that commonality is insufficient given that the unity of interest prong "will not be satisfied unless the parties share precisely the same jural relationship in the action at hand," which plaintiff failed to establish here (*Zehnick*, 20 AD3d at 796). Moreover, parties are not united in interest if "there is a possibility that the new party could have a different defense than the original party" (*Montalvo v Madjek, Inc.*, 131 AD3d 678, 680 [2d Dept 2015]), or if "one can avoid liability by placing blame on the other" (*Zehnick*, 20 AD3d at 797). Here, the interests of appellants and Square in this litigation are "not identical" inasmuch as Square, which had transferred ownership of the plaza to another entity before appellants' purchase thereof, could assert a defense blaming appellants on the ground that they, not Square, "own[] the property which is alleged to have been negligently maintained" (*id.*; *see Gerol v G & H Energy Maintenance Co.*, 239 AD2d 387, 387-388 [2d Dept 1997]).

Finally, we reject plaintiff's contention that the court properly granted the motion while preserving appellants' right to later challenge the amendment of the complaint following the completion of discovery. While plaintiff asserted that there are other ostensible bases upon which to determine that appellants and Square are united in interest, we conclude that plaintiff's "suspicions and conjecture as to the relationship between [appellants] and [Square] find no support in the record" (*Regina*, 23 AD3d at 255). Indeed, plaintiff's own submissions largely rebut her speculative assertions about the purported relationship between appellants and Square. Relatedly, even if incomplete discovery generally weighs in favor of allowing a plaintiff to amend the complaint (*see Weik v LSG Sky Chefs N. Am. Solutions, Inc.*, 190 AD3d 662, 664 [1st Dept 2021]), we further conclude that, here, none of the allegations or evidence warrant that relief (*see generally Regina*, 23 AD3d at 255).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

451

KA 21-00098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY SLAUGHTER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CHRISTINE M. COOK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 19, 2018. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree, sexual abuse in the second degree (three counts), forcible touching and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, one count each of sexual abuse in the first degree (Penal Law § 130.65 [2]) and forcible touching (§ 130.52 [1]), and three counts of sexual abuse in the second degree (§ 130.60 [2]). Defendant's conviction stems from his conduct toward two victims.

We reject defendant's contention that County Court erred in allowing expert testimony concerning child sexual abuse accommodation syndrome (CSAAS). Such testimony is admissible "for the purpose of explaining behavior that might be puzzling to a jury" (*People v Spicola*, 16 NY3d 441, 465 [2011], *cert denied* 565 US 942 [2011]; *see People v Nicholson*, 26 NY3d 813, 828 [2016]). The expert's testimony "educates the jury on a scientifically-recognized 'pattern of secrecy, helplessness, entrapment [and] accommodation' " experienced by child victims (*Nicholson*, 26 NY3d at 828). The testimony must be "general in nature and . . . not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Drake*, 138 AD3d 1396, 1398 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see People v Diaz*, 20 NY3d 569, 575-576 [2013]; *People v Williams*, 20 NY3d 579, 584 [2013]), and we conclude that the expert here testified within those parameters. Although the expert also testified briefly regarding the general behavior of

perpetrators, the court ultimately sustained defense counsel's objection thereto and granted defendant's request for a limiting instruction (*cf. People v Ruiz*, 159 AD3d 1375, 1376-1377 [4th Dept 2018]). Defendant's contention that the court should have struck that testimony is not preserved for our review inasmuch as defendant never asked for that relief (*see generally People v Wright*, 38 AD3d 1232, 1233 [4th Dept 2007], *lv denied* 9 NY3d 853 [2007], *reconsideration denied* 9 NY3d 884 [2007]). Contrary to defendant's further contention, the record here does not support that CSAAS is no longer generally accepted in the scientific community (*see People v Austen*, 197 AD3d 861, 862 [4th Dept 2021], *lv denied* 37 NY3d 1095 [2021]).

Defendant contends that the counts involving the first victim should have been severed for trial from the counts involving the second victim to avoid the danger that the jury would convict him based on propensity evidence. We conclude that the court did not abuse its discretion in denying that part of defendant's motion seeking to sever the counts. Defendant correctly conceded that the counts are joinable because they "are defined by the same or similar statutory provisions and consequently are the same or similar in law" (CPL 200.20 [2] [c]), and we conclude that he failed to show good cause for a discretionary severance under CPL 200.20 (3) (*see People v Keegan*, 133 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]; *People v Rios*, 107 AD3d 1379, 1380-1381 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *see generally People v Mahboubian*, 74 NY2d 174, 183 [1989]). The counts "were not so numerous as to tempt the jury to view the evidence cumulatively and to convict defendant based on a perception that he was prone to commit the sort of offenses charged in the indictment" (*People v Streitferdt*, 169 AD2d 171, 176 [1st Dept 1991], *lv denied* 78 NY2d 1015 [1991]).

We reject defendant's contention that the verdict is against the weight of the evidence. " 'Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor' " (*People v Barnes*, 158 AD3d 1072, 1073 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Contrary to defendant's contention, while there were some inconsistencies in the testimony of the victims, their testimony was not incredible as a matter of law (*see People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]; *People v Johnson*, 153 AD3d 1606, 1607 [4th Dept 2017], *lv denied* 30 NY3d 1020 [2017]). 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 conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

455

CA 21-01371

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

FAWZI ABDELHAY AND WARDA ABDELHAY,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

1105 GROUP PROPERTY MANAGEMENT, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (MARC H. GOLDBERG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. KRUPPA OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered September 20, 2021. The order denied the motion of plaintiffs for partial summary judgment and denied in part the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs appeal and defendant cross-appeals from an order that, inter alia, denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240 (1) and the derivative causes of action and denied that part of defendant's motion for summary judgment dismissing the complaint with respect to the Labor Law § 240 (1) cause of action. We affirm.

Fawzi Abdelhay (plaintiff) sustained injuries while performing electrical work on a construction project on defendant's property. Plaintiff's injuries occurred when he fell off of an A-frame ladder after he rested his foot on a shelf in order to reach tape being passed to him through an electrical conduit and the shelf collapsed. Labor Law § 240 (1) provides in relevant part that contractors and owners in the "erection, demolition, repairing, [or] altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected . . . ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed." " 'Labor Law § 240 (1) was designed to prevent those types of accidents in which the . . . ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an

object or person' " (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). The purpose of that section is to protect workers by placing the ultimate responsibility for safety practices on the owner and general contractor, instead of on the workers (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], *rearg denied* 65 NY2d 1054 [1985]). Thus, section 240 (1) imposes absolute liability on owners for any breach of the statutory duty that proximately causes injury (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]).

We reject plaintiffs' contention on their appeal that Supreme Court erred in denying their motion with respect to liability on the Labor Law § 240 (1) cause of action. To be entitled to summary judgment on a Labor Law § 240 (1) cause of action, a plaintiff must establish " 'a statutory violation and proximate cause' " (*Weitzel v State of New York*, 160 AD3d 1394, 1394 [4th Dept 2018]). If the plaintiff meets that burden, "[t]he defendant may . . . defeat [a plaintiff's] entitlement to summary judgment by raising an issue of fact whether the [plaintiff's] own conduct was the sole proximate cause of the accident" (*id.* at 1394-1395). Here, although plaintiffs met their initial burden (*see generally Lorenti v Stickl Constr. Co., Inc.*, 78 AD3d 1598, 1599 [4th Dept 2010]; *Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]; *Williams v City of Niagara Falls*, 43 AD3d 1426, 1427 [4th Dept 2007]), defendant raised an issue of fact whether plaintiff was the sole proximate cause of his injuries and in particular whether an adequate safety device, i.e., an extension ladder, was "readily available at the work site and whether plaintiff knew that he was expected to use [the extension ladder] but for no good reason chose not to do so" (*Banks v LPCiminelli, Inc.*, 125 AD3d 1334, 1334-1335 [4th Dept 2015]).

We also reject defendant's contention on its cross appeal that the court erred in denying its motion with respect to the Labor Law § 240 (1) cause of action inasmuch as defendant's own submissions raised a triable issue of fact whether plaintiff was the sole proximate cause of the accident (*see generally Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1402-1403 [4th Dept 2015]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

457

CA 21-00967

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

TIMOTHY D. GAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARIA GAY, DEFENDANT-RESPONDENT.

LISA S. CUOMO, PLLC, SYRACUSE (LISA S. CUOMO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered June 10, 2021. The order determined the distribution of plaintiff's pension.

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: In this postjudgment matrimonial proceeding, plaintiff appeals from a qualified domestic relations order (QDRO) that directed the New York State and Local Police and Fire Retirement System (PFRS) to pay defendant her marital share of plaintiff's pension pursuant to the *Majauskas* formula. Preliminarily, we note that "no appeal lies as of right from a QDRO" where, as here, that order implements the terms of a judgment of divorce (*Irato v Irato*, 288 AD2d 952, 952 [4th Dept 2001]; *see Econopouly v Econopouly*, 167 AD3d 1378, 1378 n [3d Dept 2018]; *Gormley v Gormley*, 238 AD2d 545, 546 [2d Dept 1997]; *cf. Shaw v Shaw*, 15 AD3d 1007, 1008 [4th Dept 2005]). Nevertheless, plaintiff "raised timely objections prior to the entry of the QDRO and thereby preserved a record for our review" (*Irato*, 288 AD2d at 952), and we therefore treat the notice of appeal as an application for leave to appeal and grant the application (*see Mancuso v Graham*, 173 AD3d 1808, 1808 [4th Dept 2019]; *Piskorz v Piskorz*, 81 AD3d 1354, 1354 [4th Dept 2011]).

Plaintiff contends that Supreme Court erred by deviating from the terms of the parties' oral stipulation, which was incorporated but not merged into the judgment of divorce, because the stipulation provided that the numerator of the *Majauskas* formula would be 253 months for plaintiff's police service during the marriage, but the court nonetheless added 36 months attributable to plaintiff's purchase of three additional years of credit for military service. We agree.

A stipulation of settlement that is incorporated but not merged into a judgment of divorce "is a contract subject to the principles of contract construction and interpretation" (*Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990], *rearg denied* 76 NY2d 889 [1990]; *see McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *Reber v Reber*, 173 AD3d 1651, 1652 [4th Dept 2019]). Where such an agreement is clear and unambiguous, the intent of the parties must be gleaned from the language used in the stipulation of settlement and not from extrinsic evidence (*see Meccico*, 76 NY2d at 824; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), and the agreement in that instance " 'must be enforced according to the plain meaning of its terms' " (*Anderson v Anderson*, 120 AD3d 1559, 1560 [4th Dept 2014], *lv denied* 24 NY3d 913 [2015], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see Roche v Lorenzo-Roche*, 149 AD3d 1513, 1513-1514 [4th Dept 2017]). "A proper QDRO obtained pursuant to a stipulation of settlement can convey only those rights to which the parties stipulated as a basis for the judgment" (*McCoy*, 99 NY2d at 304). "An alternative result would undermine litigants' freedom of contract by allowing QDROs to create new rights—or litigants to generate new claims—unexpressed in the settlement stipulation" (*id.*). Thus, "a court cannot issue a QDRO encompassing rights not provided in the underlying stipulation . . . , or one that is more expansive than the stipulation" (*Kraus v Kraus*, 131 AD3d 94, 100-101 [2d Dept 2015] [internal quotation marks omitted]; *see McCoy*, 99 NY2d at 304).

Here, as plaintiff contends and contrary to defendant's contention, we conclude that the stipulation unambiguously contemplates including no more than plaintiff's police service credit during the marriage as the numerator of the *Majauskas* formula and does not contemplate the inclusion of any additional service credits (*see generally Smith v Smith*, 59 AD3d 905, 905-907 [3d Dept 2009]). The stipulation clearly refers to the numerator as consisting exclusively of plaintiff's 21 years and 1 month of *police* service, i.e., the period of such employment from the beginning of the marriage to the commencement of the divorce action. Given that limitation, the language in the stipulation contemplating a "double-check" following the expression of belief that such period of service equated to 253 months is reasonably interpreted as simply indicating the need to confirm an accurate calculation of the precise number of months of plaintiff's police service during the marriage. Critically, despite the fact that the parties were fully aware that plaintiff had previously purchased additional years of credit for military service, there is no mention at the time of the stipulation of any attempt to include that credit in the numerator. Indeed, defendant's attorney did not dispute at the time of the stipulation the representation of plaintiff's attorney that the numerator, which was based on plaintiff's police service during the marriage, amounted to 253 months.

Based on the foregoing, we conclude that the court erred in deviating from the parties' stipulation (*see Irato*, 288 AD2d at 952-953). We therefore reverse the QDRO and remit the matter to Supreme Court for issuance of an amended QDRO in accordance with our decision

herein.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

465

KA 17-01364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAREEM J. SINGLETARY, DEFENDANT-APPELLANT.

JILL PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (GABRIELA E. WOLFE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 16, 2017. 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: On appeal 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]), defendant contends that his waiver of the right to appeal is invalid and does not foreclose his challenge to the severity of the negotiated sentence. The People correctly concede that the waiver of the right to appeal is invalid because Supreme Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of the waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v McMillian*, 185 AD3d 1420, 1421 [4th Dept 2020], *lv denied* 35 NY3d 1096 [2020]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

466

KA 20-01677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. TISDALE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered October 29, 2020. The judgment convicted defendant upon his plea of guilty of 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 one count of aggravated family offense (Penal Law § 240.75 [1]), defendant contends that his guilty plea was not knowingly, voluntarily, and intelligently entered. Initially, as defendant asserts and the People correctly concede, that contention survives defendant's waiver of the right to appeal (*see People v Stafford*, 195 AD3d 1466, 1466 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]). However, it is unpreserved for our review inasmuch as defendant did not move to withdraw his guilty plea or vacate the judgment of conviction (*see generally People v Bush*, 38 NY3d 66, 70 [2022]; *People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *People v Jones*, 118 AD3d 1354, 1354 [4th Dept 2014], *lv denied* 24 NY3d 961 [2014]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Finally, defendant's further contention that the indictment was duplicitous and multiplicitous was forfeited by defendant's guilty plea and, in any event, the waiver of the right to appeal encompasses that contention (*see People v Jackson*, 129 AD3d 1342, 1342-1343 [3d Dept 2015]; *People v Slingerland*, 101 AD3d 1265, 1266 [3d Dept 2012], *lv denied* 20 NY3d 1104 [2013]; *People v Nichols*, 32 AD3d 1316, 1317 [4th Dept 2006], *lv denied* 8 NY3d 848 [2007], *reconsideration denied* 8 NY3d 988 [2007]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

470

KA 17-01054

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT D. BASEDOW, DEFENDANT-APPELLANT.

ROBERT GALLAMORE, OSWEGO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered April 17, 2017. The judgment convicted defendant upon a jury verdict of aggravated driving while intoxicated and driving while intoxicated.

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 aggravated driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [i]) and driving while intoxicated as a class E felony (§§ 1192 [3]; 1193 [1] [c] [i]). We affirm.

We reject defendant's contention that County Court's *Sandoval* ruling constituted an abuse of discretion (*see generally People v Sandoval*, 34 NY2d 371, 374 [1974]). The court's *Sandoval* compromise limited the People's questioning on defendant's prior convictions for DWI-related offenses to whether defendant had been convicted of two felonies on the appropriate dates, without identifying the crimes, and barred the People from inquiring about the facts underlying those two convictions or about a third, older conviction for a DWI-related offense, all of which "reflects a proper exercise of the court's discretion" (*People v Stevens*, 109 AD3d 1204, 1205 [4th Dept 2013], *lv denied* 23 NY3d 1043 [2014] [internal quotation marks omitted]). We further conclude that defendant failed to meet his burden "of demonstrating that the prejudicial effect of the admission of evidence [of those prior convictions upon which the court permitted inquiry] for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion" (*Sandoval*, 34 NY2d at 378; *see People v Thomas*, 165 AD3d 1636, 1638 [4th Dept 2018], *lv denied* 32 NY3d 1129 [2018], *cert denied* — US —, 140 S Ct 257 [2019]).

Contrary to defendant's further contention, defense counsel was not ineffective for failing to object to the trial testimony of a New York State Trooper regarding the preliminary breath test that he administered to defendant prior to his arrest. Defense counsel may have had a strategic reason for failing to object inasmuch as defense counsel may not have wished to call further attention to that very brief testimony (*see People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *People v Masi*, 151 AD3d 1389, 1391 [3d Dept 2017], *lv denied* 30 NY3d 1062 [2017]). Consequently, we conclude that defendant has failed to demonstrate the absence of a legitimate explanation for defense counsel's failure to object (*see People v Burton*, 191 AD3d 1311, 1314-1315 [4th Dept 2021], *lv denied* 36 NY3d 1095 [2021]). We have reviewed defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit.

Defendant's remaining contentions are unpreserved for appellate review (*see generally* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19 [1995]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we note that the uniform sentence and commitment sheet incorrectly states that defendant was convicted upon a plea of guilty, and it must therefore be amended to reflect that he was convicted upon a jury verdict (*see People v McLamore*, 191 AD3d 1413, 1415 [4th Dept 2021], *lv denied* 37 NY3d 958 [2021]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

471

KA 20-01678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. TISDALE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KELIANN M. ARGY, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (ADAM W. KOCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered October 29, 2020. The judgment convicted defendant upon his plea of guilty of driving while ability impaired by drugs.

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 driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]), defendant contends that his guilty plea was not knowingly, voluntarily, and intelligently entered. Initially, as defendant asserts and the People correctly concede, that contention survives defendant's waiver of the right to appeal (*see People v Stafford*, 195 AD3d 1466, 1466 [4th Dept 2021], *lv denied* 37 NY3d 1029 [2021]). However, it is unpreserved for our review inasmuch as defendant did not move to withdraw his guilty plea or vacate the judgment of conviction (*see generally People v Bush*, 38 NY3d 66, 70 [2022]; *People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *People v Jones*, 118 AD3d 1354, 1354 [4th Dept 2014], *lv denied* 24 NY3d 961 [2014]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

473

CA 21-00578

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

WILLIAM H. CAREY AND BARBARA B. CAREY, AS ADMINISTRATORS OF THE ESTATE OF MICHAEL W. CAREY, CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered September 16, 2020. The order granted the renewed motion of claimants seeking leave to file a late claim based upon negligence.

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

Memorandum: Defendant, State of New York (State), appeals from an order granting claimants' renewed motion seeking leave to file a late claim. We affirm.

On April 19, 2015, claimants' son (decedent) died while incarcerated at a correctional facility, and on April 17, 2017, claimants moved for leave to file a late claim pursuant to Court of Claims Act § 10 (6). In their proposed claim, claimants asserted, inter alia, negligence and medical malpractice claims based on the State's failure to provide appropriate medical treatment to decedent. On August 9, 2018, the Court of Claims denied the motion, determining that claimants had failed to demonstrate the merit of the proposed claim. On March 11, 2019, claimants moved for leave to renew their motion. The court granted leave to renew and the underlying motion for leave to file a late claim to the extent of allowing claimants to file a claim based upon negligence.

The State contends that the court lacked authority to grant the renewed motion for leave to file a late claim because the statute of limitations had run. We reject that contention. "Because suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed" (*Dreger v New York State Thruway Auth.*, 81 NY2d 721, 724 [1992]). "[T]he failure to comply with . . . Court of Claims Act § 10 (3), concerning the timing of a

notice of intent or a claim, . . . deprives a court of subject matter jurisdiction requiring dismissal of the claim" (*Gang v State of New York*, 177 AD3d 1300, 1301 [4th Dept 2019]; *see Hatzfeld v State of New York*, 104 AD3d 1165, 1166 [4th Dept 2013]; *Ivy v State of New York*, 27 AD3d 1190, 1190-1191 [4th Dept 2006]). Nevertheless, Court of Claims Act § 10 (6) gives a court "discretionary power to allow the late filing of a claim upon consideration of a number of factors, including the merits of the case" (*Lichtenstein v State of New York*, 93 NY2d 911, 912 [1999]; *see Stirnweiss v State of New York*, 186 AD3d 1444, 1445 [2d Dept 2020]). The motion, however, must be made before the expiration of the applicable statute of limitations under article two of the CPLR (*see* Court of Claims Act §§ 10 [6]; 12 [2]; *Shah v State of New York*, 178 AD3d 871, 872 [2d Dept 2019], *appeal dismissed* 35 NY3d 982 [2020], *lv dismissed in part and denied in part* 35 NY3d 1107 [2020], *rearg denied* 36 NY3d 1047 [2021]; *Campos v State of New York*, 139 AD3d 1276, 1278 [3d Dept 2016]; *see generally Alston v State of New York*, 97 NY2d 159, 163 [2001]). Once the statute of limitations has expired on the proposed claims, a court is without discretion to entertain an application for leave to file a late claim (*see generally Matter of Goffredo v City of New York*, 33 AD3d 346, 347 [1st Dept 2006]).

We note that the court did not allow claimants to file a claim based on medical malpractice, which has a 2½-year statute of limitations (CPLR 214-a), but rather permitted claimants to file a claim only for negligence, which has a three-year statute of limitations (CPLR 214 [5]). We agree with the State that the renewed motion for leave to file a late claim did not relate back to the date of the original motion for that relief (*see Matter of Lubin v City of New York*, 148 AD3d 898, 900 [2d Dept 2017], *lv dismissed* 32 NY3d 1218 [2019]; *Matter of Adams v City of New York*, 180 AD2d 629, 630 [2d Dept 1992]; *Matter of Asaro v City of New York*, 167 AD2d 130, 131 [1st Dept 1990], *lv dismissed in part and denied in part* 77 NY2d 956 [1991]). We nevertheless conclude that the statute of limitations on the negligence claim had not expired at the time of the renewed motion because of the CPLR 204 (a) toll, and we reject the State's contention that the CPLR 204 (a) toll does not apply to claims against the State (*see generally Kealos v State of New York*, 150 AD3d 1211, 1213 [2d Dept 2017]).

CPLR 204 (a) provides that "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." CPLR 204 (a) tolls the running of the statute of limitations while a motion seeking leave to file a late claim is pending (*see generally Matter of Stevenson v County of Monroe*, 63 NY2d 963, 965 [1984]; *Giblin v Nassau County Med. Ctr.*, 61 NY2d 67, 72, 74 [1984]; *Kulon v Liberty Fire Dist.*, 162 AD3d 1178, 1179 [3d Dept 2018]; *Young Soo Chi v Castelli*, 112 AD3d 816, 817 [2d Dept 2013]). The toll applies even where, as here, a court denies the initial motion for leave to file a late claim (*see generally Artup v Simeone*, 189 AD3d 1143, 1145 [2d Dept 2020]; *Lubin*, 148 AD3d at 900; *Young Soo Chi*, 112 AD3d at 817). The statute of limitations on the negligence

claim was tolled while claimants' initial motion seeking leave to file the late claim was pending, and thus the limitations period on the negligence claim had not expired at the time claimants made their renewed motion for leave to file and serve a late claim. The court therefore had the authority to entertain claimants' renewed motion seeking leave to file and serve a late claim with respect to the negligence claim (*see Young Soo Chi*, 112 AD3d at 817).

In view of our determination, we do not consider the State's remaining contention.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

478

CA 21-00531

PRESENT: SMITH, J.P., CENTRA, NEMOYER, AND BANNISTER, JJ.

SHIRLEY PROPST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA COUNTY JAIL, NIAGARA COUNTY SHERIFF'S DEPARTMENT AND NIAGARA COUNTY, DEFENDANTS-RESPONDENTS.

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

HURWITZ & FINE, P.C., BUFFALO (ERIC D. ANDREW OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 5, 2021. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendants created and had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she allegedly slipped and fell on water on the floor of defendant Niagara County Jail (Jail). Plaintiff went to the Jail on the morning of the accident to visit with an inmate. As she and other visitors entered the visitation room at approximately 9:30 a.m. and proceeded to their assigned seats, plaintiff slipped and fell. She did not know what she had slipped on until after she fell, when she saw a puddle of water on the ground. Supreme Court granted defendants' motion for summary judgment dismissing the complaint, and plaintiff appeals.

It is well settled that, " '[a]s the proponent of the motion, defendant[s] ha[ve] the initial burden of establishing that [they] did not create the dangerous condition that caused plaintiff to fall and did not have actual or constructive notice thereof' " (*Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505 [4th Dept 2015]; *see King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]). On appeal, plaintiff contends that defendants failed to meet their initial burden and thus that the court erred in granting the motion. Initially, we reject

defendants' contention that plaintiff is precluded from raising that issue to the extent that she did not raise it below. We conclude that "plaintiff's contention that defendant[s] failed to meet [their] initial burden on [their] motion for summary judgment is properly before us inasmuch as it involves a 'question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner' " (*Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1758-1759 [4th Dept 2019]). In her complaint, plaintiff alleges that defendants created a dangerous condition of water on the floor and had actual and constructive notice of it, and thus defendants had the burden of establishing their entitlement to summary judgment based on all three theories.

We agree with plaintiff that defendants failed to establish that they did not create the dangerous condition and thus that the court erred in granting the motion with respect to that claim, and we modify the order accordingly (*see Cooper v Carmike Cinemas, Inc.*, 41 AD3d 1279, 1280 [4th Dept 2007]; *Rivers v May Dept. Stores Co.*, 11 AD3d 963, 964 [4th Dept 2004]). Defendants submitted evidence that adult visitors and inmates were not allowed to bring drinks to the visitation room, but correction officers, at least three of whom were in the room during visits, were allowed to have drinks in the room. Defendants did not submit evidence that the correction officers in the room did not create the puddle of water on the floor. Although defendants submitted evidence that child visitors were allowed at the time to bring drinks in bottles or sippy cups, they did not submit evidence that any children were in the visitation room that morning before plaintiff entered the room. The failure of defendants to meet their initial burden requires denial of that part of their motion, "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Rivers*, 11 AD3d at 964).

Contrary to plaintiff's contention, the court properly granted the motion with respect to the claim that defendants had actual notice of the dangerous condition. "To establish that they did not have actual notice of the allegedly dangerous condition, defendants were required to show that they did not receive any complaints concerning the area where plaintiff fell and were unaware of any . . . [slippery] substance in that location prior to plaintiff's accident" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *see Cosgrove v River Oaks Rests., LLC*, 161 AD3d 1575, 1576 [4th Dept 2018]). Here, defendants submitted evidence that they did not receive any complaints about liquid on the floor or see any water on the floor prior to plaintiff's fall. In opposition to that part of the motion, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We agree with plaintiff, however, that the court erred in granting the motion with respect to the claim that defendants had constructive notice of the dangerous condition, and we therefore further modify the order accordingly. "To constitute constructive

notice, a [dangerous condition] must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [a defendant] to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, defendants were required to " 'submit evidence concerning when the [room] was last cleaned and inspected prior to the accident' " (*Lewis v Carrols LLC*, 158 AD3d 1055, 1056 [4th Dept 2018]; *see Arghittu-Atmekjian v TJX Cos., Inc.*, 193 AD3d 1395, 1396 [4th Dept 2021]). Defendants submitted evidence that employees performed safety inspections of the visitation room, including looking for slipping hazards on the floor, on a routine basis. In particular, the room was inspected before the first visit, throughout the day, and at the end of a shift. Defendants submitted evidence that a correction officer inspected the room at 7:45 a.m. before the first group of visitors arrived at 8:30 a.m. Plaintiff was one of the second group of visitors that day and entered the visitation room at approximately 9:30 a.m. We conclude that the reasonableness of defendants' inspection practices and whether the dangerous condition existed for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it are issues for a jury to determine (*see generally Catalano v Tanner*, 23 NY3d 976, 977 [2014]), and defendants failed to establish as a matter of law that they did not have constructive notice of the dangerous condition (*see Rivers*, 11 AD3d at 964).

We have reviewed plaintiff's remaining contention and conclude that it is without merit.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

485

KA 21-00992

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARREN HIGHTOWER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (THOMAS M. LEITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered June 16, 2021. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We affirm.

We reject defendant's contention that County Court erred in refusing to suppress evidence obtained pursuant to search warrants for defendant's apartment and his motor vehicle. "[A] search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched" (*People v McLaughlin*, 193 AD3d 1338, 1339 [4th Dept 2021], *lv denied* 37 NY3d 973 [2021] [internal quotation marks omitted]; *see People v Bartholomew*, 132 AD3d 1279, 1280 [4th Dept 2015]). "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but[, rather, it] merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]).

Here, the factual allegations contained in the affidavit attached to the warrant application from a detective with the Syracuse Police Department provided probable cause to believe that defendant was

operating his drug business out of his apartment based on the detective's observations of defendant's involvement in two controlled buy operations with a confidential informant (*see People v Ferron*, 248 AD2d 962, 962 [4th Dept 1998], *lv denied* 92 NY2d 879 [1998]). The court properly determined that there was a reasonable belief, based on the controlled buy operations, that it was likely that further evidence of cocaine distribution could be found on defendant's person and at his residence (*see People v Harvey*, 298 AD2d 527, 529 [2d Dept 2002]; *People v Rodriguez*, 270 AD2d 956, 957 [4th Dept 2000], *lv denied* 95 NY2d 870 [2000]).

Further, having reviewed the transcript from the *Darden* hearing, we conclude that "the confidential informant's basis of knowledge was sufficiently established at the in camera *Darden* hearing" (*People v Mitchum*, 130 AD3d 1466, 1468 [4th Dept 2015]) inasmuch as "the information from the informant, in its totality, 'provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of' " drugs (*People v Knight*, 94 AD3d 1527, 1529 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]; *see People v Lowe*, 50 AD3d 516, 516 [1st Dept 2008], *affd* 12 NY3d 768 [2009]). We further conclude that the testimony at the *Darden* hearing established that "the hearsay information supplied in the search warrant application satisfied the two prongs of the *Aguilar-Spinelli* test and that the search warrant was issued upon probable cause" (*Mitchum*, 130 AD3d at 1468).

With respect to the search warrant for defendant's vehicle, we reject defendant's contention that the amended search warrant application did not properly incorporate the affidavit supporting the original search warrant application. "[S]earch warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest" (*People v Hanlon*, 36 NY2d 549, 559 [1975]; *see People v Coles*, 275 AD2d 995, 995 [4th Dept 2000], *lv denied* 95 NY2d 962 [2000]); rather, such applications "must be considered in the clear light of everyday experience and accorded all reasonable inferences" (*Hanlon*, 36 NY2d at 559; *see People v Cahill*, 2 NY3d 14, 41 [2003]). Thus, properly read in conjunction, we conclude that the search warrant application and the amended search warrant application contained sufficient factual averments to support a reasonable belief that evidence of defendant's drug sales would be found in his vehicle (*see generally Bigelow*, 66 NY2d at 423). Even assuming, arguendo, that there was no probable cause to believe that evidence of a crime—i.e., cocaine distribution—would be found in the vehicle (*cf. People v Gordon*, 36 NY3d 420, 430 [2021]; *see generally Bigelow*, 66 NY2d at 423), we conclude that the particular circumstances of this case permit the rare application of the harmless error rule to defendant's guilty plea (*see People v Clanton*, 151 AD3d 1576, 1579 [4th Dept 2017]). Given that the court properly denied suppression of the large amount of cocaine and drug packaging materials recovered from defendant's apartment, which would be admissible at trial, "there is no reasonable possibility that the court's error in failing to suppress [the limited amount of physical evidence recovered from the vehicle] contributed to [defendant's] decision to plead guilty" (*id.*;

see People v Wells, 21 NY3d 716, 719 [2013]; *cf. People v Grant*, 45 NY2d 366, 379-380 [1978]).

Defendant's contention that the confidential informant's single photo identification of defendant was improper and tainted the entire warrant application is unpreserved for our review inasmuch as it was not raised in defendant's motion papers or at the suppression hearing (*see generally* CPL 470.05 [2]; *People v Santos*, 122 AD3d 1394, 1395 [4th Dept 2014]), 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]).

Contrary to defendant's further contention, we conclude that the bargained-for sentence is not unduly harsh or severe. Finally, we note that the court misstated at sentencing that defendant was being sentenced as a second felony offender, rather than as a second felony drug offender (*see* Penal Law § 70.70 [1] [b]; *see generally People v Manners*, 196 AD3d 1125, 1127 [4th Dept 2021], *lv denied* 37 NY3d 1028 [2021]). Consequently, the certificate of conviction must be amended to reflect that defendant was sentenced as a second felony drug offender (*see Manners*, 196 AD3d at 1127).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

488

KA 21-00858

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORY W. PAINE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Michael L. Dollinger, J.), dated March 16, 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court abused its discretion in denying his request for a downward departure from his presumptive risk level. We reject that contention.

Defendant was convicted upon a plea of guilty of possessing a sexual performance by a child (Penal Law § 263.16), relating to his possession of over 5,000 images and videos of child pornography. In anticipation of a sentence of 10 years of probation, the Monroe County Probation Department completed a risk assessment instrument that assessed defendant a risk factor score of 120 points. The court, with the consent of the People, removed points for certain risk factors relating to criminal history and acceptance of responsibility. Ultimately, the court assessed defendant a risk factor score of 90 points, making him a presumptive level two risk. That assessment included 30 points for risk factor 3, i.e., greater than three victims, and 20 points for risk factor 7, i.e., a stranger relationship with the victims.

Defendant failed to establish by a preponderance of the evidence the existence of mitigating factors that were, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). Further,

although the court, on the People's recommendation, sentenced defendant to only a term of probation, thus indicating that defendant does not pose a significant threat to the community (*see People v Morana*, 198 AD3d 1275, 1277 [4th Dept 2021]), defendant failed to preserve for our review his contention that the probationary sentence is a mitigating factor warranting a downward departure (*see People v Colon*, 186 AD3d 1730, 1731 [2d Dept 2020], *lv denied* 36 NY3d 903 [2020]). Even assuming, arguendo, that the probationary sentence is an appropriate mitigating factor (*see Morana*, 198 AD3d at 1276-1277; *see generally Gillotti*, 23 NY3d at 861), we conclude that the court did not abuse its discretion in determining that the totality of the circumstances, including the other alleged mitigating factors, did not warrant a departure from the presumptive risk level (*see Gillotti*, 23 NY3d at 861; *cf. Morana*, 198 AD3d at 1277).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

495

CA 21-00597

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

WILLIAM J. LEBERMAN, CHAPTER 7 TRUSTEE, ON
BEHALF OF PATRICIA M. MILLER,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT GLICK, M.D., OSWEGO HOSPITAL,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

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

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (GABRIELLE L. BULL OF COUNSEL), FOR DEFENDANT-APPELLANT OSWEGO HOSPITAL.

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

Appeals from an order of the Supreme Court, Oswego County (Gregory R. Gilbert, J.), entered March 23, 2021. The order denied the motions of defendants Scott Glick, M.D. and Oswego Hospital for summary judgment.

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

Memorandum: In this medical malpractice action seeking damages for injuries that Patricia M. Miller allegedly sustained as a result of defendants' negligence in failing to recognize that she was or would soon be suffering from a stroke and to provide appropriate treatment for that condition, Oswego Hospital (hospital) and Scott Glick, M.D. (defendants) each appeal from an order that denied their respective motions for summary judgment dismissing the complaint against them. We affirm.

Miller, an employee of the hospital, was brought to the hospital's emergency department approximately 90 minutes after the start of her evening shift because a coworker observed that Miller was displaying symptoms that were possibly indicative of a stroke. Miller presented at the emergency department with, inter alia, dizziness, weakness, and a headache, all of which had a sudden onset. Glick examined Miller and, inter alia, ordered a CT scan of Miller's brain. Another doctor at the hospital reviewed the CT scan, which he

interpreted as normal. Based on his examination of Miller and the results of the CT scan, Glick concluded that Miller did not present with any stroke-like symptoms. Ultimately, Glick diagnosed Miller with a urinary tract infection based on the results of other tests performed at the hospital. Because Miller's other symptoms appeared to have resolved, Glick discharged Miller from the hospital approximately five hours after she presented at the emergency room. A day later, Miller woke up on the floor of her bedroom, unable to get up. She was taken to another hospital, where she was diagnosed as having suffered a moderate-sized acute right middle cerebral artery infarction—i.e., a stroke.

We reject defendants' contentions that Supreme Court erred in denying their motions. Preliminarily, there is no dispute that defendants met their initial burden on their respective motions by submitting the affidavits of Glick and an expert neurologist, who addressed each of the factual allegations of negligence raised in the bill of particulars (*see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]) and established that defendants did not deviate from the applicable standard of care and that any purported deviation was not a proximate cause of Miller's injuries (*see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]; *Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]; *Bickom v Bierwagen*, 48 AD3d 1247, 1247 [4th Dept 2008]).

Contrary to defendants' contentions, however, plaintiff raised triable issues of fact sufficient to defeat the motions by submitting, inter alia, expert affidavits establishing "both that defendants deviated from the applicable standard of care and that such deviation was a proximate cause of [Miller's] injuries" (*Occhino*, 151 AD3d at 1871; *see Bickom*, 48 AD3d at 1247; *see generally Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). At the outset, we reject defendants' contentions that the opinions of plaintiff's experts were insufficient to raise an issue of fact with respect to defendants' deviation from the applicable standard of care because they relied on practice guidelines—in this case a stroke scale—to assist in establishing the relevant standard of care. The experts' reliance on a stroke scale to establish the relevant standard of care was not improper here because the practice guidelines were not offered as the sole evidence of the standard of care in opposition to defendants' motions (*cf. Spensieri v Lasky*, 94 NY2d 231, 238-239 [1999]; *see generally Hinlicky v Dreyfuss*, 6 NY3d 636, 647 [2006]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]). It is undisputed that plaintiff's experts had "the requisite skill, training, education, knowledge or experience from which it can be assumed that [the experts'] opinion[s] rendered . . . [are] reliable" (*Stradtman v Cavaretta* [appeal No. 2], 179 AD3d 1468, 1470 [4th Dept 2020] [internal quotation marks omitted]; *see Payne v Buffalo Gen. Hosp.*, 96 AD3d 1628, 1629-1630 [4th Dept 2012]). Based on that foundation, both experts stated their opinion that using a stroke scale during the neurological examination of a suspected stroke patient was necessary to satisfy the standard of care. Indeed, Glick's affidavit and deposition testimony, which we accept as true insofar as it favors the

nonmoving party (*see Bunk v Blue Cross & Blue Shield of Utica-Watertown*, 244 AD2d 862, 862-863 [4th Dept 1997]), also supported reliance on a stroke scale as a generally-accepted standard or practice in diagnosing and treating strokes. Consequently, we conclude that it was not inappropriate for plaintiff's experts to rely, at least in part, on a stroke scale to establish the relevant standard of care for diagnosing and treating a patient presenting with stroke-like symptoms in opining that defendants deviated from that standard of care. To the extent defendants argue that plaintiff's experts improperly relied on outdated practice guidelines, we conclude that issue goes to the weight to be given to the experts' opinions, rather than their admissibility (*see generally Revere v Burke*, 200 AD3d 1607, 1609 [4th Dept 2021]; *Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 143 [4th Dept 2007]).

We further conclude that plaintiff's experts raised questions of fact with respect to causation. Under the circumstances of this case involving the loss of chance theory of causation, we reject defendants' contentions that the experts were required to precisely explain how or why specific tests or therapies would have improved Miller's outcome (*cf. Martingano v Hall*, 188 AD3d 1638, 1640 [4th Dept 2020], *lv denied* 36 NY3d 912 [2021]). The loss of chance theory of causation applicable to the facts of this case requires only that a plaintiff "present evidence from which a rational jury could infer that there was a 'substantial possibility' that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care" (*Clune v Moore*, 142 AD3d 1330, 1331-1332 [4th Dept 2016]; *see Wolf v Persaud*, 130 AD3d 1523, 1525 [4th Dept 2015]). Here, plaintiff's neurological expert opined that defendants' failure to perform a comprehensive neurological examination and to evaluate Miller as a candidate for fibrinolytic therapy, which would have minimized the damage caused by the stroke had they been done when Miller first presented with her symptoms, deprived Miller of "a substantially improved likelihood of achieving recovery from the infarct and a significantly less debilitating outcome." Plaintiff's neurological expert also opined that defendants' failure to order a more sensitive diagnostic test than the CT scan—i.e., an MRI or MRA—which would have resulted in an earlier detection of the stroke, likely resulted in the stroke doubling in size and rendered Miller ineligible for certain treatments. In short, the neurological expert's opinion was neither conclusory nor speculative (*see Stradtman*, 179 AD3d at 1471; *Clune*, 142 AD3d at 1332). The affidavit of the expert neurologist provides a "rational basis" for his opinions regarding the "probability" of a better outcome and, thus, "[t]he probative force of [his] opinion is not to be defeated by semantics" (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; *see Cooke v Corning Hosp.*, 198 AD3d 1382, 1383-1384 [4th Dept 2021]). Ultimately, the conflicting expert opinions about whether certain tests or therapies would have improved Miller's outcome present "a classic battle of the experts that is properly left to a jury for resolution" (*Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018] [internal quotation marks omitted]; *see Hilbrecht v Greco*, 189 AD3d

2073, 2074 [4th Dept 2020]; *Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1286 [4th Dept 2018]).

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

497

CA 21-00842

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

JUDITH LANDA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK POLONCARZ, ERIE COUNTY EXECUTIVE,
DEFENDANT-APPELLANT.

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

ZEICHNER ELLMAN & KRAUSE LLP, NEW YORK CITY (J. DAVID MORRISSY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered June 9, 2021. The order denied in part the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking to dismiss the first through fourth causes of action for failure to comply with General Municipal Law § 50-h and dismissing those causes of action without prejudice, and as modified the order is affirmed without costs.

Memorandum: In this action seeking, inter alia, damages arising from alleged defamatory statements made by defendant, defendant appeals from an order denying in part his motion to dismiss the complaint. We agree with defendant that Supreme Court erred in denying the motion insofar as it sought to dismiss the first through fourth causes of action on the ground that plaintiff failed to comply with defendant's demand for an oral examination pursuant to General Municipal Law § 50-h (1), and we therefore modify the order accordingly. "[A] plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" (*McDaniel v City of Buffalo*, 291 AD2d 826, 826 [4th Dept 2002]; *see Jeffrey T.C. v Grand Is. Cent. Sch. Dist.*, 196 AD3d 1117, 1117-1118 [4th Dept 2021]). Here, plaintiff adjourned the examination on two separate occasions and failed to respond to defendant's subsequent request that she choose from a list of dates when she would be available for examination. Under the circumstances, plaintiff bore the burden of rescheduling the examination (*see Kluczynski v Zwack*, 170 AD3d 1656, 1657 [4th Dept 2019]; *Bailey v New York City Health & Hosps. Corp.*, 191 AD2d 606, 606 [2d Dept 1993], *lv denied* 83 NY2d 759 [1994]), and because plaintiff failed to

reschedule, she was barred by statute from commencing an action (*see* § 50-h [5]). "Although compliance with General Municipal Law § 50–h (1) may be excused in 'exceptional circumstances' " (*McDaniel*, 291 AD2d at 826), there were no such circumstances here. Contrary to defendant's contention, however, the first through fourth causes of action should be dismissed without prejudice (*see Jeffrey T.C.*, 196 AD3d at 1118; *Kowalski v County of Erie*, 170 AD2d 950, 950 [4th Dept 1991], *lv denied* 78 NY2d 851 [1991]).

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

498

CA 21-01020

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

JAIMERE HENDERSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SHAIMAN CUYLER, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AALOK J. KARAMBELKAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC P. SMITH, LIVERPOOL, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 15, 2021. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he was struck by a vehicle operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident. Defendant now appeals from an order insofar as it denied the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. We agree with defendant that Supreme Court should have granted his motion in its entirety, and we reverse the order insofar as appealed from.

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]; *Lamar v Anastasi*, 188 AD3d 1637, 1637 [4th Dept 2020]). We agree with defendant that he met his initial burden on the motion by submitting the affidavit of a physician who reviewed plaintiff's imaging studies, medical records and medical history and opined that plaintiff sustained only "temporary soft tissue contusions (bruises) of the left hip and ribs as a result of the accident," which

do not constitute serious injury (*see e.g. Kracker v O'Connor*, 158 AD3d 1324, 1325 [4th Dept 2018]; *Williams v Jones*, 139 AD3d 1346, 1347 [4th Dept 2016]), and that any other residual alleged injuries were caused by "pre-existing conditions" (*see Perl v Meher*, 18 NY3d 208, 218 [2011]; *Lamar*, 188 AD3d at 1637-1638).

Inasmuch as defendant met his initial burden on the motion, the burden shifted to plaintiff to "come forward with evidence indicating a serious injury causally related to the accident" (*Pommells v Perez*, 4 NY3d 566, 579 [2005]). We agree with defendant that plaintiff failed to raise a triable issue of fact sufficient to defeat the motion. Plaintiff's expert, who did not physically examine plaintiff until six years after the accident, "failed to adequately address plaintiff's preexisting . . . condition and other medical problems, and did not provide any foundation or objective medical basis supporting the conclusions [he] reached" (*Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *see Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400 [4th Dept 2010]). More specifically, in light of the six-year gap in treatment, the opinion of plaintiff's expert chiropractor that the range of motion limitations were causally related to the subject accident is "speculative" (*Alverio v Martinez*, 160 AD3d 454, 455 [1st Dept 2018]). Plaintiff's expert chiropractor never explained how he reached the conclusion that the accident caused the injuries he observed six years later (*see generally Gaddy v Eyler*, 79 NY2d 955, 958 [1992]) and never addressed the findings of defendant's expert to the contrary (*see McConnell v Freeman*, 52 AD3d 1190, 1191 [4th Dept 2008]; *Wallingford v Perez*, 11 AD3d 390, 391 [1st Dept 2004]). "Such failure to address crucial facts relevant to causation warrants a finding" that the accident did not cause any of the alleged serious physical injuries that the chiropractor documented six years later (*Wallingford*, 11 AD3d at 391; *see Rivera v Francis*, 7 AD3d 690, 691 [2d Dept 2004]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

509

KA 18-01871

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYSEAN RUMPH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 28, 2018. The judgment convicted defendant upon a 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: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe.

We agree with defendant that the waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver is inaccurate and misleading insofar as it purports to impose "an absolute bar to the taking of a direct appeal" and purports to deprive defendant of his "attendant rights to counsel and poor person relief, [as well as] all postconviction relief separate from the direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Although Supreme Court's colloquy regarding the waiver of the right to appeal remedied some of "the mischaracterization[s,] . . . [t]he court's verbal statements . . . did nothing to counter the other inaccuracies set forth in the written appeal waiver" (*People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]). A "waiver[] cannot be upheld . . . on the theory that the offending language can be ignored and that [it is] enforceable based on the court's few correctly spoken terms" (*Thomas*, 34 NY3d at 566).

However, we reject defendant's contention that the bargained-for

sentence is unduly harsh and severe.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

510

KA 18-00608

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE LOPEZ-SARMIENTO, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered May 2, 2017. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, assault in the second degree, menacing in the second degree, criminal mischief in the fourth degree and harassment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the second degree (Penal Law § 120.05 [2]) to attempted assault in the second degree (§§ 110.00, 120.05 [2]) and vacating the sentence imposed on count two of the indictment and as modified the judgment is affirmed, and the matter is remitted to Yates County Court for sentencing on the conviction of attempted assault in the second degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, among other things, burglary in the first degree (Penal Law § 140.30 [3]) and assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention, County Court properly admitted evidence regarding defendant's prior harassment conviction stemming from an unrelated incident during which he threatened the victim with a knife. That evidence was relevant to the issue of defendant's intent and the lack of mistake or accident (*see People v Dorm*, 12 NY3d 16, 19 [2009]; *People v Simpson*, 173 AD3d 1617, 1619 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]). Further, the court properly "balanced the probative value of the evidence against its potential for prejudice . . . and its instructions to the jury minimized any prejudicial effect" (*People v Smalls*, 70 AD3d 1329, 1330 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010], *reconsideration denied* 15 NY3d 778 [2010]; *see Dorm*, 12 NY3d at 19).

We agree with defendant that the evidence is legally insufficient to establish that he caused physical injury to the victim by means of

a dangerous instrument and thus that the conviction of assault in the second degree is not supported by legally sufficient evidence (*see generally* Penal Law § 10.00 [9]). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), establishes that defendant attempted to stab the victim and the two struggled over the knife; however, the victim suffered no more than minor cuts to her hands that did not require bandaging and caused only transient pain (*see People v Patterson*, 192 AD2d 1083, 1083 [4th Dept 1993]; *see also People v Sanders*, 245 AD2d 471, 472 [2d Dept 1997]). Nevertheless, we further conclude that the evidence is legally sufficient to establish defendant's guilt of the lesser included offense of attempted assault in the second degree (§§ 110.00, 120.05 [2]; *see* CPL 470.15 [2] [a]). We therefore modify the judgment accordingly. We have examined defendant's remaining contentions and conclude that none warrants reversal or further modification of the judgment.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

511

KA 20-01573

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REDDELL SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered February 6, 2020. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that Supreme Court erred in denying his request for an order barring the prosecution from cross-examining him concerning who he was with during this incident, in the event that he chose to testify. Defendant contends that such cross-examination would have violated his Fifth Amendment rights because that information was the subject of a pending federal indictment (*see generally People v Cantave*, 21 NY3d 374, 379 [2013], *motion to clarify op denied* 21 NY3d 1070 [2013]; *People v Betts*, 70 NY2d 289, 291 [1987]). We reject that contention.

It is well settled that, "when a defendant testifies, 'he subjects himself voluntarily to the situation of any other witness, and if he is compelled to answer disparaging questions, or to give evidence relevant to the issue, which is injurious, it is the consequence of an election which he makes to become a witness, which involves a waiver on his part at that time, of the constitutional exemption' " (*Betts*, 70 NY2d at 293). Nevertheless, "a defendant-witness does not generally and automatically waive the privilege against self-incrimination as to pending collateral criminal charges" (*id.* at 294-295). Consequently, where, as here, a defendant wishes to testify at trial but assert his or her Fifth Amendment privilege against self-incrimination with respect to a pending

criminal charge, the "defendant is entitled to a pretrial ruling . . . precluding the prosecution from cross-examining for credibility purposes only as to pending unrelated criminal charges if defendant takes the stand" (*id.* at 291).

Here, assuming, arguendo, that defendant's request, which was made after the People had rested and defendant had presented other evidence, was a proper and timely manner in which to seek such a "pretrial ruling" (*id.*; *see also Cantave*, 21 NY3d at 378-379), we conclude that the court properly denied defendant's request. The allegations in the indictment arose from an incident in which two groups of people became embroiled in an altercation. Both groups included several people, many of whom were involved in the altercation. Defendant was charged with stabbing a member of the other group, and he presented a justification defense at trial. In the request at issue, he sought to preclude the prosecution from cross-examining him about who he was with at the time of the altercation based on his claim that he was charged in federal court with associating with gang members on the day in question and thus that, if he were to testify about who he was with, he would incriminate himself with respect to the pending federal charges.

As noted, however, the *Betts* rule provides that the prosecution may not cross-examine a defendant for credibility purposes about "pending unrelated criminal charges" (70 NY2d at 291; *see also Cantave*, 21 NY3d at 381). Here, although the facts at issue could incriminate defendant in the pending federal charge, that "charge was not a collateral matter but, rather, was directly relevant to and probative of the charges at issue" (*People v Soto*, 70 AD3d 981, 981 [2d Dept 2010], *lv denied* 15 NY3d 757 [2010]).

Defendant further contends that the verdict is contrary to the weight of the evidence on several grounds, including the jury's rejection of his justification defense. Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that, when 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]), including the charge on the defense of justification, the jury failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

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

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

512

CA 21-00160

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

S.P., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M.P., DEFENDANT-RESPONDENT.

S.P., PLAINTIFF-APPELLANT PRO SE.

VERA A. VENKOVA, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), dated September 2, 2020. The order denied the application of plaintiff for sole custody of the subject children.

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

Memorandum: Plaintiff mother appeals from an order denying her application to modify the parties' existing custody and access agreement (CA agreement) by awarding her sole custody of the subject children. We reject the mother's contention that Supreme Court erred in denying her application. Assuming, arguendo, that the mother "met [her] threshold burden of demonstrating a change in circumstances sufficient to justify a best interests analysis" (*Matter of William F.G. v Lisa M.B.*, 169 AD3d 1428, 1430 [4th Dept 2019]), we conclude that the court's determination that the existing custody arrangement is in the children's best interests is supported by a sound and substantial basis in the record (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Janowsky v Monte*, 200 AD3d 1694, 1695 [4th Dept 2021]; *Matter of Common v Pirro*, 184 AD3d 1087, 1088 [4th Dept 2020]).

We also reject the mother's contention that the court erred in refusing to allow her to present evidence in support of her allegations that defendant father abused the subject children. The court properly limited the proof to incidents that occurred after the parties entered into the CA agreement (*see Matter of Hall v Hawthorne*, 99 AD3d 1237, 1238 [4th Dept 2012]). Moreover, although there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child where the statements are corroborated, the mother failed to offer any evidence to corroborate the children's out-of-court statements and, therefore, the court's preclusion of those statements was proper (*see id.*). In addition, the court properly precluded testimony of a child protective services caseworker

and the admission in evidence of the related investigatory file because the mother failed to establish the applicability of a statutory provision allowing her to introduce the unfounded child protective service reports or testimony concerning those reports (*see Matter of Brown v Simon*, 123 AD3d 1120, 1122 [2d Dept 2014], *lv denied* 25 NY3d 902 [2015]; *Matter of Brockington v Alexander*, 26 AD3d 884, 885 [4th Dept 2006]; *Matter of Humberstone v Wheaton*, 21 AD3d 1416, 1417 [4th Dept 2005]).

Contrary to the mother's contention, the court properly denied her motions seeking to disqualify the Attorney for the Child (AFC) (*see generally Matter of Giohna R. [John R.]*, 179 AD3d 1508, 1509 [4th Dept 2020], *lv dismissed in part and denied in part* 35 NY3d 1003 [2020]; *Matter of Athoe v Goodman*, 170 AD3d 1532, 1533 [4th Dept 2019]; *Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]). The contentions raised by the mother for the first time in her reply brief are not properly before us (*see Matter of Carroll v Chugg*, 141 AD3d 1106, 1106 [4th Dept 2016]; *Cunningham v Cunningham*, 137 AD3d 1704, 1705 [4th Dept 2016]). We have considered the mother's remaining contentions and conclude that none warrants modification or reversal of the order.

The issues raised by the AFC are not properly before us inasmuch as the AFC did not file a notice of appeal (*see Matter of Noble v Gigon*, 165 AD3d 1640, 1641 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Carroll*, 141 AD3d at 1106).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

513

CA 21-00794

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

STEPHANIE TULLY, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KENMORE-TONAWANDA UNION FREE SCHOOL DISTRICT,
ANTHONY RAMUNNO, DEFENDANTS-RESPONDENTS-APPELLANTS,
ET AL., DEFENDANT.

GROSS SHUMAN, P.C., BUFFALO (SARAH P. RERA OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (BRIAN M. WEBB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 28, 2021. The order denied in part and granted in part the motion for summary judgment of defendants Kenmore-Tonawanda Union Free School District and Anthony Ramunno.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in its entirety and dismissing the amended complaint against defendants Kenmore-Tonawanda Union Free School District and Anthony Ramunno, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained while riding in a school bus operated by Kenmore-Tonawanda Union Free School District and Anthony Ramunno (defendants) and defendant Kenmore-Tonawanda Department of Transportation when the bus drove over a large bump in the road, thereby causing plaintiff to be lifted out of her seat and strike her head on a bar above the emergency exit door. Plaintiff appeals and defendants cross-appeal from an order that granted those parts of defendants' motion for summary judgment dismissing the amended complaint, as amplified by the bill of particulars, with respect to the significant disfigurement, permanent consequential limitation of use (PCLU), and 90/180-day categories of serious injury against them, and denied defendants' motion with respect to the significant limitation of use (SLU) category (*see* Insurance Law § 5102 [d]). We agree with defendants that Supreme Court erred in failing to grant the motion in its entirety, and we therefore modify the order accordingly.

We note at the outset that the court properly granted the motion with respect to the significant disfigurement category because plaintiff, in opposition to the motion, abandoned any claim under that category (*see Endres v Shelba D. Johnson Trucking, Inc.*, 60 AD3d 1481, 1482 [4th Dept 2009]).

We reject plaintiff's contention on her appeal that the court erred in granting the motion with respect to the PCLU category. In order to satisfy the serious injury threshold under Insurance Law § 5102, a plaintiff must present "objective proof of . . . injury"; "subjective complaints alone are not sufficient" (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *see Weaver v Town of Penfield*, 68 AD3d 1782, 1784 [4th Dept 2009]). Thus, with respect to the PCLU category specifically, "a plaintiff must 'submit objective proof of a permanent injury' to establish a qualifying serious injury" (*Gamblin v Nam*, 200 AD3d 1610, 1613 [4th Dept 2021]). "[A] 'minor, mild or slight limitation of use [is] classified as insignificant within the meaning of the [no-fault] statute' " (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]).

Here, we conclude that defendants met their initial burden with respect to the PCLU category by submitting, inter alia, plaintiff's medical records and the affirmed independent medical examination (IME) reports of a neurologist and a neuropsychologist, who each examined plaintiff on behalf of defendants and opined that there was no objective medical evidence of a serious injury (*see Koneski v Seppala*, 158 AD3d 1211, 1213 [4th Dept 2018]; *Downie v McDonough*, 117 AD3d 1401, 1402 [4th Dept 2014], *lv denied* 24 NY3d 906 [2014]). The IME neurologist concluded that there was no convincing evidence that plaintiff sustained a concussion because, among other things, all imaging studies of her brain, including multiple MRIs, had been normal and it could not be said within a reasonable degree of medical certainty that plaintiff exhibited symptoms that would lead to the conclusion that she sustained a concussion (*cf. Snyder v Daw*, 175 AD3d 1045, 1046 [4th Dept 2019]). Importantly, the IME neurologist noted that neuropsychological testing conducted five months after the bus incident by plaintiff's own clinical neuropsychologist revealed a "largely normal cognitive examination" of a patient with "average intellectual reasoning" and "cognitive functioning . . . within normal limits," and with none of the weaknesses on the exam representing "a clinically significant cognitive deficit." The IME neuropsychologist likewise concluded that, in the aggregate, his neuropsychological evaluation supported and expanded upon the conclusions of plaintiff's clinical neuropsychologist insofar as plaintiff did not have, nor would she be expected to have, any causally related cognitive deficits due to the incident and, instead, had significant affective disorder underlying her various subjective mental and physical complaints (*see Flisch v Walters*, 42 AD3d 682, 683 [3d Dept 2007]). Although plaintiff asserts that defendants' own submissions raise a triable issue of fact because the IME neurologist ostensibly diagnosed her with post-traumatic headaches and occipital neuralgia related to the incident, that assertion lacks merit inasmuch as the IME neurologist specified that such assessment was based upon plaintiff's subjective complaints only, which is insufficient to raise a triable issue of

fact (*see Beaton v Jones*, 50 AD3d 1500, 1502 [4th Dept 2008]). Additionally, defendants' submissions demonstrated that any post-traumatic concussive symptoms experienced by plaintiff following the incident, such as headaches, had not "in any way incapacitated [her] or interfered with [her] ability to work or engage in activities at home" (*Licari v Elliott*, 57 NY2d 230, 239 [1982]; *see McKeon v McLane Co., Inc.*, 145 AD3d 1459, 1461 [4th Dept 2016]; *cf. Cook v Peterson*, 137 AD3d 1594, 1595-1596 [4th Dept 2016]).

The burden thus shifted to plaintiff, who failed to submit objective proof of a permanent consequential injury (*see McKeon*, 145 AD3d at 1461). Contrary to plaintiff's contention, we conclude that the affirmation of her treating neurologist, which consists of a recitation of the treatment he provided to plaintiff based on her subjective reports of headaches and related symptoms followed by a conclusory opinion that plaintiff sustained significant and consequential limitations, "is insufficient to raise an issue of fact because it fails to address the absence of objective findings on the . . . MRI scans, [and] relies upon subjective complaints of . . . headaches" (*Smith v Reeves*, 96 AD3d 1550, 1552 [4th Dept 2012]; *see Downie*, 117 AD3d at 1403; *Solarzano v Power Test Petro, Inc.*, 181 AD2d 631, 631 [1st Dept 1992], *lv denied* 80 NY2d 602 [1992]).

We also reject plaintiff's contention on her appeal that the court erred in granting the motion with respect to the 90/180-day category. To recover under that category, a person must sustain "a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than [90] days during the [180] days immediately following the occurrence of the injury or impairment" (Insurance Law § 5102 [d]). Thus, "[t]o qualify as a serious injury under the 90/180[-day] category, there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent" (*Baldauf v Gambino*, 177 AD3d 1307, 1308 [4th Dept 2019] [internal quotation marks omitted]; *see Licari*, 57 NY2d at 236).

Here, even assuming, arguendo, that the cervical MRI performed three months after the incident showing, inter alia, a disc herniation/protrusion at C4-5 and small posterior disc bulges mildly effacing the thecal sac at C6-7 constituted objective evidence of a medically determined injury or impairment of a non-permanent nature, defendants nonetheless met their initial burden by establishing that plaintiff's activities were not curtailed to a great extent during the applicable period. Plaintiff went to work after the incident, did not seek medical treatment for a week, and thereafter did not miss any time from work or school during the six months following the incident (*see Baldauf*, 177 AD3d at 1308; *Robinson v Polasky*, 32 AD3d 1215, 1216 [4th Dept 2006]). The purported restrictions mentioned in defendants' moving papers and now relied upon by plaintiff on appeal do not raise a triable issue of fact regarding whether plaintiff was prevented from performing substantially all of her daily activities. While plaintiff testified that she had a slight lifting restriction at her job at a

pizzeria following the incident, she acknowledged that she did not submit any medical documentation to her employer for any restriction at work and, in any event, plaintiff maintained her full work schedule, and her claimed restriction of no longer being able to lift sauce buckets and cheese bins constitutes, at most, "some slight curtailment" of her daily activities, which is insufficient to raise a triable issue under the 90/180-day category (*Licari*, 57 NY2d at 236; *see LaBeef v Baitsell*, 104 AD3d 1191, 1192 [4th Dept 2013]). Additionally, "[a]lthough there was evidence that [plaintiff] could not [or was told not to] participate in some activities, such as gym class[, bowling,] and [softball], that is insufficient to [raise a triable issue of fact whether] she 'was unable to perform substantially all of the material acts that constituted her usual and customary daily activities' " (*Burns v McCabe*, 17 AD3d 1111, 1111 [4th Dept 2005]; *see Altieri v Liccardi*, 163 AD3d 1254, 1256 [3d Dept 2018]; *Macdelinne F. v Jimenez*, 126 AD3d 549, 550 [1st Dept 2015]).

The burden thus shifted to plaintiff, and we conclude that she failed to meet that burden inasmuch as her treating neurologist's "conclusory recitation of statutory language was insufficient to raise a triable issue of fact" (*Griffo v Colby*, 118 AD3d 1421, 1422 [4th Dept 2014]).

Defendants contend on their cross appeal that the court erred in denying the motion, without explanation, insofar as it sought summary judgment dismissing the amended complaint with respect to the SLU category. We agree.

With respect to plaintiff's alleged head and cognitive injuries, defendants met their initial burden on the SLU category for the same reasons discussed above regarding the PCLU category (*see e.g. Koneski*, 158 AD3d at 1212-1213; *Downie*, 117 AD3d at 1402-1403). Defendants submitted, inter alia, plaintiff's medical records and the reports of the IME neurologist and IME neuropsychologist, who opined that there was no objective medical evidence of serious injury related to plaintiff's subjective complaints of headaches and cognitive dysfunction (*see Koneski*, 158 AD3d at 1213). In particular, the IME neurologist concluded that there was no convincing evidence that plaintiff sustained a concussion and noted that the examination of plaintiff's clinical neuropsychologist revealed normal cognitive function, while the IME neuropsychologist likewise concluded that plaintiff had no causally related cognitive deficits due to the incident (*see Walk-Reinard v Smith*, 197 AD3d 888, 889 [4th Dept 2021]; *Latini v Barwell*, 181 AD3d 1305, 1306 [4th Dept 2020]). Moreover, defendants' submissions established that, regardless, any post-incident limitations were insignificant within the meaning of the statute (*see Licari*, 57 NY2d at 236).

With respect to plaintiff's spinal complaints, defendants also met their initial burden. Specifically, defendants submitted the report of the IME neurologist who, after reviewing plaintiff's medical records and examining her, opined that plaintiff did not sustain any significant cervical injury as a result of the incident. The IME neurologist noted in particular that, during her early medical

appointments following the incident, plaintiff made no complaints of neck pain and her examination one week after the incident showed no pain or abnormalities related to the neck or cervical spine. The IME neurologist also noted that plaintiff was frequently found to have a normal objective cervical exam. With respect to the cervical MRI showing, in relevant part, a disc herniation/protrusion at C4-5 and small posterior disc bulges mildly effacing the thecal sac at C6-7, the IME neurologist opined that such abnormalities could not be attributed within a reasonable degree of medical certainty to the incident (*see Bleier v Mulvey*, 126 AD3d 1323, 1324 [4th Dept 2015]). In addition, defendants also submitted plaintiff's testimony in which she testified that she went to work immediately after the incident and that she continued with her daily activities after the incident (*see Heller v Jansma*, 103 AD3d 1160, 1161 [4th Dept 2013]).

Inasmuch as defendants met their initial burden of showing that plaintiff did not sustain a serious injury under the SLU category as a result of the incident, the burden shifted to plaintiff to raise a triable issue of fact. Plaintiff failed to meet that burden. The affirmation of plaintiff's treating neurologist, "which merely repeats plaintiff[']s subjective complaints . . . and consists of conclusory assertions tailored to meet the statutory requirements[,] . . . is insufficient to establish serious injury" (*Muratore v Tierney*, 229 AD2d 1018, 1019 [4th Dept 1996] [internal quotation marks omitted]; *see Gaddy*, 79 NY2d at 958; *Smith*, 96 AD3d at 1552). Moreover, the records of plaintiff's orthopaedist, who began seeing plaintiff over four years after the incident, are likewise insufficient to raise a triable issue of fact. While the orthopaedist noted that plaintiff's cervical range of motion was limited in extension and rotation, "the records upon which plaintiff relies fail to 'recite the tests used to ascertain the degree of plaintiff's loss of range of motion' " (*Paveljack v Cirino*, 93 AD3d 1286, 1287 [4th Dept 2012]; *see Weaver*, 68 AD3d at 1785). Moreover, as defendants correctly contend, the orthopaedist did not offer any opinion as to the cause of plaintiff's cervical spine complaints, i.e., he did not relate any range of motion loss to the incident (*see French v Symborski*, 118 AD3d 1251, 1252 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]).

Entered: July 8, 2022 Ann Dillon Flynn
Clerk of the Court

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

520

CA 21-00102

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

IN THE MATTER OF DP FULLER FAMILY LP,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW
FOR CITY OF CANANDAIGUA, RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.
(APPEAL NO. 1.)

BIERSDORF & ASSOCIATES, P.A., MINNEAPOLIS, MINNESOTA (RYAN R. SIMATIC OF COUNSEL), FOR PETITIONER-APPELLANT.

BOYLAN CODE, LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Gail Donofrio, J.), entered December 8, 2020 in proceedings pursuant to RPTL article 7. The order and judgment, inter alia, granted the motion of respondents City of Canandaigua and Board of Assessment Review for City of Canandaigua to dismiss the petitions and dismissed the petitions.

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

Memorandum: Petitioner owns commercial property that is located within the nonparty Canandaigua City School District (School District) in Ontario County. Petitioner commenced proceedings against the taxing authority respondents pursuant to RPTL article 7 in July 2016 and July 2017 seeking review of the real property tax assessments for, respectively, the 2016 and 2017 tax years. In each proceeding, petitioner mailed a bare "notice of claim" for reduction of the assessment to the superintendent of the School District indicating that a petition had been filed and purporting to "incorporate[]" the unattached petition into the notice of claim. Petitioner did not, however, mail a copy of the notice of petition and the petition to the superintendent. Respondents answered, but the School District did not appear.

Petitioner also commenced a proceeding against respondents in July 2018 seeking review of the real property tax assessment for the 2018 tax year. Petitioner personally delivered the notice of petition and the petition to the assistant superintendent of the School

District and to a senior clerk in the Ontario County Treasurer's Office. Petitioner did not, however, mail a copy of the notice of petition and the petition to the superintendent of the School District or the treasurer of Ontario County. Again, respondents answered, but the School District did not appear.

The matters proceeded together, including with the issuance of scheduling orders, and respondents City of Canandaigua and Board of Assessment Review for City of Canandaigua (hereinafter respondents) eventually moved by order to show cause in February 2020 to dismiss the 2016 and 2017 petitions on the ground that, in contravention of RPTL 708 (3), petitioner had failed to mail a copy of the notice of petition and the petition to the superintendent of the School District and failed to show good cause, which required dismissal of the petitions pursuant to the statute. Respondents subsequently moved by notice of motion in June 2020 to dismiss the 2018 petition on the ground that petitioner failed to comply with the statutory notice requirements of RPTL 708 (3) because it personally delivered the notice of petition and the petition to the wrong people instead of mailing copies thereof to the correct people.

Supreme Court determined that petitioner failed to comply with the requirements of RPTL 708 (3) and rejected petitioner's procedural and substantive opposition to the motions. In appeal No. 1, petitioner appeals from an order and judgment that, inter alia, granted respondents' motion to dismiss the 2016 and 2017 petitions. In appeal No. 2, petitioner appeals from an order and judgment that, inter alia, granted respondents' motion to dismiss the 2018 petition. We now affirm in each appeal.

"Pursuant to RPTL 708 (3), within 10 days of the service of the notice of petition and [the] petition on [the tax assessors of] a municipality in a tax certiorari proceeding, a petitioner must mail a copy of the same documents to the superintendent of schools of 'any school district within which any part of the real property on which the assessment to be reviewed is located' " (*Matter of Westchester Joint Water Works v Assessor of City of Rye*, 27 NY3d 566, 570 [2016]). The statute also requires, in all instances, that the petitioner mail a copy of the notice of petition and the petition "to the treasurer of any county in which any part of the real property is located" within the same statutorily prescribed period (RPTL 708 [3]). Within 10 days of those mailings, the petitioner must file with the court proof of such mailings to the superintendent of schools and the treasurer of the county (*see* RPTL 708 [3]).

Nonetheless, proper notice to the superintendent and the treasurer does not thereby make the school district or the county a party to the proceeding (*see* RPTL 708 [3]). Indeed, the current version of the statute "was structured so as to allow school districts to avoid the expense of participating in every tax certiorari proceeding" (*Westchester Joint Water Works*, 27 NY3d at 575). "The mailing requirements ensure that an affected school district is promptly notified of a tax certiorari proceeding so as to allow that district to determine whether to participate in that matter and

whether to reserve monies to satisfy an adverse ruling" (*id.* at 575-576).

With respect to the consequences of noncompliance with the notice requirements, the statute provides that "[f]ailure to comply with the provisions of this section shall result in the dismissal of the petition, unless excused for good cause shown" (RPTL 708 [3]). As the Court of Appeals has emphasized, "[t]he language of RPTL 708 (3) providing that the dismissal for failure to comply with the mailing provisions of that statute shall be excused only 'for good cause shown' reflects an intent to permit a petitioner who has ignored the subject mailing requirements to proceed only where the error is found to be excusable" (*Westchester Joint Water Works*, 27 NY3d at 574). The statute thus "requires that where there is no 'good cause' to avoid dismissal of a proceeding commenced pursuant to RPTL article 7, that proceeding is finally and conclusively dismissed" (*id.* at 575).

Petitioner contends that the School District, by failing to appear and intervene in these proceedings, waived the defense of defective notice, and that respondents lack standing to seek dismissal of the petitions on the ground that the School District did not receive proper statutory notice. We reject that contention.

Beginning with the statutory language, we conclude that there is no suggestion in the text that a named respondent in a tax certiorari proceeding pursuant to RPTL article 7 cannot bring a motion to dismiss the petition on the ground that the petitioner, without good cause shown, failed to comply with the notice requirements to a nonparty school district and nonparty county (*see* RPTL 708 [3]). To the contrary, in enacting the current version of RPTL 708 (3), the legislature "strengthened compliance with those requirements" (*Westchester Joint Water Works*, 27 NY3d at 573) by providing in broad and unflinching terms, not restricted to any individual or entity, that "[f]ailure to comply with the provisions of this section *shall result* in the dismissal of the petition, unless excused for good cause shown" (RPTL 708 [3] [emphasis added]).

Moreover, permitting the named respondent to move for dismissal of the petition for noncompliance with the notice requirements, even when a school district chooses not to intervene, is consistent with the purpose of the statute. As noted by the Court of Appeals, the statute was revised to its current form, which included the strengthened dismissal provision, in order to relieve school districts of time consuming and expensive involvement in tax certiorari proceedings in which they had no desire to participate (*see Westchester Joint Water Works*, 27 NY3d at 572, 575-576; Bill Jacket, L 1996, ch 503 at 7-12). Where a petitioner, without good cause, fails to comply with the notice requirements of RPTL 708 (3), thereby depriving a school district of "the opportunity to economically address a tax certiorari proceeding," permitting the named respondent to move to dismiss the petition without the school district's intervention is consistent with the statutory intent of allowing the school district to "avoid the expense of participating in [the] tax certiorari proceeding" (*Westchester Joint Water Works*, 27 NY3d at 575-

576).

Contrary to petitioner's assertion, the case law supports the position that a named respondent has standing to move to dismiss the petition for noncompliance with the notice requirements. As the Second Department has expressly held, a respondent tax assessor "ha[s] standing to seek dismissal of the proceedings based on the petitioner's failure to give notice of the proceedings to the [s]uperintendent of the [school d]istrict pursuant to RPTL 708 (3)" (*Matter of Westchester Joint Water Works v Assessor of City of Rye*, 120 AD3d 1352, 1354 [2d Dept 2014], *affd on other grounds* 27 NY3d 566 [2016]; *see generally Matter of Landesman v Whitton*, 46 AD3d 827, 827-828 [2d Dept 2007]; *Matter of MM1, LLC v LaVancher*, 45 AD3d 1481, 1482 [4th Dept 2007]; *Matter of Macy's Primary Real Estate v Assessor of City of White Plains*, 291 AD2d 73, 77 [2d Dept 2002], *lv denied* 99 NY2d 502 [2002]).

Inasmuch as respondents have standing to seek dismissal of the petitions based on petitioner's failure to give proper notice of the proceedings to the superintendent and treasurer (*see* RPTL 708 [3]; *Westchester Joint Water Works*, 120 AD3d at 1354), and respondents made those motions here, any waiver by the School District is immaterial (*cf. Matter of Brookview Apts. v Stuhlman*, 278 AD2d 825, 826-827 [4th Dept 2000]). We thus conclude that, despite the School District's choice not to participate, respondents were entitled to move to dismiss the petitions for petitioner's failure to comply with the notice requirements of RPTL 708 (3).

Petitioner nonetheless contends that, even if respondents had standing to assert the defense of noncompliance with the notice requirements of RPTL 708 (3), they waived that defense by failing to include it as an affirmative defense in their answer in each proceeding. We reject that contention.

To the extent that petitioner relies on provisions of the CPLR for the proposition that affirmative defenses are waived unless raised in an answer or pre-answer motion to dismiss (*see* CPLR 3018 [b]; CPLR 3211 [e]), such reliance is misplaced (*see generally Landesman*, 46 AD3d at 828). The Court of Appeals has emphasized that, " '[a]s a general rule, there should be no resort to the provisions of the CPLR in instances where the [RPTL] expressly covers the point in issue' " (*Westchester Joint Water Works*, 27 NY3d at 575; *see* CPLR 101). Here, RPTL 712 expressly covers the requirements for answering a petition in an RPTL article 7 proceeding and, unlike the abovementioned provisions of the CPLR, RPTL 712 does not provide that affirmative defenses are waived unless raised in the answer. If the legislature had intended RPTL 712 to operate in the same manner as the CPLR, "it easily could have said so," but it did not (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 662 [2006]). Relatedly, the case law is clear that failure to raise noncompliance with RPTL 708 (3) as an affirmative defense in an answer does not, by itself, result in waiver of that defense. Rather, waiver occurs only when the tax assessor respondent "neither raise[s] the lack of notice in its answer nor move[s] to dismiss the petitions on that ground" (*Matter of First*

Source Fed. Credit Union v Stuhlman, 275 AD2d 908, 908 [4th Dept 2000]). In other words, "the taxing authority may move to dismiss the proceeding if it raises the issue [of noncompliance with RPTL 708 (3)] in its answer *or* makes a timely motion" (*Brookview Apts.*, 278 AD2d at 826 [emphasis added]).

In that regard, petitioner contends that respondents' motions to dismiss are untimely because petitioner commenced the proceedings in July 2016, July 2017, and July 2018, yet respondents did not move to dismiss the petitions until February 2020 and June 2020. We reject that contention as well.

As the parties agree, "taxing authorities are not bound by the requirement of CPLR 3211 (e) that a motion to dismiss be made prior to the time in which to serve an answer" (*Matter of Village Sq. of Penna v Semon*, 290 AD2d 184, 187 [3d Dept 2002], *lv dismissed* 98 NY2d 647 [2002]) because RPTL 712 (1) specifies that a taxing authority need not even answer, that a failure to answer is deemed a denial of the allegations, and that "[a] motion to dismiss the petition shall not be denied merely on the ground that an answer has been deemed made" (*see Village Sq. of Penna*, 290 AD2d at 187; *Matter of Abramov v Board of Assessors, Town of Hurley*, 257 AD2d 958, 960 [3d Dept 1999]). Despite the inapplicability of CPLR 3211 (e) (*see Village Sq. of Penna*, 290 AD2d at 187; *see generally Westchester Joint Water Works*, 27 NY3d at 575), and the absence of an applicable time period within RPTL article 7, courts have nonetheless stated, albeit without setting the manner of fixing the time period, that the taxing authority must "make[] a *timely* motion" to dismiss the petition for noncompliance with RPTL 708 (3) (*Brookview Apts.*, 278 AD2d at 826 [emphasis added]; *see Village Sq. of Penna*, 290 AD2d at 186-187).

Whatever the outer limit of a timely motion may be, we conclude that there is no basis to support a determination that respondents' motions here were untimely. Petitioner brought successive proceedings in July 2016, July 2017, and July 2018 to challenge the assessments for those respective tax years. The matters proceeded together and were initially subject to a scheduling order in May 2019 that required all motions to be made by October 4, 2019. The scheduling order was later amended to provide that all motions were to be made before March 20, 2020. Respondents complied with the amended scheduling order by moving by order to show cause in February 2020 to dismiss the 2016 and 2017 petitions. The order to show cause signed by the court held the amended scheduling order in abeyance and, therefore, respondents were still in compliance when they moved on June 18, 2020 to dismiss the 2018 proceeding and, in any event, they were within an administrative 90-day extension of scheduling order deadlines due to the COVID-19 pandemic. Respondents' motions to dismiss were not only compliant with the amended scheduling order collectively governing all three proceedings, but the timing of the motions was well within the range of when such motions are routinely brought and entertained in other successive multi-year tax assessment challenges (*see e.g. Westchester Joint Water Works*, 27 NY3d at 570; *Matter of Board of Mgrs. of Copley Ct. Condominium v Town of Ossining*, 19 NY3d 869, 870 [2012];

Landesman, 46 AD3d at 827-828). Contrary to petitioner's contention, even if there are examples of a motion to dismiss being brought quicker (*see Village Sq. of Penna*, 290 AD2d at 186-187), that does not, by that very fact, render the present motions untimely. Moreover, the other cases relied upon by petitioner are inapposite (*cf. Matter of Nicola v Board of Assessors of Town of N. Elba*, 46 AD3d 1161, 1163 [3d Dept 2007]; *Matter of Sessa v Board of Assessors of Town of N. Elba*, 46 AD3d 1163, 1164 [3d Dept 2007]; *Matter of North Country Hous. v Board of Assessment Review for Vil. of Potsdam*, 298 AD2d 667, 669 [3d Dept 2002]).

Petitioner nonetheless asserts two additional grounds purportedly supporting the proposition that respondents' motions were untimely, i.e., respondents had already participated in the litigation before moving to dismiss and petitioner was prejudiced by the ostensible delay because it incurred the costs of obtaining an appraisal before respondents moved to dismiss the petitions. We reject those assertions.

With respect to the first ground, petitioner cites an inapposite case in which the *school district's* motion to dismiss was properly denied because the *school district*, by informally appearing through substantial participation in the proceeding before answering and seeking dismissal, waived its defense that notice was not properly given in accordance with RPTL 708 (3) (*see Matter of Champlain Ctr. N. LLC v Town of Plattsburgh*, 165 AD3d 1440, 1442 [3d Dept 2018]). That case thus stands for the proposition that a school district is not allowed to use the provisions of RPTL article 7 as both a shield and a sword by fully participating without objection, even while not automatically being made a party, and then suddenly answering and moving for dismissal for lack of proper notice. That case did not, however, involve waiver of the defense by the *tax assessor respondent*. Indeed, holding that a tax assessor respondent waives the ability to move to dismiss for noncompliance with RPTL 708 (3) after participating in the proceeding would improperly undermine a tax assessor respondent's ability to make such a motion because the tax assessor respondent is, unlike a school district, a party from the outset of the proceeding. By contrast, permitting a tax assessor respondent to appear and then assert the RPTL 708 (3) noncompliance defense essentially on behalf of a *non-participating school district* is entirely consistent with the statutory purpose of allowing the school district to avoid the expense of participating in a tax certiorari proceeding of which it did not receive proper notice (*see Westchester Joint Water Works*, 27 NY3d at 575).

With respect to the second ground, we conclude that any prejudice to petitioner was of its own making and is not a basis upon which to conclude that respondents' motions to dismiss were untimely. The provisions of RPTL 708 (3) demand strict compliance (*see Matter of Gatsby Indus. Real Estate, Inc. v Fox*, 45 AD3d 1480, 1481 [4th Dept 2007]), and the fact that petitioner failed to adhere to those standards, proceeded with obtaining an appraisal anyway, and later faced appropriate motions to dismiss, does not support denial of the motions.

Finally, petitioner contends that the absence of prejudice to the School District is a valid ground upon which to deny the motions to dismiss, and that it established good cause to excuse its failure to comply with RPTL 708 (3) because it made a good faith effort to comply but simply made a mistake. We conclude that petitioner's contention lacks merit.

It is beyond dispute that "RPTL 708 (3) requires [a] petitioner to show good cause to excuse its failure to notify the appropriate school district, and not merely to demonstrate the absence of prejudice to the school district" (*Board of Mgrs. of Copley Ct. Condominium*, 19 NY3d at 871). Thus, contrary to petitioner's contention, "noncompliance with the statute may not be excused on the ground that [the school district] ha[s] not been prejudiced thereby" (*MM1, LLC*, 45 AD3d at 1482; *see Board of Mgrs. of Copley Ct. Condominium*, 19 NY3d at 871; *Gatsby Indus. Real Estate, Inc.*, 45 AD3d at 1481; *Matter of Orchard Hgts., Inc. v Yancy*, 15 AD3d 854, 854-855 [4th Dept 2005], *lv denied* 4 NY3d 710 [2005]; *Matter of Premier Self Stor. of Lancaster v Fusco*, 12 AD3d 1135, 1135-1136 [4th Dept 2004], *lv denied* 4 NY3d 710 [2005]). To the extent that the sole case relied upon by petitioner held otherwise, we do not consider it good law in that regard (*cf. Matter of Bloomingdale's, Inc. v City Assessor of City of White Plains*, 294 AD2d 570, 571 [2d Dept 2002], *lv dismissed* 99 NY2d 553 [2002]).

Moreover, contrary to petitioner's assertions, "noncompliance with the statute [cannot] be excused as a mere technicality" (*MM1, LLC*, 45 AD3d at 1482), and "[t]he mistake or omission of petitioner's attorney," including a factual mistake during an attempt to provide notice, "does not constitute good cause shown within the meaning of RPTL 708 (3) to excuse petitioner's failure to comply with that section" (*Matter of Clay Dome & Golf Ctr. v Board of Assessors of Town of Clay*, 300 AD2d 1092, 1092-1093 [4th Dept 2002] [internal quotation marks omitted]; *see Board of Mgrs. of Copley Ct. Condominium*, 19 NY3d at 871; *MM1, LLC*, 45 AD3d at 1482; *cf. Matter of Harris Bay Yacht Club, Inc. v Town of Queensbury*, 46 AD3d 1304, 1306 [3d Dept 2007]).

Based on the foregoing, we conclude that petitioner failed to establish good cause within the meaning of RPTL 708 (3) to excuse its failure to comply with the statute, and that the court properly granted respondents' motions dismissing the petitions.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00103

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

IN THE MATTER OF DP FULLER FAMILY LP,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF CANANDAIGUA, BOARD OF ASSESSMENT REVIEW
FOR CITY OF CANANDAIGUA, RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.
(APPEAL NO. 2.)

BIERSDORF & ASSOCIATES, P.A., MINNEAPOLIS, MINNESOTA (RYAN R. SIMATIC OF COUNSEL), FOR PETITIONER-APPELLANT.

BOYLAN CODE, LLP, ROCHESTER (J. MICHAEL WOOD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Gail Donofrio, J.), entered December 8, 2020 in a proceeding pursuant to RPTL article 7. The order and judgment, inter alia, granted the motion of respondents City of Canandaigua and Board of Assessment Review for the City of Canandaigua to dismiss the petition and dismissed the petition.

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

Same memorandum as in *Matter of DP Fuller Family LP v City of Canandaigua* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00717

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

NORMAN K., INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF DANIELLE L.K., DECEASED, AND
AS PARENT AND NATURAL GUARDIAN OF DEVYN K.,
BRIANE M. AND TYLER A.M., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALAN POSNER, M.D., MARY BROWN, N.P.,
ET AL., DEFENDANTS,
AND LYNNE ROSS, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

EAGAN & HEIMER PLLC, BUFFALO (LAUREN HEIMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 30, 2021. The order denied the motion of defendant Lynne Ross, M.D. to dismiss the amended complaint and any cross claims against her.

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

Memorandum: Plaintiff commenced this medical malpractice action against, among others, defendants Alan Posner, M.D. and Mary Brown, N.P. and, after the applicable statute of limitations period had expired, plaintiff filed an amended complaint adding Lynne Ross, M.D. as a defendant. Ross moved pursuant to CPLR 3211 (a) (5) to dismiss the amended complaint and any cross claims against her as time-barred and, in appeal No. 1, Ross appeals from an order that denied the motion. In appeal No. 2, Ross appeals from an order that granted plaintiff's motion to settle the order in appeal No. 1.

Initially, inasmuch as Ross has not raised any contentions with respect to the order in appeal No. 2, that appeal must be dismissed as abandoned (*see Golf Glen Plaza Niles, Il. L.P. v Amcoid USA, LLC*, 160 AD3d 1375, 1376 [4th Dept 2018]; *Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Contrary to Ross's contention in appeal No. 1, the motion to dismiss was properly denied based on the relation back doctrine (*see*

May v Buffalo MRI Partners, L.P. [appeal No. 2], 151 AD3d 1657, 1658 [4th Dept 2017]). " 'In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff[] must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he [or she] will not be prejudiced in maintaining his [or her] defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff[] as to the identity of the proper parties, the action would have been brought against him [or her] as well' " (*id.*; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Nani v Gould*, 39 AD3d 508, 509 [2d Dept 2007]).

We reject Ross's contention that plaintiff failed to establish the second and third prongs of the test. The second prong, unity of interest, is satisfied " 'when the interest of the parties in the subject-matter is such that they [will] stand or fall together and that judgment against one will similarly affect judgment against the other' " (*Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1150 [3d Dept 2007]). "There is unity of interest where the defenses available . . . will be identical, [which occurs] . . . where one is vicariously liable for the acts of the other" (*May*, 151 AD3d at 1658-1659 [internal quotation marks omitted]). Contrary to Ross's contention, the record establishes that she was united in interest with Brown inasmuch as Ross was Brown's employer during the relevant time period (*see id.*; *Perillo v DiLamarter*, 151 AD3d 1710, 1711 [4th Dept 2017]; *see generally Athenas v Simon Prop. Group, LP*, 185 AD3d 884, 885 [2d Dept 2020], *lv denied* 36 NY3d 901 [2020]).

With respect to the third prong, "the mistake by plaintiff need not be an excusable mistake" (*May*, 151 AD3d at 1659; *see Buran*, 87 NY2d at 180-181). Here, we conclude that the third prong was satisfied because plaintiff established that the "failure to include [Ross] as a defendant in the original . . . complaint was a mistake and not . . . the result of a strategy to obtain a tactical advantage" (*Nasca v DelMonte*, 111 AD3d 1427, 1429 [4th Dept 2013] [internal quotation marks omitted]). Even assuming, arguendo, that plaintiff was negligent in not ascertaining Ross's potential liability sooner, we conclude that "there was still a mistake by plaintiff[] in failing to identify [Ross] as a defendant" (*Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1194 [4th Dept 2013]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-00745

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, AND WINSLOW, JJ.

NORMAN K., INDIVIDUALLY AND AS ADMINISTRATOR
OF THE ESTATE OF DANIELLE L.K., DECEASED, AND
AS PARENT AND NATURAL GUARDIAN OF DEVYN K.,
BRIANE M. AND TYLER A.M., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALAN POSNER, M.D., ET AL., DEFENDANTS
AND LYNNE ROSS, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

EAGAN & HEIMER PLLC, BUFFALO (LAUREN HEIMER OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 30, 2021. The order granted the motion of plaintiff to settle the order.

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

Same memorandum as in *Norman K. v Posner* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01034

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. HORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. The judgment convicted defendant, upon his plea of guilty, of intimidating a victim or witness in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of intimidating a victim or witness in the third degree (Penal Law § 215.15 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the first degree (§§ 110.00, 120.10 [1]). In appeal No. 3, defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (§ 120.05 [2]). In appeal No. 4, defendant appeals from a judgment convicting him, upon his plea of guilty, of petit larceny (§ 155.25). In appeal No. 5, defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the second degree (§ 120.05 [7]). The sentences for the felony convictions in appeal Nos. 1, 2, 3, and 5 were imposed concurrently to each other, and the sentence for the misdemeanor conviction in appeal No. 4 merged by operation of law with the remaining sentences (*see* § 70.35). In each of the five appeals, we modify the judgment by vacating the sentence, and we remit the matter to County Court to afford defendant the opportunity to either withdraw his guilty pleas or be resentenced in compliance with Penal Law § 70.25 (2-b) and (5) (b)-(c).

Preliminarily, we note that defendant was either 20 or 21 years old when he committed the crimes to which he pleaded guilty in each of the five appeals. Thus, contrary to defendant's contention in all

five appeals, he was ineligible for youthful offender treatment on any of the convictions now before us (*see* CPL 720.10 [1]), and there is therefore "no basis for resentencing pursuant to *People v Middlebrooks* (25 NY3d 516 [2015])" (*People v Walker*, 148 AD3d 1569, 1570 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]). Moreover, defendant's challenge to the voluntariness of his guilty plea in each appeal is unpreserved and, in any event, is without merit (*see People v Cato*, 199 AD3d 1388, 1389 [4th Dept 2021]).

We conclude, however, that the sentences imposed in appeal Nos. 1, 2, and 3 must be vacated for a reason not raised by the parties. The court erred in directing that the sentences underlying these appeals run concurrently without making " 'a statement on the record of the facts and circumstances' " warranting that determination (*People v Phelps*, 91 AD3d 1276, 1276 [4th Dept 2012]; *see* Penal Law § 70.25 [2-b]). Here, defendant committed the crimes to which he pleaded guilty in appeal Nos. 2 and 3 while released on recognizance for the charge to which he pleaded guilty in appeal No. 1, and defendant also committed the crime to which he pleaded guilty in appeal No. 2 while released on recognizance for the charge to which he pleaded guilty in appeal No. 3. Thus, in the absence of a statement of the facts and circumstances warranting concurrent sentences set forth on the record, the court was required to direct that the felony sentences run consecutively (*see* § 70.25 [2-b]; *People v Davis*, 37 AD3d 1179, 1180 [4th Dept 2007], *lv denied* 8 NY3d 983 [2007]).

We must also vacate the sentence imposed in appeal No. 5, again for a reason not raised by the parties. A court may, in the interest of justice, impose a concurrent sentence for a conviction of assault in the second degree under Penal Law § 120.05 (7), provided that the court sets forth in the record its reasons for imposing a concurrent sentence (*see* Penal Law § 70.25 [5] [c]; *People v Smith*, 171 Misc 2d 804, 810 [Sup Ct, Bronx County 1997]). Here, however, the court imposed a concurrent sentence without setting forth its reason on the record.

Moreover, because defendant's guilty pleas in appeal Nos. 1 through 5 were all induced by the promise of illegal concurrent sentencing, we must also vacate the sentence imposed in appeal No. 4, and in each of the five appeals we remit the matter to County Court to afford defendant the opportunity to either withdraw his guilty plea or be resentenced in compliance with Penal Law § 70.25 (2-b) and (5) (b-c) (*see People v DeValle*, 94 NY2d 870, 871-872 [2000]; *Phelps*, 91 AD3d at 1276).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

529

KA 21-01035

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. HORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. 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 modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for further proceedings in accordance with the same memorandum as in *People v Horton* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

530

KA 21-01036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. HORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for further proceedings in accordance with the same memorandum as in *People v Horton* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

531

KA 21-01037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. HORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. The judgment convicted defendant, upon his plea of guilty, of petit larceny.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for further proceedings in accordance with the same memorandum as in *People v Horton* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

532

KA 21-01038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE J. HORTON, DEFENDANT-APPELLANT.
(APPEAL NO. 5.)

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Patrick F. McAllister, A.J.), rendered June 14, 2021. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for further proceedings in accordance with the same memorandum as in *People v Horton* ([appeal No. 1] — AD3d — [July 8, 2022] [4th Dept 2022]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

534

CAF 21-00808

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

IN THE MATTER OF SILAS W., SIRE W.,
CHARLES W., JR., HARMONY W. AND CHARLYS W.
---------- MEMORANDUM AND ORDER
ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND
FAMILY SERVICES, PETITIONER-RESPONDENT;

NATASHA W., RESPONDENT-APPELLANT.

ANDREW T. COYLE, SYRACUSE, FOR RESPONDENT-APPELLANT.

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

WALTER J. BURKARD, MANLIUS, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered May 25, 2021 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

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

Memorandum: Petitioner commenced this proceeding pursuant to Family Court Act article 10, seeking a determination that respondent mother neglected the subject children based on the conditions of the mother's home and allegations that one of the children had fallen out of a window after the mother left the children unsupervised. The mother contends that Family Court erred in granting the petition. We agree.

As a threshold matter, petitioner contends that the appeal must be dismissed on the ground that no appeal lies from a decision. We reject that contention. The paper appealed from meets the essential requirements of an order and we therefore treat it as such (*see Downstairs Cabaret, Inc. v Wesco Ins. Co.*, 187 AD3d 1642, 1643 [4th Dept 2020]; *Nicol v Nicol*, 179 AD3d 1472, 1473 [4th Dept 2020]; *see generally* CPLR 2219 [a]). We note that Family Court Act § 1112 (a) provides that an appeal from an intermediate order in a neglect proceeding "may be taken as of right" and, here, the right to appeal from the intermediate order has not terminated inasmuch as there has been no subsequent entry of an order of disposition (*cf. Matter of Anthony W. [Anthony W.]*, 200 AD3d 1596, 1596 [4th Dept 2021]).

With respect to the merits, we agree with the mother that petitioner failed to establish that the mother neglected the children. A party seeking to establish neglect "must establish 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 and guardianship" (*Matter of Balle S. [Tristian S.]*, 194 AD3d 1394, 1394-1395 [4th Dept 2021], *lv denied* 37 NY3d 904 [2021] [internal quotation marks omitted]; *see* Family Ct Act § 1012 [f] [i]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Whether "any impairment, actual or imminent, . . . [is] a consequence of the parent's failure to exercise a minimum degree of parental care . . . is an objective test that asks whether a reasonable and prudent parent [would] have so acted or failed to act, under the circumstances" (*Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1278 [4th Dept 2014] [internal quotation marks omitted]; *see Nicholson*, 3 NY3d at 370). Although "[a]n isolated accidental injury may constitute neglect if the parent was aware of the intrinsic danger of the situation" (*Matter of James HH.*, 234 AD2d 783, 784 [3d Dept 1996], *lv denied* 89 NY2d 812 [1997]), here, there was nothing intrinsically dangerous about leaving two of the children to eat and watch television while the mother was in the bathroom with the door open (*cf. Matter of Jarrett SS. [Jade TT.-Scott SS.]*, 183 AD3d 1031, 1034-1035 [3d Dept 2020]; *Matter of Tylasia B. [Wayne B.]*, 72 AD3d 1074, 1075 [2d Dept 2010], *lv denied* 15 NY3d 713 [2010]; *Matter of Victoria CC.*, 256 AD2d 931, 933 [3d Dept 1998]). The record establishes that the mother knew that one of her children was sometimes aggressive towards his younger siblings, but there is no evidence in the record that she was aware that he may open a locked window, remove the screen, and drop his sibling from a height of two stories (*cf. Raven B.*, 115 AD3d at 1279). In making that determination, we note that the window involved in the incident was not deemed dangerous by a caseworker during a home visit less than a month before the incident.

We further conclude that petitioner's evidence regarding the hygiene of the children and the condition of the apartment, which petitioner's caseworker testified met "minimal standards," was not sufficient to establish neglect (*see* Family Ct Act § 1012 [f] [i] [A]; *cf. Raven B.*, 115 AD3d at 1280). Further, although a "finding of neglect may be entered where, though [being] financially able to do so or offered financial or other reasonable means to do so, a parent fails to provide the child[ren] with adequate clothing and basic medical care" (*Matter of Annastasia C. [Carol C.]*, 78 AD3d 1579, 1580-1581 [4th Dept 2010], *lv denied* 16 NY3d 708 [2011] [internal quotation marks omitted]), here, "[n]o evidence was presented at the fact-finding hearing concerning the financial status of the mother" (*id.* at 1581).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

540

CA 21-01456

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

IN THE MATTER OF THEODORE FORSYTH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE
DEPARTMENT, RESPONDENTS-APPELLANTS.

PATRICK BEATH, DEPUTY CORPORATION COUNSEL, ROCHESTER (STEPHANIE A. PRINCE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROTH & ROTH, LLP, NEW YORK CITY (ELLIOT D. SHIELDS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 18, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted petitioner's motion for leave to renew his request for attorney's fees and costs and, upon renewal, granted petitioner's request for attorney's fees and costs.

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

Memorandum: Petitioner made a request pursuant to the Freedom of Information Law ([FOIL] Public Officers Law art 6) for certain video footage recorded by respondent Rochester Police Department (RPD) as part of its Body-Worn Camera (BWC) program. Respondents responded by providing petitioner, pursuant to their policy, access to a video consisting of fully blurred images with the audio removed. Respondents noted in their response that, if a less redacted copy was requested, the cost would need to be estimated by the BWC unit of RPD and such fees would need to be paid in advance to obtain the more precisely redacted video.

Petitioner pursued an administrative appeal of respondents' FOIL response, which petitioner considered a constructive denial of his request given respondents' blanket redaction of the entire video without any specific and particularized justification. Respondents responded to petitioner's administrative appeal by stating that petitioner had been provided with a copy of the video that included respondents' "standard blurring filter and audio redaction." Respondents criticized petitioner for pursuing an administrative appeal without first requesting an estimate, despite the language in

the response stating that petitioner had to request an estimate for the cost of more precise blurring if he was unsatisfied. While respondents considered petitioner's administrative appeal "premature" because "nothing ha[d] been denied" given that respondents had "provided the full video with the standard blanket redactions with additional instructions as to next steps," they nonetheless proceeded to render a determination on the administrative appeal. Respondents further stated that, although petitioner had requested on administrative appeal that respondents release an unredacted version of the video, petitioner was entitled only to the video with redactions applied pursuant to the Public Officers Law. However, due to the specialized skill required to perform such redactions, prepayment for preparation of the video was required before it could be processed. Based on the estimated amount of work needed to fulfill the request, respondents informed petitioner that prepayment in the amount of nearly $300 would be required in advance of the redaction process.

Petitioner thereafter commenced this CPLR article 78 proceeding seeking to compel respondents to comply with his FOIL request by providing a complete, unredacted video except for any parts that fell within an exemption to disclosure under the law and to recover attorney's fees and costs pursuant to Public Officers Law § 89 (4) (c). Supreme Court concluded that Public Officers Law § 87 did not permit respondents to meet their FOIL obligations by providing a "blanket-blurred" video to petitioner; determined that respondents could charge a fee "directly related to the redaction of electronic records," provided the fee was not onerous; and remitted the matter to respondents for reconsideration, directing respondents to provide a privilege log to petitioner detailing which sections of the video must be redacted and the reason for such redaction.

Petitioner thereafter filed a notice of appeal and, following additional communication requesting that respondents comply with the order, petitioner moved for an order of civil contempt. Respondents, in an effort to resolve the contempt motion, wrote to petitioner's counsel enclosing a redaction log that provided numerous redactions for content such as faces of minors, names, addresses, and dates of birth. The court ultimately denied the motion, and petitioner appealed from the order denying the contempt motion as well.

On appeal, we agreed with petitioner that respondents may not charge petitioner a fee for the costs associated with their review or redaction of the BWC footage requested by petitioner (*Matter of Forsyth v City of Rochester*, 185 AD3d 1499, 1500 [4th Dept 2020]; *see* Comm on Open Govt FOIL-AO-18904 [2012]). We nonetheless rejected petitioner's further contention that the court should have decided his entitlement to the video footage without allowing respondents to reconsider the request, provide a privilege log, and ultimately comply with their statutory obligations, and we therefore concluded that petitioner's request for attorney's fees was premature at that juncture (*Forsyth*, 185 AD3d at 1500-1501). We also concluded that the court properly denied petitioner's contempt motion (*id.* at 1501).

Immediately following our decision in the prior appeals, petitioner's counsel emailed respondents' counsel requesting that respondents produce an unredacted video and, after respondents' counsel failed to respond, petitioner's counsel sent another email. Respondents eventually released the BWC footage to petitioner along with a redaction log. Respondents explained that the redactions, pursuant to Public Officers Law § 87 (2) (b), were limited to personal information only, e.g., dates of birth and residential addresses. Respondents dropped their claim that the personal privacy exemption required the redaction of names and faces of minors, and therefore produced the footage without such redactions.

Petitioner then renewed his request to recover attorney's fees and costs, and the court determined that respondents lacked a reasonable basis to deny petitioner's original FOIL request, that petitioner substantially prevailed in the proceedings, and that petitioner was therefore entitled to reasonable attorney's fees and costs pursuant to Public Officers Law § 89. Respondents appeal, and we now affirm.

As relevant to the issues on appeal, the statute provides that, in a CPLR article 78 proceeding reviewing the denial of a FOIL request, the court must assess against the agency involved the requesting party's reasonable attorney's fees and other litigation costs when the requesting party "has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (Public Officers Law § 89 [4] [c] [ii]).

Respondents contend that they never denied petitioner's FOIL request within the meaning of the statute because, in response to their release of a completely redacted and soundless video pursuant to their policy, petitioner failed to submit prepayment in compliance with the policy and instead commenced the instant proceeding. That contention is devoid of merit because the record establishes that respondents did, in fact, deny petitioner's FOIL request. Instead of providing a copy of the requested BWC footage, respondents—pursuant to a blanket redaction policy that did not involve an evaluation of whether any particular footage was exempt from disclosure—released to petitioner a completely blurred, entirely soundless video. Then, on administrative appeal, respondents refused petitioner's request to release all of the video and instead conditioned the release of a less redacted video with audio on prepayment of nearly $300. Those actions constituted a blanket denial of petitioner's request (*see Matter of Bottom v Fischer*, 129 AD3d 1604, 1604-1605 [4th Dept 2015]). Indeed, respondents acknowledged that their response to petitioner's request was pursuant to a policy of providing "a blanket redacted video to all requestors in the first instance" without determining whether such full nondisclosure of the images and audio was warranted under the law. That was an improper denial inasmuch as "blanket exemptions for particular types of [media] are inimical to FOIL's policy of open government" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]).

Next, respondents do not dispute on appeal that petitioner

"substantially prevailed when respondents, during the pendency of this proceeding, disclosed the records sought in the FOIL request" (*Matter of Dioso Faustino Freedom of Info. Law Request v City of New York*, 191 AD3d 504, 504 [1st Dept 2021]; *see* Public Officers Law § 89 [4] [c] [ii]). Instead, respondents contend that they had a reasonable basis for denying petitioner's FOIL request pursuant to their prepayment redaction policy. We reject that contention.

Here, respondents "had no reasonable basis for [their] blanket denial of petitioner's request" as a matter of course without first reviewing the video to determine whether any information fell within a statutory exemption to disclosure (*Bottom*, 129 AD3d at 1605). "[A]n agency responding to a demand under [FOIL] may not withhold a record solely because some of the information in that record may be exempt from disclosure" (*Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 45 [2011]). "Instead, to invoke one of the exemptions of section 87 (2), the agency must articulate 'particularized and specific justification' for not disclosing requested [records]" (*Gould*, 89 NY2d at 275, quoting *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571 [1979]), and respondents failed to do so. Moreover, even if respondents had a reasonable basis for their prepayment redaction policy generally (*cf.* Comm on Open Govt FOIL-AO-18904 [2012]), the record establishes that they had no reasonable basis for applying that policy to petitioner's FOIL request. Respondents' contention that they had a reasonable basis for denying all access to a video without redaction absent prepayment of redaction costs is belied by their release of a largely unredacted video after the courts ordered them to reconsider the FOIL request and justify their nondisclosure (*see Bottom*, 129 AD3d at 1605). Indeed, respondents abandoned their claims that the personal privacy exemption required the redaction of faces and names. In the end, the only audio content requiring redaction related to addresses and dates of birth, and the only visual content requiring redaction related to brief depictions of driver's licenses and a patrol car monitor. The record thus establishes that, had respondents simply reviewed the BWC footage in the first instance for statutorily authorized redactions instead of denying petitioner's request by releasing a completely blurred and soundless video, respondents could have produced a video with minimal authorized redactions that fulfilled their statutory obligations and petitioner's FOIL request.

Based on the foregoing, we conclude that petitioner "has been subjected to the very kinds of unreasonable delays and denials of access which the counsel fee provision seeks to deter" (*Bottom*, 129 AD3d at 1605-1606 [internal quotation marks omitted]), and that the court properly ordered that petitioner is entitled to reasonable attorney's fees and other litigation costs.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

541

CA 21-01206

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

SALLIE MANCUSO AND SAMUEL MANCUSO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

REEBOK INTERNATIONAL, LTD., AND MASON
COMPANIES, INC., DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (MATTHEW C. LENAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PAUL W. BELTZ, P.C., BUFFALO (PHILIPP LEE RIMMLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered August 9, 2021. The order denied defendants' motion for summary judgment dismissing plaintiffs' complaint.

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

Memorandum: Plaintiffs commenced this action after Sallie Mancuso (plaintiff) fell while walking down the stairs in her home. At the time of her fall, plaintiff was wearing "Reebok Easytone" shoes that were allegedly "designed, manufactured, assembled and/or distributed" by defendants. Plaintiffs asserted causes of action for negligence, strict products liability predicated on defects in design and manufacture, and breach of express and implied warranties. Defendants moved for summary judgment dismissing the complaint, and Supreme Court denied the motion. We now affirm.

With respect to the strict products liability cause of action, we conclude that, even assuming, arguendo, that defendants met their "initial burden of establishing entitlement to judgment as a matter of law by submitting evidence that [their] product was not defective . . . , and that it was reasonably safe for its intended use" (*Menear v Kwik Fill*, 174 AD3d 1354, 1355-1356 [4th Dept 2019]; *see Beechler v Kill Bros. Co.*, 170 AD3d 1606, 1607-1608 [4th Dept 2019], *lv denied in part and dismissed in part* 34 NY3d 973 [2019]), plaintiffs raised a triable issue of fact.

Once defendants met their burden on the motion with respect to strict products liability, the burden "shifted to [plaintiffs] to raise an issue of fact by submitting evidence of a specific flaw in

the product . . . or circumstantial evidence that the product did not perform as intended excluding all causes for the product's failure not attributable to [defendants]" (*Menear*, 174 AD3d at 1357). Inasmuch as plaintiffs did not exclude all causes for plaintiff's fall not attributable to the shoe, the issue here is whether plaintiffs submitted sufficient evidence to raise a triable question of fact regarding a specific flaw in the shoe.

Where, as here, a plaintiff's expert "opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis" (*Terwilliger v Max Co., Ltd.*, 137 AD3d 1699, 1702 [4th Dept 2016]; *see generally Estate of Smalley v Harley-Davidson Motor Co. Group LLC*, 170 AD3d 1549, 1552 [4th Dept 2019]). Despite any alleged infirmities in the studies performed by plaintiffs' expert, we agree with the court that there are conflicting opinions between parties' experts, and those conflicts " 'may not be resolved on a motion for summary judgment' " (*Pittman v Rickard*, 295 AD2d 1003, 1004 [4th Dept 2002]).

We also note that defendant Reebok International, LTD (Reebok) acknowledged that it intentionally designed the shoe to be unstable in an attempt to provide toning benefits to users. As plaintiffs contend, the fact that the shoe was designed to be unstable is evidence, albeit not conclusive, that the shoe is actually unstable. Although it is true, as defendants point out, that the Federal Trade Commission (FTC) later determined Reebok engaged in false advertising by claiming that the shoe had toning benefits, that does not in itself establish that the shoe was stable, as defendants suggest.

Inasmuch as "there is almost no difference between a prima facie case in negligence and one in strict products [liability]," and the breach of express and implied warranties cause of action is " 'coextensive with [the] tort based [causes of action]' " (*Menear*, 174 AD3d at 1357), we similarly conclude that the court properly denied defendants' motion with respect to those causes of action.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

570

CAF 21-00626

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

IN THE MATTER OF ANDREW R. DUPONT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERIKA K. ARMSTRONG, RESPONDENT-APPELLANT.

KEEM APPEALS, PLLC, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR RESPONDENT-APPELLANT.

COHEN & COHEN, UTICA (RICHARD A. COHEN OF COUNSEL), FOR PETITIONER-RESPONDENT.

KACIE M. CROUSE, UTICA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 26, 2021 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner primary residential custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: In this Family Court Act article 6 proceeding, respondent mother appeals from an order that, inter alia, granted petitioner father's petition seeking to modify a prior order entered on consent by transferring primary residential custody of the parties' child from the mother to the father. Approximately one week prior to the hearing on the father's petition, the mother's attorney informed Family Court that there had been a breakdown in her attorney-client relationship with the mother, as a result of which she was no longer representing the mother, and she requested an adjournment of the hearing. On the morning of the hearing, the court failed to make any inquiry of the mother concerning the fact that her attorney was not present at the hearing, nor did the court make any mention of the attorney's adjournment request. The mother herself then sought an adjournment and confirmed to the court that there had been a fundamental breakdown in the relationship with her attorney. The mother explained that she had spoken to, and scheduled a meeting with, a new attorney and that the new attorney could not be present due to a preexisting obligation. The court denied her request, and required the mother to proceed pro se through the conclusion of the hearing.

We agree with the mother that the court abused its discretion in denying her request to adjourn the hearing (*see Daming Zhu v Ye Cheng*, 142 AD3d 1365, 1365 [4th Dept 2016]; *Matter of Bobi Jo B. v Jerry L.W.*, 45 AD3d 1382, 1383 [4th Dept 2007]; *cf. Matter of Latonia W. [Anthony W.]*, 144 AD3d 1692, 1693 [4th Dept 2016]). The record establishes that the mother's request was not a delay tactic and did not result from her lack of diligence in retaining new counsel (*see Bobi Jo B.*, 45 AD3d at 1383). Moreover, the request was the mother's first request for an adjournment in the matter (*see Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]). We therefore reverse the order and remit the matter to Family Court for a new hearing on the petition. Pending the court's determination upon remittal, the custody and visitation provisions in the order appealed from shall remain in effect (*see Daming Zhu*, 142 AD3d at 1366).

In light of our determination, we do not reach the mother's remaining contentions.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

572.1

KA 21-01674

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KIRK COTTOM, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered June 21, 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.*). We affirm.

Initially, inasmuch as the record establishes that defendant did not request an adjournment, including for the purpose of permitting him to obtain additional materials pursuant to Correction Law § 168-n (3), defendant's contention that Supreme Court deprived him of due process by failing to adjourn the hearing is not preserved for our review (*see People v LaRock*, 45 AD3d 1121, 1123 [3d Dept 2007]; *see generally People v Scott*, 71 AD3d 1417, 1417 [4th Dept 2010], *lv denied* 14 NY3d 714 [2010]).

Next, contrary to defendant's contention, we conclude that the court properly assessed 10 points under risk factor 12 based on defendant's failure to accept responsibility. The risk assessment guidelines issued by the Board of Examiners of Sex Offenders (Board) provide that "[a]n offender who does not accept responsibility for his conduct or minimizes what occurred is a poor prospect for rehabilitation" and, consequently, 10 points are properly assessed to an offender who has not accepted responsibility (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006] [Guidelines]). The Guidelines further provide that, "[i]n scoring this category, the Board or court should examine the offender's most recent credible statements and should seek evidence of

genuine acceptance of responsibility" (Guidelines at 15). Here, although defendant pleaded guilty to the child pornography crimes underlying the SORA determination, the People established by clear and convincing evidence, including reliable hearsay (*see* Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 573 [2009]), that defendant subsequently made statements after his release from incarceration in direct contradiction to his guilty plea by denying that he had engaged in any illegal activity (*see People v Hiram*, 142 AD3d 1304, 1305 [4th Dept 2016], *lv denied* 28 NY3d 911 [2016]; *People v Noriega*, 26 AD3d 767, 767 [4th Dept 2006], *lv denied* 6 NY3d 713 [2006]). Defendant's "contradictory statements, considered together, do not reflect a genuine acceptance of responsibility as required by the [Guidelines] developed by the Board" (*Noriega*, 26 AD3d at 767 [internal quotation marks omitted]; *see Hiram*, 142 AD3d at 1305).

Defendant also contends that the court erred in granting the People's request for an upward departure from his presumptive classification as a level one risk to a level two risk. We reject that contention.

It is well settled that when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are "as a matter of law, of a kind or to a degree not adequately taken into account by the [G]uidelines," a court "must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure" from a sex offender's presumptive risk level (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Sincerbeaux*, 27 NY3d 683, 689-690 [2016]; *People v Coon*, 184 AD3d 1091, 1092 [4th Dept 2020], *lv denied* 35 NY3d 916 [2020]; Guidelines at 4).

Here, the People established by clear and convincing evidence the existence of aggravating factors not adequately taken into account by the Guidelines, including the quantity of images depicting child pornography that were discovered on defendant's computers and the sadomasochistic nature of certain of those images (*see People v June*, 195 AD3d 1443, 1444 [4th Dept 2021], *lv denied* 37 NY3d 912 [2021]; *Coon*, 184 AD3d at 1092; *People v McCabe*, 142 AD3d 1379, 1380 [4th Dept 2016]). Contrary to defendant's contention, the court was not limited to considering only the crimes of which defendant was convicted in making its determination (*see* Guidelines at 5; *People v Hightower*, 197 AD3d 742, 744 [2d Dept 2021], *lv denied* 37 NY3d 918 [2022]), and the information in the presentence report and case summary regarding the quantity and nature of the child pornography in defendant's possession constitutes "reliable hearsay" upon which the court properly relied and credited in making the upward departure (Correction Law § 168-n [3]; *see Mingo*, 12 NY3d at 572-573; *Coon*, 184 AD3d at 1092; *see generally People v Diaz*, 34 NY3d 1179, 1181 [2020]). Contrary to defendant's further contention, the aggravating factors outweighed any mitigating factors, and the totality of the circumstances thus warranted an upward departure to avoid an under-assessment of defendant's dangerousness and risk of sexual recidivism (*see People v*

Sczerbaniewicz, 126 AD3d 1348, 1349-1350 [4th Dept 2015]; *see generally Gillotti*, 23 NY3d at 861).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

572

TP 22-00180

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

IN THE MATTER OF ROBERT L. MALVESTUTO,
PETITIONER,

V MEMORANDUM AND ORDER

MARK J.F. SCHROEDER, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER, NEW YORK STATE
DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ALEXANDER E. BASINSKI OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Niagara County [Frank Caruso, J.], entered February 1, 2022) to review a determination of respondent. The determination revoked petitioner's driver's license.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 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 (DWI). We confirm the determination.

Contrary to petitioner's contention, the determination is supported by substantial evidence. The arresting officer's testimony at the hearing established that the officer possessed reasonable grounds to believe that petitioner had been driving while intoxicated inasmuch as the hood of the vehicle in question was warm when the officer arrived at the scene, there was a single set of footprints in the snow leading away from the driver's side of the vehicle following the path that petitioner was alleged by the complaining witness to have taken, petitioner admitted that he had been in the vehicle, petitioner exhibited signs of alcohol consumption and impairment, and petitioner refused to perform field sobriety tests (*see Matter of Thompson v New York State Dept. of Motor Vehs.*, 170 AD3d 1657, 1657-1658 [4th Dept 2019]; *see also People v Barnes*, 137 AD3d 1571, 1571-

1572 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016]; *People v Annis*, 126 AD3d 1525, 1526 [4th Dept 2015]). In addition, the officer's testimony, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to the chemical test after he was arrested for DWI and warned three times of the consequences of such refusal (*see* Vehicle and Traffic Law § 1194 [2] [a] [1]; *Matter of Huttenlocker v New York State Dept. of Motor Vehs. Appeals Bd.*, 156 AD3d 1464, 1464 [4th Dept 2017]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

574

TP 22-00179

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF LEROY JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

STEWART T. ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

LEROY JOHNSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered November 16, 2021) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul a determination, following a tier II disciplinary hearing, that he violated certain inmate rules. Contrary to petitioner's contention, the misbehavior reports constitute substantial evidence supporting the determination that he violated the subject inmate rules (*see Matter of Perez v Wilmot*, 67 NY2d 615, 616-617 [1986]; *Matter of Murphy v Graham*, 98 AD3d 833, 834-835 [4th Dept 2012]). Petitioner's testimony merely presented credibility issues for the Hearing Officer to resolve (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

575

CA 22-00200

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

S.P., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M.P., DEFENDANT-RESPONDENT.

S.P., PLAINTIFF-APPELLANT PRO SE.

VERA A. VENKOVA, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Niagara County (Frank A. Sedita, III, J.), entered January 5, 2022. The order, inter alia, precluded plaintiff from filing any new application without leave of court or approval of an attorney.

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

Memorandum: Plaintiff mother appeals from an order that effectively denied her requests for various relief and precluded her from filing any new application for legal relief without leave of court or approval of an attorney. Contrary to the mother's contention, her requests for relief were all without merit, and Supreme Court did not abuse its discretion in placing restrictions on future filings. Although "[p]ublic policy mandates free access to the courts . . . , a party may forfeit that right if she or he abuses the judicial process by engaging in meritless litigation motivated by spite or ill will" (*Ritchie v Ritchie*, 184 AD3d 1113, 1117 [4th Dept 2020] [internal quotation marks omitted]; *see Cangro v Marangos*, 160 AD3d 580, 580 [1st Dept 2018], *appeal dismissed* 32 NY3d 947 [2018]; *Matter of Pavic v Djokic*, 152 AD3d 696, 697 [2d Dept 2017]). The mother has made multiple motions for various relief, many of which are repetitive, and each motion is accompanied by voluminous and mostly irrelevant exhibits. When her requests for relief are denied, the mother ignores the court's ruling and continues making the same meritless arguments. Moreover, the mother is sending copies of her papers, which contain sensitive issues, to people who have no involvement at all in the case. We thus agree with the court that the mother " 'has abused the judicial process by engaging in meritless, frivolous or vexatious litigation' " (*Ritchie*, 184 AD3d at 1118; *see Matter of Pignataro v Davis*, 8 AD3d 487, 489 [2d Dept 2004]).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

579

CAF 21-00860

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF JIRYAN S.

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

MEMORANDUM AND ORDER

TAMMY (ALSO KNOWN AS TAMARA) D., AND
JASON S., RESPONDENTS-APPELLANTS.

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

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT TAMMY (ALSO KNOWN AS TAMARA) D.

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

ELIZABETH SCHENCK, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeals from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered April 26, 2021 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents with respect to the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating those parts finding that respondent Tammy (also known as Tamara) D. permanently neglected the subject child and terminating her parental rights and as modified the order is affirmed without costs and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother and respondent father each appeal from an order entered upon their respective defaults that, inter alia, determined that the subject child had been permanently neglected and terminated their parental rights with respect to that child. The mother and the father each failed to appear at the fact-finding hearing on the petition to terminate their parental rights and, although their attorneys were present at the hearing, neither attorney participated. Each parent's failure to appear constituted a default (*see Matter of Hayden A. [Karen A.]*, 188 AD3d 1759, 1759 [4th Dept 2020]; *Matter of Lastanzea L. [Lakesha L.]*, 87 AD3d 1356, 1356 [4th Dept 2011], *lv dismissed in part and denied in part* 18 NY3d 854 [2011]), and this Court previously granted petitioner's motion to

dismiss the appeals except insofar as the mother or the father raised any issue that was subject to contest in the proceedings in Family Court (*Matter of Jiryan S.*, 2021 NY Slip Op 74536[U] [4th Dept 2021]; *see generally Hayden A.*, 188 AD3d at 1759; *Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]), i.e., the court's denial of the attorneys' requests for an adjournment (*see Hayden A.*, 188 AD3d at 1759; *Matter of Ramere D. [Biesha D.]*, 177 AD3d 1386, 1386-1387 [4th Dept 2019], *lv denied* 35 NY3d 904 [2020]).

We reject the father's contention that the court abused its discretion in denying his attorney's request for an adjournment (*see Matter of Ferratella v Thomas*, 173 AD3d 1834, 1835 [4th Dept 2019]; *Matter of Daniel K.L. [Shaquanna L.]*, 138 AD3d 743, 745 [2d Dept 2016]; *Matter of Wilson v McCray*, 125 AD3d 1512, 1513 [4th Dept 2015], *lv denied* 25 NY3d 908 [2015]). The father's contention that he was constructively denied counsel is not properly before us (*see Matter of Nevaeh D.J. [Daniel J.-Janelle J.]*, 151 AD3d 1867, 1868 [4th Dept 2017]).

We agree with the mother that the court abused its discretion in denying her attorney's request for an adjournment. The mother had not previously requested an adjournment, and there was no indication in the record that an adjournment would have adversely affected the child (*see Hayden A.*, 188 AD3d at 1760; *Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]). Further, the mother was experiencing COVID-like symptoms and, under the court's own rules, she was prohibited from entering the courthouse (*cf. Ramere D.*, 177 AD3d at 1387). We therefore vacate those parts of the order determining that the mother permanently neglected the subject child and terminating her parental rights, and we remit the matter to Family Court for further proceedings on the petition against the mother.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

581

KA 16-01896

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL E. SARVER, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered August 25, 2016. The judgment convicted defendant upon his plea of guilty of vehicular assault in the first degree, driving while intoxicated, a class D felony, and assault in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, vehicular assault in the first degree (Penal Law § 120.04 [2] [b]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. As the People correctly concede, County Court provided defendant with erroneous information about the scope of the waiver of the right to appeal; therefore we conclude that the record fails to establish that defendant's waiver of the right to appeal was voluntary, knowing, and intelligent (*see People v Thomas*, 34 NY3d 545, 564-568 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). Nevertheless, the sentence is not unduly harsh or severe.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

582

KA 21-00002

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CARR, DEFENDANT-APPELLANT.

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN, FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered October 27, 2020. The judgment convicted defendant upon a plea of guilty of burglary in the second degree and burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and burglary in the third degree (§ 140.20), defendant contends that his waiver of the right to appeal is invalid and that the sentence is unduly harsh and severe. Contrary to defendant's contention, the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and we note that County Court used the appropriate model colloquy with respect to the waiver of the right to appeal (*see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Jeffords*, 185 AD3d 1417, 1417-1418 [4th Dept 2020], *lv denied* 35 NY3d 1095 [2020]). Further, the court inquired about defendant's asserted mental health issues, and those issues "did not invalidate the waiver of the right to appeal inasmuch as there was no showing that defendant was uninformed, confused or incompetent when he waived the right to appeal" (*People v Henderson*, 162 AD3d 1507, 1507 [4th Dept 2018], *lv denied* 32 NY3d 1004 [2018] [internal quotation marks omitted]; *see People v Brand*, 112 AD3d 1320, 1321 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014]). The valid waiver of the right to appeal encompasses his challenge to the severity of the bargained-for sentence (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *see also Lopez*, 6 NY3d at 255-256).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

586

CAF 21-01129

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

IN THE MATTER OF ERIN M. SHEPHERD,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

THAD A. SHEPHERD, JR.,
RESPONDENT-PETITIONER-RESPONDENT.

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

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

ANDREW G. MORABITO, EAST ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered June 24, 2021 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted respondent-petitioner sole legal custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that, inter alia, effectively granted the cross petition of respondent-petitioner father insofar as the cross petition sought sole custody of the parties' two minor children. We affirm. The mother's contention that Family Court should have ordered a forensic evaluation for consideration in the analysis of the best interests of the children is unpreserved for our review (*see Matter of Garrick v Simon*, 197 AD3d 1316, 1316-1317 [2d Dept 2021]; *see also Matter of Canfield v McCree*, 90 AD3d 1653, 1654 [4th Dept 2011]).

We reject the mother's further contention that the court erred in granting the father sole custody of the subject children. "[A] court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight" (*Matter of Saunders v Stull*, 133 AD3d 1383, 1383 [4th Dept 2015] [internal quotation marks omitted]), and such a determination "will not be disturbed as long as it is supported by a sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]). Here, the

court's custody determination is supported by a sound and substantial basis in the record (*see Matter of Benson v Smith*, 178 AD3d 1430, 1431 [4th Dept 2019]). Contrary to the mother's contention, joint custody was not appropriate given the parties' acrimonious relationship (*see id.*).

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

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

773/20

KA 14-02245

PRESENT: WHALEN, P.J., SMITH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KESEAN R. MCKENZIE-SMITH, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 19, 2013. The judgment convicted defendant upon a jury verdict of murder in the second degree, robbery in the first degree (three counts) and attempted robbery in the first degree (two counts). The judgment was reversed by order of this Court entered October 9, 2020 (187 AD3d 1668), and the People on February 28, 2022 were granted leave to appeal to the Court of Appeals from the order of this Court (38 NY3d 929), and the Court of Appeals on May 19, 2022 reversed the order and remitted the case to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (— NY3d — [May 19, 2022]).

Now, upon remittitur from the Court of Appeals and having considered the facts and issues raised but not determined on the appeal to this Court,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from be and the same hereby is unanimously modified on the law by directing that the sentence imposed on count one of the indictment shall run concurrently with the consecutive sentences imposed on the remaining counts, and as modified the judgment is affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v McKenzie-Smith*, — NY3d —, 2022 NY Slip Op 03308 [2022], *revg* 187 AD3d 1668 [4th Dept 2020]). Defendant and a codefendant were charged with, inter alia, murder in the second degree (Penal Law § 125.25 [3]), arising from the death of a man who was shot during a robbery. Both defendant and the codefendant were convicted after a joint trial. On the codefendant's appeal, we modified the sentence imposed, and as modified we affirmed the judgment of

conviction (*People v Wilkins*, 175 AD3d 867 [4th Dept 2019], *affd* 37 NY3d 371, 380 [2021]). We previously reversed the judgment convicting defendant (*McKenzie-Smith*, 187 AD3d at 1669-1670), concluding that there was insufficient evidence that defendant or his counsel knowingly waived defendant's *Antommarchi* rights (*see generally People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). The People appealed, however, and the Court of Appeals reversed our determination, concluding that this Court "erred in holding that defendant's *Antommarchi* claim . . . entitled him to a new trial" (*McKenzie-Smith*, — NY3d at —, 2022 NY Slip Op 03308 at *1). The Court of Appeals remitted the matter to this Court for "consideration of the facts and issues raised but not determined" previously (*id*.).

Contrary to defendant's contention, he is not entitled to a new trial based on Supreme Court's restrictions on the cross-examination of a prosecution witness. During the trial, defendant's counsel and the codefendant's counsel questioned a prosecution witness extensively about his prior bad acts, and the witness admitted that he committed acts constituting, inter alia, forgery and theft. Defendant's counsel asked the same witness about his involvement in an alleged gang assault, and the witness denied committing the assault. After learning that a grand jury had declined to indict the witness on charges related to the alleged gang assault, the court barred defendant's counsel from asking the witness further questions about that alleged assault. Initially, we note that, at trial, defendant did not contend that he was deprived of the ability to argue that the witness received a benefit from the prosecutor due to the grand jury's determination not to indict the witness, thus he failed to preserve that contention for our review (*see generally People v George*, 67 NY2d 817, 818-819 [1986]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant did preserve his contention that the court erred in precluding him from cross-examining the witness concerning prior bad acts committed by the witness that resulted in the charges with which the grand jury declined to indict defendant. Nevertheless, even assuming, arguendo, that the court erred in precluding such cross-examination (*cf. generally People v Smith*, 27 NY3d 652, 662-668 [2016], *rearg denied* 28 NY3d 1112 [2016]), we conclude that any error is harmless. The evidence of defendant's guilt is overwhelming, and inasmuch as the witness was extensively cross-examined regarding other bad acts that were directly pertinent to his credibility, and he had already denied committing the alleged gang assault, there is no significant probability that defendant would have been acquitted if defendant's attorney had been permitted to engage in further questioning of the witness about that alleged crime (*see Smith*, 27 NY3d at 665; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his contention that the court violated the procedures regarding sentencing (*see generally People v Morales-Lopez*, 110 AD3d 1248, 1249 [3d Dept 2013], *lv denied* 22 NY3d 1140 [2014]; *People v Brotz*, 108 AD3d 1236, 1236 [4th Dept 2013]). We decline to exercise our power to review that contention as

a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends, and the People correctly concede, however, that the court erred in directing that the sentence imposed on count one, charging him with felony murder, run consecutively to the consecutive sentences imposed on the remaining counts (*see Wilkins*, 175 AD3d at 869; *see generally People v Parks*, 95 NY2d 811, 814-815 [2000]). Consequently, we modify the judgment by directing that the sentence imposed on count one of the indictment run concurrently with the consecutive sentences imposed on the remaining counts. The sentence, as modified, is not unduly harsh or severe.

We have considered defendant's further contention and conclude that it does not warrant reversal or further modification of the judgment.

Entered: July 8, 2022

Ann Dillon Flynn
Clerk of the Court

MOTION NO. (270/22) CA 21-00248. -- LISA PARKISON, AS CHAIR OF WAYNE FINGER LAKES SCHOOL WORKERS' COMPENSATION PLAN, PLAINTIFF-RESPONDENT, V KBM MANAGEMENT, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for renewal of the appeal be and the same hereby is granted to the extent that, upon renewal, the order entered April 22, 2022 (204 AD3d 1435 [4th Dept 2022]) is amended by deleting the ordering paragraph and substituting the following ordering paragraph and memorandum:

> It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied.
>
> Memorandum: Plaintiff commenced this action seeking damages arising from consulting services provided by defendant related to the Wayne Finger Lakes School Workers' Compensation Plan (Plan), which included audits of certain of the Plan's records. Defendant now appeals from an order insofar as it granted plaintiff's motion for summary judgment on the breach of contract cause of action. We reverse the order insofar as appealed from.
>
> Supreme Court erred in granting plaintiff's motion because she failed to meet her initial burden. Specifically, plaintiff failed to establish as a matter of law that any damages were proximately caused by the alleged breach of contract by defendant (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Mosca v Normile*, 277 AD2d 942, 942 [4th Dept 2000]).

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

(Filed July 8, 2022.)

MOTION NO. (278/22) CA 21-00247. -- DARRIN WINKLEY, AS PRESIDENT OF ROCHESTER AREA SCHOOLS WORKERS' COMPENSATION PLAN, PLAINTIFF-RESPONDENT, V KBM MANAGEMENT, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for renewal of the appeal be and the same hereby is granted to the extent that, upon renewal, the order entered April 22, 2022 (204 AD3d 1437 [4th Dept 2022]) is amended by deleting the ordering paragraph and substituting the following ordering paragraph and memorandum:

> It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied.
>
> Memorandum: Plaintiff commenced this action seeking damages arising from consulting services provided by defendant related to the Rochester Area Schools Workers' Compensation Plan (Plan), which included audits of certain of the Plan's records. Defendant now appeals from an order insofar as it granted plaintiff's motion for summary judgment on the breach of contract cause of action. We reverse the order insofar as appealed from.
>
> Supreme Court erred in granting plaintiff's motion because he failed to meet his initial burden. Specifically, plaintiff failed to establish, as a matter of law, that any damages were proximately caused by the alleged breach of contract by defendant (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Mosca v Normile*, 277 AD2d 942, 942 [4th Dept 2000]).

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

(Filed July 8, 2022.)