SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 10, 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

HON. MARK A. MONTOUR, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

596
CA 21-00765
PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND NEMOYER, JJ.

HOGANWILLIG, PLLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SWORMVILLE FIRE CO., INC., DEFENDANT-RESPONDENT.

HOGANWILLIG, PLLC, AMHERST (JEFFREY B. NOVAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered April 28, 2021. The order, insofar as appealed from, granted that part of defendant's motion seeking disqualification of HoganWillig, PLLC.

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 disqualification of HoganWillig, PLLC is denied.

Memorandum: Plaintiff HoganWillig, PLLC (HoganWillig) appeals from an order that, inter alia, prohibited the law firm from serving as legal counsel for itself in its action against defendant Swormville Fire Co., Inc. (SFC). HoganWillig had represented SFC, a volunteer fire company, in its longstanding litigation against the architectural firm and the contractor involved in the design and construction of SFC's fire station. In the years following commencement of that litigation, the parties twice modified the governing retainer agreements in response to SFC's concerns about its litigation costs. During a meeting between HoganWillig attorneys and SFC representatives held more than eight years into the litigation, HoganWillig's owner (owner) gave SFC an estimate of trial readiness that prompted questions from SFC about HoganWillig's diligence given the amount of time and money already devoted to the litigation. The meeting apparently became acrimonious and, although the parties dispute whether HoganWillig withdrew from representation unilaterally without cause or due to an irretrievable breakdown of the attorney-client relationship induced by SFC, it is undisputed that the owner told SFC that " 'We're done. Go get another law firm.' " A few weeks after the meeting, the owner sent SFC a letter providing an overview of the litigation to date and promising to cooperate with SFC's new counsel. SFC thereafter retained new counsel and settled the litigation less than two years later.

HoganWillig commenced the present action seeking, inter alia, to recover payment for legal services provided to SFC. SFC, as relevant here, answered and interposed counterclaims, including for declarations that the retainer agreements were unenforceable and that HoganWillig forfeited legal fees by unilaterally terminating its representation and abandoning SFC as a client. SFC thereafter moved to disqualify HoganWillig from representing itself in the action. SFC contended that the attorneys who attended the meeting should be disqualified under the advocate-witness rule contained in rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0) because they were likely to be witnesses on a significant issue of fact in the litigation and for other reasons related to their roles in billing and statements about the representation, and that the disqualification of those attorneys required disqualification of the entire law firm as well.

Supreme Court determined that the owner and two other HoganWillig attorneys who attended the meeting could not serve as advocates in a matter in which they would also be witnesses, but that the law firm itself should not be disqualified because the court was not convinced that the testimony of the disqualified attorneys "will be prejudicial" to HoganWillig. The court further reasoned that, if HoganWillig concluded it was the best strategy to allow other attorneys from the firm to represent it in the action, HoganWillig was entitled to make that decision without judicial interference. The court thus granted the motion in part by disqualifying the aforementioned attorneys but denied the motion with respect to the remainder of the law firm.

SFC moved for leave to reargue its original motion, and the court, upon considering the reargument motion, determined that it had previously misapplied the law because the standard was whether the testimony of the disqualified attorneys "may" be prejudicial to HoganWillig, not whether it "will" be prejudicial. The court thus granted leave to reargue. On reargument, the court determined that SFC met the standard of establishing that prejudice may result and, on that basis alone, concluded that HoganWillig should be disqualified. The court emphasized that it would provide sufficient time for HoganWillig to obtain new counsel. As limited by its brief, HoganWillig contends on appeal that the court erred in granting SFC's reargument motion to the extent that it sought to disqualify the law firm.

Preliminarily, SFC contends that the appeal should be dismissed on the ground that HoganWillig was not permitted to represent itself and yet it filed a notice of appeal in violation of the order appealed from, thereby rendering the notice of appeal null and void. SFC further contends that the court's subsequent order granting HoganWillig permission to represent itself on appeal is not effective nunc pro tunc. We reject those contentions. The notice of appeal was timely filed by HoganWillig on its own behalf before the date by which it was required, under the order appealed from, to substitute new counsel, a deadline that fell beyond the time by which HoganWillig had to take an appeal (*see* CPLR 5513 [a]) and, in any event, the court's subsequent order granting HoganWillig permission to represent itself

on appeal, of which we take judicial notice (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 145 at 1-2), effectively authorized HoganWillig, nunc pro tunc, to file the notice of appeal (*see generally Gradl v Saulpaugh*, 268 App Div 787, 787 [2d Dept 1944]).

With respect to the merits, the advocate-witness rule embodied in rule 3.7 of the Rules of Professional Conduct provides, as relevant here, that "[a] lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless . . . the testimony relates solely to an uncontested issue . . . [or] the testimony relates solely to the nature and value of legal services rendered in the matter" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [a] [1], [2]). The rule further contemplates disqualification of a law firm under certain circumstances insofar as "[a] lawyer may not act as advocate before a tribunal in a matter if . . . another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [b] [1]).

Critically, however, "[t]he advocate-witness disqualification rules . . . provide guidance, not binding authority, for courts in determining whether a party's law firm, at its adversary's instance, should be disqualified during litigation" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 440 [1987]). "Courts must, in addition, consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation" (*id.*). Indeed, "[d]isqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants" (*id.* at 443). "Disqualification denies a party's right to representation by the attorney of its choice" (*id.*). "The right to counsel of choice is not absolute and may be overridden where necessary—for example, to protect a compelling public interest—but it is a valued right and any restrictions must be carefully scrutinized" (*id.*). "Moreover, [courts] cannot ignore that where the [Rules of Professional Conduct are] invoked not in a disciplinary proceeding to punish a lawyer's own transgression, but in the context of an ongoing lawsuit, disqualification of a [litigant's] law firm can stall and derail the proceedings, redounding to the strategic advantage of one party over another" (*id.*). In sum, "[c]onsidering all the significant interests to be balanced, it is particularly important that the [Rules of Professional Conduct] not be mechanically applied when disqualification is raised in litigation"; instead, the rules must be employed to provide "guidance for the courts in determining whether a case would be tainted by the participation of an attorney or a firm" (*id.* at 444-445 [internal quotation marks omitted]).

The party seeking disqualification of a law firm or an attorney bears the "burden of making 'a clear showing that disqualification is warranted' " (*Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]; *see S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 445;

Jozefik v Jozefik, 89 AD3d 1489, 1490 [4th Dept 2011]), and a trial court's decision to disqualify a law firm or an attorney shall be reviewed on appeal for abuse of discretion (*see Jozefik*, 89 AD3d at 1490; *Lake*, 60 AD3d at 1470). In this case, we conclude for the reasons that follow that the court erred in granting that part of SFC's reargument motion with respect to disqualification of HoganWillig.

First, we agree with HoganWillig that SFC failed to establish that "it is apparent that the testimony [of the disqualified attorneys] may be prejudicial to [HoganWillig]" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7 [b] [1]; *see e.g. S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 446; *Matter of Bodkin* [appeal No. 3], 128 AD3d 1526, 1527 [4th Dept 2015]). "The word 'apparent' means that prejudice to the client must be visible, as opposed to merely speculative, conceivable, or imaginable," i.e., the prejudice "has to be a real possibility, not just a theoretical possibility" (Simon's NY Rules of Prof. Conduct § 3.7:22 [Dec 2021 Update]). Consistent therewith, a movant's "vague and conclusory" assertions are insufficient to establish that an attorney's testimony may be prejudicial to the client (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 446 [internal quotation marks omitted]).

Here, the record reveals nothing more than a speculative or theoretical possibility that the testimony of the disqualified attorneys may be prejudicial to HoganWillig. The letter and affidavits of the owner are clear that he will testify that HoganWillig engaged in extensive efforts on behalf of SFC during the litigation and will testify that HoganWillig did not, contrary to SFC's allegations, abruptly withdraw without cause, but instead ended its representation only after SFC's actions and relentless criticisms caused an irretrievable breakdown of the attorney-client relationship. SFC's conclusory and speculative suggestion that testimony by the owner about his statement during the meeting may be prejudicial to HoganWillig is insufficient because, in context, the owner's statement shows no more than that HoganWillig ended its representation of SFC, which is already an undisputed fact and consistent with HoganWillig's position that SFC caused the breakdown of the relationship (*cf. Hitzig v Borough-Tel Serv.*, 108 AD2d 677, 678 [1st Dept 1985], *appeal dismissed* 65 NY2d 784 [1985]; *see generally NY Kids Club 125 5th Ave., LLC v Three Kings, LLC*, 133 AD3d 580, 581 [2d Dept 2015]). Similarly, as HoganWillig further contends, the owner's statements regarding trial preparation and billings to SFC, considered in the context of the owner's likely overall testimony, only support HoganWillig's position that the underlying litigation was complex and that it made significant efforts to maintain the attorney-client relationship, and thus SFC made no showing that the owner's testimony on those topics may be prejudicial to HoganWillig's case (*see Advanced Chimney, Inc. v Graziano*, 153 AD3d 478, 481 [2d Dept 2017]; *NY Kids Club 125 5th Ave., LLC*, 133 AD3d at 581; *Bodkin*, 128 AD3d at 1527).

Additionally, SFC claimed in support of its motion, and reiterates in its respondent's brief, that the owner and one of the

other disqualified attorneys, who were involved in negotiating and drafting the retainer agreements, will provide testimony prejudicial to HoganWillig by establishing that the retainer agreements are unenforceable. Those claims constitute "vague and conclusory" assertions that are insufficient to establish that testimony about the retainer agreements may be prejudicial to HoganWillig (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 446 [internal quotation marks omitted]; *see Cathedral Ct. Assoc., L.P. v Cathedral Props. Corp.*, 116 AD3d 649, 651 [2d Dept 2014], *lv denied in part and dismissed in part* 24 NY3d 941 [2014]). Indeed, "aside from conclusory assertions," SFC has provided no basis upon which to conclude that the owner and the other disqualified attorneys are likely to testify that they drafted the retainer agreements in an unenforceable manner (*Cathedral Ct. Assoc., L.P.*, 116 AD3d at 651; *cf. Zagari v Zagari*, 295 AD2d 891, 891 [4th Dept 2002]).

Consequently, we conclude that "there was no showing [by SFC] that [the disqualified attorneys'] testimony may be prejudicial to [HoganWillig's] case" (*Advanced Chimney, Inc.*, 153 AD3d at 481; *see S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 446; *NY Kids Club 125 5th Ave., LLC*, 133 AD3d at 581; *Bodkin*, 128 AD3d at 1527; *Cathedral Ct. Assoc., L.P.*, 116 AD3d at 651).

Second, after determining—incorrectly—that SFC had shown that it was apparent that the testimony of the disqualified attorneys may prejudice HoganWillig, the court "then simply imposed disqualification of the firm as the mandated consequence" of the Rules of Professional Conduct (*S & S Hotel Ventures Ltd. Partnership*, 69 NY2d at 443). That too was error (*see id.*).

Here, the court erred in failing to "consider such factors as [HoganWillig's] valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification" (*id.* at 440). "Disqualification denies a party's right to representation by the attorney of its choice," and we conclude under the circumstances of this case that depriving HoganWillig of its right to represent itself in the present action is particularly unwarranted given that counsel and client are one and the same (*id.* at 443). As the court properly determined when it first considered the original motion, whether HoganWillig thinks it is desirable, despite the disqualification of three of its attorneys, to continue representing itself is a strategic decision that should be left to HoganWillig. If the representation proves difficult, HoganWillig's decision will have hurt only its own interests rather than those of a separate client that the ethical rule is designed in part to protect (*see id.* at 444). Additionally, we agree with HoganWillig that its disqualification from representing itself, thereby requiring it to retain outside counsel that would have to wade through the complicated and lengthy attorney-client relationship and billing issues, will further "stall and derail the proceedings, redounding to the strategic advantage of [SFC]" (*id.* at 443). Considering all of the circumstances, SFC has failed to establish any "taint or unfairness" in allowing HoganWillig to continue representing

itself in this action (*id.* at 445).

Based on the foregoing, we conclude that SFC "failed to meet [its] burden of making 'a clear showing that disqualification is warranted,' " and thus the court abused its discretion in granting that part of SFC's reargument motion seeking disqualification of HoganWillig (*Lake*, 60 AD3d at 1470). In light of our determination, we do not address HoganWillig's remaining contention.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

601
CA 21-00865
PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND NEMOYER, JJ.

JUANITA WALKER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY AND ERIE INSURANCE COMPANY
OF NEW YORK, DEFENDANTS-APPELLANTS-RESPONDENTS.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (KEVIN A. SZANYI OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered June 14, 2021. The order, upon reargument, denied plaintiff's motion for summary judgment and denied defendant Erie Insurance Company's cross motion for summary judgment.

It is hereby ORDERED that said appeal insofar as taken by defendant Erie Insurance Company of New York is unanimously dismissed and the order is modified on the law by granting the cross motion of defendant Erie Insurance Company insofar as it seeks summary judgment dismissing the complaint to the extent that it alleges that the professional liability exclusion, if properly noticed to the insured, does not apply to preclude coverage for the underlying claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff contracted the bacterial infection Methicillin-Resistant Staphylococcus Aureus (MRSA) during a pedicure performed at a nail salon (hereinafter, insured) that was insured pursuant to a policy with commercial general liability coverage issued by Erie Insurance Company (defendant). Plaintiff commenced a personal injury action alleging that the insured's negligence caused her injuries. The insured requested coverage under the policy, but defendant disclaimed on the basis that the policy contained an endorsement consisting of a professional liability exclusion that precluded coverage for the underlying action. A judgment was ultimately entered against the insured in the underlying action and plaintiff subsequently commenced the present action alleging that, pursuant to Insurance Law § 3420, she was entitled to recover the damages under the judgment pursuant to the terms of the policy issued by defendant to the insured. Defendants appeal and plaintiff cross-appeals from an order that, upon granting plaintiff's motion for leave to reargue, denied plaintiff's motion for summary judgment on

the complaint and denied defendant's cross motion for summary judgment dismissing the complaint.

Preliminarily, we note that defendant Erie Insurance Company of New York is not an aggrieved party, and we thus dismiss the appeal insofar as taken by that defendant (*see* CPLR 5511; *Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582 [4th Dept 2011]).

Defendant contends on its appeal that Supreme Court erred in denying its cross motion because construction of the professional liability exclusion is a question of law for the court to decide, the exclusion is unambiguous, and the exclusion precludes coverage for plaintiff's injuries inasmuch as the evidence establishes that plaintiff contracted MRSA due to the rendering of a cosmetic service or treatment, namely, the professional pedicure performed by the insured. Plaintiff contends on her cross appeal that the court erred in denying her motion for summary judgment because the subject exclusion is inapplicable given that she was injured due to preparatory acts taken by the insured prior to and unconnected with any specific cosmetic treatment, and any ambiguity must be construed in favor of coverage. Plaintiff also contends in response to defendant's appeal that the court properly denied defendant's cross motion because defendant failed to meet its initial burden of establishing that the insured had notice of the exclusion. We conclude that the court should have granted defendant's cross motion for summary judgment dismissing the complaint to the extent that the complaint alleges that the professional liability exclusion, if properly noticed to the insured, does not apply to preclude coverage for the underlying claims. We therefore modify the order accordingly.

"In determining a dispute over insurance coverage, [courts] first look to the language of the policy" and, "[a]s with the construction of contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of law for the court" (*Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 28 NY3d 675, 681-682 [2017] [internal quotation marks omitted]). "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). "[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so 'in clear and unmistakable' language" (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]). "Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (*id.*). "To the extent that there is any ambiguity in an exclusionary clause, [courts] construe the provision in favor of the insured" (*Cragg*, 17 NY3d at 122; *see Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 353 [1978], *rearg denied* 46 NY2d 940 [1979]). Thus, "[i]n order to establish that an exclusion defeats coverage, the insurer has the 'heavy burden' of establishing that the exclusion is expressed in clear and unmistakable language, is subject to no other reasonable interpretation, and is applicable to the facts"

(*Georgetown Capital Group, Inc. v Everest Natl. Ins. Co.*, 104 AD3d 1150, 1152 [4th Dept 2013], quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 654-655 [1993]; *see Seaboard Sur. Co.*, 64 NY2d at 311; *Hillcrest Coatings, Inc. v Colony Ins. Co.*, 151 AD3d 1643, 1645 [4th Dept 2017]).

Here, the professional liability exclusion states—in clear and unmistakable language—that the insured's policy "does not apply to 'bodily injury' . . . due to . . . [t]he rendering of or failure to render cosmetic . . . services or treatments." We agree with defendant that, contrary to plaintiff's contention, "[t]here is no ambiguity in the wording of the exclusion" inasmuch as it is susceptible of only one reasonable interpretation: there is no coverage for bodily injury due to (i.e., "caused by") the rendering (i.e., the performance) of a cosmetic service or treatment (e.g., a pedicure) (*Beauty by Encore of Hicksville v Commercial Union Ins. Co.*, 92 AD2d 855, 856 [2d Dept 1983]). Thus, employing " 'the test to determine whether an insurance contract is ambiguous [by] focus[ing] on the reasonable expectations of the average insured upon reading the policy and employing common speech' " (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]), we conclude that the exclusion is unambiguous because the average insured would understand the policy to exclude coverage for injuries caused by the performance of acts that constitute part of the pedicure service (*see Beauty by Encore of Hicksville*, 92 AD2d at 856).

Plaintiff nonetheless insists on a different reading, i.e., that the policy excludes only "injuries due to the manner in which the cosmetic service is performed" such that "the manner in which the pedicure was performed must be the cause of the injury," which would not include preparatory tasks undertaken before a customer arrives for cosmetic treatment. We reject plaintiff's proposed reading. "Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreement[]" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]; *see Slattery Skanska Inc. v American Home Assur. Co.*, 67 AD3d 1, 14 [1st Dept 2009]). That, however, is precisely what plaintiff asks us to do by adopting her reading of the exclusion. Nowhere does the exclusion limit its reach to "the manner" of performance, which, under plaintiff's view, means only those precise physical acts undertaken contemporaneous with the cosmetic service upon the customer's person, but does not include any tasks taken in preparation for the service. Rather, as our analysis of the exclusion language makes clear, the policy excludes coverage for injuries caused by the performance of acts that constitute part of the pedicure service (*see Beauty by Encore of Hicksville*, 92 AD2d at 856; *Brockbank v Travelers Ins. Co.*, 12 AD2d 691, 691 [3d Dept 1960], *lv denied* 9 NY2d 609 [1961]).

Plaintiff's further assertion that any other interpretation but her own would swallow the coverage otherwise provided by the policy is incorrect. Contrary to plaintiff's suggestion, if a ceiling tile fell on and injured a patron during a cosmetic service, the matter would be

a premises case, not a professional liability case, and the exclusion would not apply because the injury was not caused by acts that constituted part of the professional cosmetic service, but rather by an act or omission (lack of premises maintenance) or a condition (loose ceiling tile) independent of, and thus not part of, the cosmetic service (*see Beauty by Encore of Hicksville*, 92 AD2d at 855-856). We thus conclude that "[t]he enforcement of the exclusion does not create a result that would have the exclusion swallow the policy" (*Lend Lease [US] Constr. LMB Inc.*, 28 NY3d at 685 [internal quotation marks omitted]).

Ultimately, we agree with defendant that plaintiff's assertion that the "due to" causal trigger in the exclusion may be reasonably interpreted to draw a distinction between acts that occur during the cosmetic service and those that occur in preparation thereof constitutes an impermissible attempt to manufacture an ambiguity. "[P]arties cannot create ambiguity from whole cloth where none exists, because provisions 'are not ambiguous merely because the parties interpret them differently' " (*Universal Am. Corp.*, 25 NY3d at 680). Where, as here, "the meaning of [a] . . . contract is plain and clear . . . [it is] entitled to [be] enforced according to its terms . . . [and] not to be subverted by straining to find an ambiguity which otherwise might not be thought to exist" (*Uribe v Merchants Bank of New York*, 91 NY2d 336, 341 [1998] [internal quotation marks omitted]). "There is no ambiguity in the wording of the exclusion" here, the only reasonable interpretation of which is the reading set forth above (*Beauty by Encore of Hicksville*, 92 AD2d at 856; *see Brockbank*, 12 AD2d at 691). Based on the foregoing, we conclude that defendant met its burden on its cross motion of "establishing that the exclusion is expressed in clear and unmistakable language[and] is subject to no other reasonable interpretation" (*Georgetown Capital Group, Inc.*, 104 AD3d at 1152).

Defendant is also required to establish that the exclusion "is applicable to the facts" (*id.*). Defendant met that part of its burden as well (*see generally Valley Forge Ins. Co. v ACE Am. Ins. Co.*, 160 AD3d 905, 907 [2d Dept 2018]). With respect to the applicable law, in determining whether a professional liability exclusion applies, courts " '[look] to the nature of the conduct under scrutiny rather than to the title or the position of those involved' . . . , as well as to the underlying complaint" (*Reliance Ins. Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 262 AD2d 64, 65 [1st Dept 1999]; *accord Beazley Ins. Co., Inc. v ACE Am. Ins. Co.*, 880 F3d 64, 71 [2d Cir 2018]).

Here, defendant submitted in support of its cross motion the verified complaint in plaintiff's underlying personal injury action in which plaintiff alleged that she received a pedicure by a nail technician employed by the insured and, as a result of the insured's negligence, contracted MRSA. More particularly, plaintiff alleged that the insured was negligent in "fail[ing] to properly clean, disinfect and sanitize the pedicure equipment and materials used for . . . [p]laintiff's pedicure, including but not limited to the foot bath, to ensure the safety and health of . . . customers including

. . . [p]laintiff." Plaintiff further alleged that her infection was "caused by the actions, equipment and/or materials that were exclusively in the [insured's] control." Defendant also submitted the verified complaint in the present action in which plaintiff represented that, pursuant to the underlying judgment, the insured was found liable for the conduct alleged in the underlying verified complaint and set forth in a confession of judgment. Pursuant to the confession of judgment as quoted by plaintiff, the court found that the insured was negligent in failing to properly clean, disinfect, and sanitize the premises to ensure the safety and health of the customers and, consequently, the premises and the equipment and materials used for plaintiff's pedicure, including the foot bath and tools, became contaminated. Plaintiff contracted MRSA directly as a result of the insured's negligent acts and omissions.

We conclude that defendant's submissions established that the exclusion applies to the facts here because the bodily injury (MRSA infection) was due to (caused by) the rendering (the performance) of a cosmetic service and treatment (the professional pedicure) with the unsanitary pedicure equipment and materials. As is clear from the allegations of negligence for which the insured was found liable, plaintiff's injury was not caused by the insured's mere failure to sanitize the pedicure equipment—i.e., plaintiff was not infected simply by her presence among unsanitary instruments at the nail salon—but rather was caused by the insured's *use* of that contaminated equipment while *performing* the professional pedicure on plaintiff's feet and toenails. We have considered plaintiff's contentions seeking to classify the insured's culpable conduct as ordinary negligence in maintaining the premises that is distinct from the rendering of a professional pedicure and conclude that those contentions lack merit.

Plaintiff's further contention that the exclusion does not apply to the insured's liability for her negligent training and supervision claims is also without merit. Each of plaintiff's negligence theories, including negligent supervision and training, is dependent on the injury sustained as a result of the insured's failure to use sanitized equipment during the professional pedicure service, and therefore those theories "are solely and entirely within the exclusionary provisions of the [professional liability] exclusion" (*Handlebar, Inc. v Utica First Ins. Co.*, 290 AD2d 633, 635 [3d Dept 2002], *lv denied* 98 NY2d 601 [2002]; *see Westchester Fire Ins. Co. v Metropolitan Life Ins. Co.*, 280 AD2d 331, 332 [1st Dept 2001]; *see generally Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 352 [1996]).

In view of the foregoing, we conclude that defendant met its heavy burden on its cross motion of establishing that the exclusion defeats coverage (*see generally Georgetown Capital Group, Inc.*, 104 AD3d at 1152). The burden thus shifted to plaintiff to raise a triable issue of fact and she failed to do so. The construction of the insurance policy is a question of law for the courts to resolve and, contrary to plaintiff's various contentions, the exclusion is susceptible to only one reasonable interpretation. To the extent that plaintiff attempts to raise a triable issue of fact whether the

unambiguous exclusion applies to these facts by submitting an expert affidavit questioning whether the sanitizing of pedicure equipment required professional judgment, we conclude that the expert affidavit is insufficient inasmuch as it consists of "impermissible legal conclusions" (*Preston v APCH, Inc.*, 175 AD3d 850, 854 [4th Dept 2019], *affd* 34 NY3d 1136 [2020]; *see Penda v Duvall*, 141 AD3d 1156, 1157-1158 [4th Dept 2016]) and conclusory assertions that are at odds with the applicable industry regulations (*see Blumenthal v Bronx Equestrian Ctr., Inc.*, 137 AD3d 432, 432 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]; *Cordani v Thompson & Johnson Equip. Co., Inc.*, 16 AD3d 1002, 1006 [3d Dept 2005], *lv denied* 5 NY3d 704 [2005]). Thus, there are no triable issues of fact regarding the applicability of the unambiguous exclusion to the facts here. For the same reasons, we conclude that the court properly denied plaintiff's motion.

We nonetheless agree with plaintiff that the court properly denied defendant's cross motion to the extent that defendant failed to meet its initial burden of establishing that the insured had notice of the exclusion. It is foundational that, "[o]n a motion for summary judgment, the moving party must 'make a prima facie showing of entitlement to judgment as a matter of law [by] tendering sufficient evidence to demonstrate the absence of any material issues of fact' " (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], *rearg denied* 27 NY3d 957 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Accadia Site Contr., Inc. v Town of Orchard Park*, 188 AD3d 1679, 1679 [4th Dept 2020]). Plaintiff, "as subrogee of the insured's rights" who " 'stands in the shoes' of the insured" in this action pursuant to Insurance Law § 3420 (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665 [1990]), alleged in her verified complaint in the present action that, upon information and belief, the policy provided by defendant to the insured omitted numerous pages and forms, including the professional liability exclusion. On that ground, plaintiff alleged that the exclusion could not form the basis for defendant's denial of coverage. Thus, in order to establish its entitlement to judgment as a matter of law by eliminating any material issues of fact in this case, defendant had the burden on its cross motion for summary judgment of establishing that the insured had notice of the exclusion (*see North Country Ins. Co. v Raspante*, 117 AD3d 1518, 1519 [4th Dept 2014]).

Defendant failed to meet that burden (*see id.*). Defendant submitted a certified copy of the policy that included the professional liability exclusion and was accompanied by a certification letter, sworn by the records coordinator for defendant and notarized in Pennsylvania, stating that the policy documents were "true likenesses of the documents issued to [the insured]." Even though the lack of an authenticating certificate accompanying the out-of-state certification letter as required by CPLR 2309 (c) constitutes a defect that may be disregarded (*see* CPLR 2001; *Smith v Allstate Ins. Co.*, 38 AD3d 522, 523 [2d Dept 2007]; *Sparaco v Sparaco*, 309 AD2d 1029, 1031 [3d Dept 2003], *lv denied* 2 NY3d 702 [2004]), the admissibility and authenticity of the certified policy does not "establish that the exclusion was actually mailed" to the insured, and

defendant did not otherwise attempt to show that the exclusion was sent to the insured pursuant to office practice (*North Country Ins. Co.*, 117 AD3d at 1519; *cf. Preferred Mut. Ins. Co. v Donnelly*, 111 AD3d 1242, 1243 [4th Dept 2013], *lv denied* 22 NY3d 1169 [2014]; *Schmiemann v State Farm Fire & Cas. Co.*, 13 AD3d 514, 515 [2d Dept 2004]). Moreover, while defendant correctly points out that the summary and declaration pages of the policy that plaintiff concedes were provided to the insured contained references to a professional liability exclusion, those references alone, without the actual terms of the exclusion in the policy documents, are insufficient to establish the presumption that the insured had notice of the terms and limits of the policy (*cf. Chase's Cigar Store v Stam Agency*, 281 AD2d 911, 912 [4th Dept 2001]). Defendant's failure to make a prima facie showing on the notice issue requires the denial of its cross motion to that extent, regardless of the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324).

Entered: November 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

626
KA 17-00492
PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY T. HOWARD, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (CLEA WEISS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 7, 2016. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the written waiver of the right to appeal is invalid because it contained overbroad advisements suggesting that it was "an absolute bar to the taking of a direct appeal" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), and that the oral waiver of the right to appeal did not cure the deficiencies in the written waiver. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of any of defendant's contentions, we nevertheless affirm the judgment.

Defendant contends that Supreme Court erred in refusing to suppress evidence obtained as a result of an allegedly unlawful arrest without conducting a hearing with respect to the legality of that arrest. A court is required to grant a suppression hearing "if the defendant 'raise[s] a factual dispute on a material point which must be resolved before the court can decide the legal issue' of whether evidence was obtained in a constitutionally permissible manner" (*People v Burton*, 6 NY3d 584, 587 [2006]; *see People v Mendoza*, 82 NY2d 415, 426 [1993]). The "factual sufficiency should be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*Mendoza*, 82 NY2d at 422; *see People v Battle*, 109 AD3d 1155, 1157 [4th Dept 2013], *lv denied* 22

NY3d 1038 [2013]).

We reject defendant's contention that a hearing was warranted based on an alleged violation of CPL 140.15 (2). CPL 140.15 (2) provides that, when arresting a person without a warrant, "[t]he arresting police officer must inform such person of his [or her] authority and purpose and of the reason for such arrest unless he [or she] encounters physical resistence, flight or other factors rendering such procedure impractical." Any violation of CPL 140.15 (2) is "a statutory, as opposed to a constitutional, violation" and "does not itself trigger suppression" (*People v Henry*, 185 AD2d 1, 3 n [1st Dept 1992], *lv denied* 81 NY2d 887 [1993]) or render the arrest unlawful (*see People v Battest*, 168 AD2d 958, 959 [4th Dept 1990], *lv denied* 77 NY2d 958 [1991]; *see also People v Hampton*, 44 AD3d 1071, 1072 [2d Dept 2007], *lv denied* 10 NY3d 840 [2008]).

We further reject defendant's contention that a hearing was warranted based on his allegation that he was arrested without probable cause. It is well settled that a police officer may arrest a person without a warrant when he or she has probable cause to believe that such person has committed a crime (*see People v Johnson*, 66 NY2d 398, 402 [1985]). The search warrant application used to secure a search warrant for the premises in which defendant was arrested was before the court, and that application "was sufficient to establish probable cause to believe that defendant had committed [a crime]" (*People v Carlton*, 26 AD3d 738, 739 [4th Dept 2006]; *see People v Snagg*, 35 AD3d 1287, 1288 [4th Dept 2006], *lv denied* 8 NY3d 950 [2007]; *see generally People v Parker*, 160 AD3d 989, 990 [2d Dept 2018]). In support of his motion, defendant "failed to raise factual issues sufficient to require a hearing" (*People v Caldwell*, 78 AD3d 1562, 1563 [4th Dept 2010], *lv denied* 16 NY3d 796 [2011]; *see Mendoza*, 82 NY2d at 426).

Defendant further contends that the court erred in denying defense counsel's request for an adjournment of sentencing in order to, inter alia, submit a motion on defendant's behalf. It is well settled that the determination whether to grant an adjournment of sentencing rests within the sound discretion of the court and should not be disturbed unless there is a clear abuse of that discretion (*see People v Hernandez*, 192 AD3d 1528, 1532 [4th Dept 2021], *lv denied* 37 NY3d 957 [2021]; *see generally People v Spears*, 24 NY3d 1057, 1059-1060 [2014]). Defense counsel sought an adjournment to review the plea minutes and prepare a motion to withdraw the plea, and to investigate possible newly discovered evidence. The court noted that the plea was entered knowingly and voluntarily and advised defendant that it would entertain any postconviction motion based on newly discovered evidence. Under the circumstances, we conclude that the court did not abuse its discretion in denying the request for an adjournment (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *People v Ippolito*, 242 AD2d 880, 880-881 [4th Dept 1997], *lv denied* 91 NY2d 874 [1997]; *see also People v Rivera*, 34 AD3d 240, 240-241 [1st Dept 2006], *lv denied* 8 NY3d 926 [2007]; *People v Vucetovic*, 258 AD2d 335, 335 [1st Dept 1999], *lv*

denied 93 NY2d 930 [1999]).

We have considered defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

627

CA 22-00190

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

BANKERS HEALTHCARE GROUP, LLC,
PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

ENRIL L. PASUMBAL, DOING BUSINESS AS
ENRIL L. PASUMBAL, R.N., AND ENRIL L.
PASUMBAL, DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (LEE ALCOTT OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Robert E. Antonacci, II, J.), entered October 26, 2021. The order denied the motion of plaintiff for summary judgment on the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion dated August 19, 2021, is granted in part with respect to the issue of liability and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this breach of contract action after defendants defaulted on a "financing agreement," also titled a "promissory note/security agreement/personal guaranty" (note). Insofar as relevant to this appeal, the note provided that "[t]he terms of the [note] and all loan documents executed herewith shall be governed by and construed in accordance with *the substantive and procedur[al] laws of the State of Florida*, exclusive of the principals [sic] of conflict of laws" (emphasis added).

Plaintiff thereafter moved pursuant to CPLR 3212 for summary judgment on the complaint. Although defendants did not oppose the motion, Supreme Court, relying on *2138747 Ontario, Inc. v Samsung C&T Corp.* (31 NY3d 372, 377 [2018]), denied the motion on the ground that it was "incumbent for the [p]laintiff to delineate which 'laws of the State of Florida' apply to this action and how the application of those laws entitle[s] the [plaintiff] to summary judgment."

Plaintiff later filed a second motion for summary judgment on the complaint, this time citing Rule 1.510 (a) of the Florida Rules of Civil Procedure as well as case law from the State of Florida. As with the first motion, defendants failed to respond. The court nevertheless denied the second motion, and plaintiff now appeals. The court stated in its decision that, "having elected to have the

'procedur[al] laws of the State of Florida' apply exclusively in this action, the [p]laintiff could not rely on <u>any</u> of the provisions of New York's Civil Practice Law and Rules in prosecuting this action." The court relied on CPLR 101, which the court quoted in its decision as providing, in pertinent part, that " '[t]he civil practice law and rules shall govern the *procedure in civil judicial proceedings in all courts of the state and before all judges*, except where the procedure is regulated by inconsistent statute' " (emphasis added by the court). The court thus concluded that, due to the perceived conflict between the contractual choice-of-law provisions and CPLR 101, it could not grant the second motion.

We agree with plaintiff that the court erred in denying the second motion. It is well settled that "freedom to contract is an important public policy in New York" (*Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.*, 32 NY3d 139, 154 [2018]), and "courts will generally enforce choice-of-law clauses" (*Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 470 [2015], *rearg denied* 26 NY3d 1136 [2016]). "[T]he fundamental, neutral precept of contract interpretation [is] that agreements are construed in accord with the parties' intent, and [t]he best evidence of what parties to a written agreement intend is what they say in their writing . . . In addition, it is a deeply rooted principle of New York contract law that parties may . . . contract as they wish . . . in the absence of some violation of law or transgression of a strong public policy" (*2138747 Ontario, Inc.*, 31 NY3d at 377 [internal quotation marks omitted]).

"Contractual '[c]hoice of law provisions typically apply to only substantive issues' " (*id.*, quoting *Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010], *rearg denied* 15 NY3d 833 [2010]), although parties can agree otherwise. Here, the note provides that "[t]he terms" of the documents are to be governed by the substantive and procedural rules of Florida, but that does not establish that the rules of Florida were intended to govern the procedures of the New York State court system, which would effectively preclude any action on the note in New York. Indeed, the note itself provides that venue for any action related to the note may be in either "Onondaga County, New York or Broward County, Florida." Thus, the parties anticipated that New York courts could and would be able to handle a judicial action related to the note (*see id.*).

Inasmuch as plaintiff established on the second motion that there was a valid contract and a material breach of that contract (*see Cincinnati Ins. Co. v GC Works Inc.*, 2022 WL 787952, *5, 2022 US Dist LEXIS 35332, *13 [SD Fla, Feb. 25, 2022, No. 21-cv-21159-COOKE/DAMIAN], *report and recommendation adopted* 2022 WL 783285 [SD Fla, Mar. 15, 2022]; *Absen, Inc. v LED Capital, LLC*, 2020 WL 9065755, *6, 2020 US Dist LEXIS 252667, *13 [MD Fla, Mar. 19, 2020, No. 6:19-cv-905-Orl-40LRH], *report and recommendation adopted* 2020 WL 9065756 [MD Fla, Apr. 3, 2020]; *see also Harvey v Agle*, 115 AD3d 1200, 1200 [4th Dept 2014]; *Niskayuna Sq., LLC v 81 & 3 of Watertown, Inc.*, 12 AD3d 1160, 1160 [4th Dept 2004]), and defendants failed to raise a material issue of fact in opposition, we conclude that plaintiff is entitled to partial summary judgment on the issue of liability under

either Rule 1.510 (a) of the Florida Rules of Civil Procedure (*see generally Sterling Mirror Co., LLC v Jordan Glass Corp.*, — So 3d —, —, 2022 WL 2231263, *1, 2022 Fla App LEXIS 4307, *1 [Fla Dist Ct App 2022]; *Beezley v Deutsche Bank Natl. Trust Co.*, 336 So 3d 814, 816-817 [Fla Dist Ct App 2022]; *Jaffer v Chase Home Fin., LLC*, 155 So 3d 1199, 1202-1203 [Fla Dist Ct App 2015]) or CPLR 3212 (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We therefore reverse the order on appeal, grant the second motion in part with respect to the issue of liability and remit the matter to Supreme Court for a determination of damages.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

643
CA 21-01222
PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

MTGLQ INVESTORS, LP, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SEEMA A. ZAVERI, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

FRIEDMAN VARTOLO LLP, NEW YORK CITY (VIRGINIA CLAIRE GRAPENSTETER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered July 19, 2021. The order and judgment, insofar as appealed from, granted the motion of defendant Seema A. Zaveri for summary judgment dismissing the complaint against her and for an award of attorneys' fees and expenses pursuant to Real Property Law § 282.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Seema A. Zaveri is denied, and the complaint is reinstated against that defendant.

Memorandum: In this residential foreclosure action, plaintiff appeals, as limited by its brief, from that part of an order and judgment granting the motion of Seema A. Zaveri (defendant) for summary judgment dismissing the complaint against her as time-barred and for an award of attorneys' fees and expenses pursuant to Real Property Law § 282. We reverse the order and judgment insofar as appealed from.

In 2012, plaintiff's predecessor in interest commenced a residential foreclosure action against defendant, among others (2012 action). That action remained dormant and, on March 2, 2016, it was "pre-marked off" Supreme Court's calendar in a clerk's minute entry. On March 2, 2017, pursuant to CPLR 3404, the action was deemed abandoned and dismissed. Plaintiff's predecessor in interest appealed from the denial of its subsequent motion to vacate the dismissal and restore the 2012 action to the calendar, but the appeal was dismissed on November 30, 2018, for failure to perfect (*see* 22 NYCRR 1250.10 [a]). Plaintiff commenced the instant foreclosure action on April 2, 2019.

It is undisputed that the statute of limitations began to run on April 2, 2012, when plaintiff's predecessor in interest accelerated the debt by commencing the 2012 action (*see Federal Natl. Mtge. Assn. v Tortora*, 188 AD3d 70, 74 [4th Dept 2020]; *U.S. Bank N.A. v Balderston*, 163 AD3d 1482, 1483-1484 [4th Dept 2018]). Thus, defendant, as the proponent for summary judgment, met her initial burden on the motion of establishing that the instant action was time-barred inasmuch as it was commenced more than six years beyond the acceleration of the debt (*see Bank of N.Y. Mellon v Slavin*, 156 AD3d 1073, 1073-1074 [3d Dept 2017], *lv dismissed* 33 NY3d 1128 [2019]; *Schumaker v Boehringer Mannheim Corp./DePuy*, 272 AD2d 870, 870 [4th Dept 2000]; *see generally* CPLR 213 [4]). We agree with plaintiff, however, that the instant action was timely commenced because CPLR 205 (a) applies here to extend the statute of limitations.

"If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action" (CPLR 205 [a]). We reject defendant's argument that, for purposes of the statute, the 2012 action terminated when it was deemed abandoned and dismissed on March 2, 2017 (*see* CPLR 3404). Where a plaintiff has sought to appeal as of right from the denial of a motion to vacate the dismissal of its action, the action terminates for purposes of CPLR 205 (a) when the appeal "is truly 'exhausted,' either by a determination on the merits or by dismissal of the appeal, even if the appeal is dismissed as abandoned" (*Malay v City of Syracuse*, 25 NY3d 323, 329 [2015]; *see Bank of N.Y. Mellon*, 156 AD3d at 1075). Here, the dismissal of the 2012 action "did not constitute a final termination of that action within the meaning of CPLR 205 (a) because plaintiff's predecessor in interest was statutorily authorized to file a motion to vacate [the dismissal] and to appeal from the denial of that motion" (*Bank of N.Y. Mellon*, 156 AD3d at 1075; *see generally Malay*, 25 NY3d at 328; *Joseph Francese, Inc. v Enlarged City School Dist. of Troy*, 95 NY2d 59, 64 [2000]). The 2012 action thus terminated for purposes of CPLR 205 (a) on November 30, 2018, when this Court dismissed the appeal and plaintiff's predecessor in interest thereby exhausted its right of appeal (*see Malay*, 25 NY3d at 328-329; *Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C. [Habiterra Assoc.]*, 5 NY3d 514, 519-520 [2005]; *Bank of N.Y. Mellon*, 156 AD3d at 1074-1075). Inasmuch as the instant action was commenced within six months of November 30, 2018, we conclude that it was timely commenced. That conclusion is "in keeping with the statute's remedial purpose of allowing plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits where, as here, a prior action was commenced within the limitations period, thus putting defendants on notice of the claims" (*Malay*, 25 NY3d at 329).

We further conclude that "[t]he cases relied upon by

[defendant]—*Burns v Pace Univ.* (25 AD3d 334 [1st Dept 2006], *lv denied* 7 NY3d 705 [2006]), *Haber v Telson* (4 AD2d 677 [2d Dept 1957], *affd* 4 NY2d 687 [1958]) and *Jelinek v City of New York* (25 AD2d 425 [1st Dept 1966])—are factually distinguishable and inapposite" (*Bank of N.Y. Mellon*, 156 AD3d at 1075). The two older cases are rooted in the Civil Practice Act, pursuant to which a clerk's "entry of [an] order of dismissal upon the minutes of the clerk" was construed as a "written order of [the] court" (*Troiano v Kinney Motors, Inc.*, 276 App Div 869, 869 [2d Dept 1949]). Under the CPLR, a clerk's entry in the minutes, although denominated an order, is "neither signed nor initialed by [a] judge" and therefore "is not an order which may be the subject of an appeal" (*Carter v Castle Elec. Contr. Co.*, 23 AD2d 768, 768 [2d Dept 1965]; *see* CPLR 2219). Thus, neither case supports defendant's assertion that the clerk's minute entry "pre-mark[ing]" the case off of the court's calendar is the operative date for determining when the action terminated for purposes of CPLR 205 (a). *Burns* is factually distinguishable because the plaintiff never moved to vacate the dismissal (25 AD3d at 334). Thus, although the plaintiff "was entitled to rely on the tolling provision in CPLR 205 (a)," there was no later date of termination, and the toll provided by CPLR 205 (a) expired six months after the initial dismissal (*Burns*, 25 AD3d at 334-335).

The court thus erred in granting defendant's motion for summary judgment dismissing the complaint against her and for an award of attorneys' fees and expenses pursuant to Real Property Law § 282 (*see generally U.S. Bank N.A. v Krakoff*, 199 AD3d 859, 863 [2d Dept 2021]). In light of our determination, plaintiff's remaining contention is academic.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

654

CAF 20-01597

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

IN THE MATTER OF BRIANA S.-S., XAVIER S.-S.
AND KAYLEE S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMILY S., RESPONDENT-APPELLANT,
AND RICARDO S., RESPONDENT.
(APPEAL NO. 1.)

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

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

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

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 1, 2020 in proceedings pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.

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

Same memorandum as in *Matter of Briana S.-S. (Emily S.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

655
CAF 21-00074
PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF BRIANA S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMILY S., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent mother appeals, in appeal Nos. 2 through 4, from respective orders that, inter alia, terminated her parental rights with respect to the three subject children on the ground of permanent neglect and, in appeal Nos. 5 through 7, respondent father appeals from respective orders that, inter alia, terminated his parental rights with respect to the subject children on the ground of permanent neglect. The mother also appeals, in appeal No. 1, from a prior order that terminated respondents' parental rights and committed custody and guardianship of the subject children to petitioner.

As a preliminary matter, although not raised by the parties, the mother's appeal from the order in appeal No. 1 should be dismissed inasmuch as that order was superseded by the orders in appeal Nos. 2 through 7 (*see Matter of Faith K. [Cindy R.]*, 194 AD3d 1402, 1402 [4th Dept 2021]; *Matter of Hayden A. [Karen A.]*, 188 AD3d 1758, 1759 [4th Dept 2020]).

We reject the contentions of the mother and the father that petitioner failed to establish that it exercised diligent efforts, as required by Social Services Law § 384-b (7) (a), to encourage and

strengthen the respective parent-child relationships. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child[ren], providing services to the parents to overcome problems that prevent the discharge of the child[ren] into their care, and informing the parents of their child[ren]'s progress" (*Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018] [internal quotation marks omitted]; *see Matter of Nathan N. [Christopher R.N.]*, 203 AD3d 1667, 1668 [4th Dept 2022], *lv denied* 38 NY3d 909 [2022]). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i]) that it fulfilled its duty to exercise diligent efforts to encourage and strengthen respondents' relationships with the children by providing appropriate referrals to respondents for mental health counseling, domestic violence and parenting classes, and housing and public assistance (*see Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1597 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]). In addition, petitioner scheduled regular visitation between respondents and the children, during which petitioner provided the services of a parent aide to educate respondents on appropriate parenting techniques (*see Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Hannah W. [William W.]*, 182 AD3d 1032, 1033 [4th Dept 2020]). "Although petitioner's efforts were unsuccessful . . . , it was not required to guarantee success" (*Matter of Regina M.C.*, 139 AD2d 929, 930 [4th Dept 1988]).

We further conclude that, contrary to respondents' contentions, petitioner established that, despite those diligent efforts, respondents permanently neglected the children because they "failed to plan appropriately for the child[ren]'s future" (*Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]). "It is well settled that, to plan substantially for a child's future, 'the parent must take meaningful steps to correct the conditions that led to the child's removal' " (*id.; see Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986]). Here, respondents failed to take such meaningful steps inasmuch as they failed to successfully complete the programs and services that were made available to them and continued to violate orders of protection directing that they have no contact with each other. In addition, in the mother's case, despite petitioner's best efforts, a trial discharge of the children lasted only approximately six weeks (*see generally Jerikkoh W.*, 134 AD3d at 1551; *Matter of David C.*, 162 AD2d 973, 974 [4th Dept 1990]). Furthermore, while incarcerated for violating an order of protection directing that he have no contact with the mother, and knowing that a permanent neglect petition had been filed against her, the father continued to suggest that the children be released to the mother's custody. "The failure of an incarcerated parent to provide any 'realistic and feasible' alternative to having the children remain in foster care until the parent's release from prison . . . supports a finding of permanent neglect" (*Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594 [4th Dept 2012], *lv dismissed* 21 NY3d 975 [2013]).

To the extent that the mother preserved for our review her contention that Family Court abused its discretion in admitting in

evidence at the dispositional hearing a psychological report prepared as a result of a court-ordered psychological examination, we reject that contention. "[O]nly material and relevant evidence may be admitted in a dispositional hearing" (Family Ct Act § 624). Contrary to the mother's contention, the report was relevant and material to the issue whether termination of the mother's parental rights was in the best interests of the children (*see generally Matter of Jamaal DeQuan M.*, 24 AD3d 667, 668 [2d Dept 2005]; *Matter of Ricky A.B.*, 15 AD3d 838, 839 [4th Dept 2005]; *Matter of Jack McG.*, 223 AD2d 369, 369 [1st Dept 1996]).

We reject the father's contention that the court abused its discretion in denying his attorney's request for an adjournment when the father was not transported from the facility where he was incarcerated to the courthouse on the first day of the fact-finding hearing. "[A] parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute . . . [W]hen faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child[ren] in determining whether to proceed" (*Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015] [internal quotation marks omitted]; *see Matter of Eden S. [Joshua S.]*, 170 AD3d 1580, 1581 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]). Here, "the court properly proceeded in the father's absence in order to provide the children with a prompt and permanent adjudication" (*Eden S.*, 170 AD3d at 1581 [internal quotation marks omitted]). Although the father was not present on the first day of the hearing, he was able to assist his attorney in cross-examining the mother after she testified during her case-in-chief, and in cross-examining a caseworker during her continued testimony on the second day of the hearing; the court balanced the need for a prompt adjudication with the father's interests in its evidentiary rulings by, inter alia, denying petitioner's application to play an exhibit on the first day of the hearing when the father was not present; and the father's attorney "represented his interests at the hearing" (*id.*). Thus, the father "failed to demonstrate that he suffered any prejudice as a result of his absence" (*id.*).

Finally, contrary to the father's contention, the court did not abuse its discretion in denying his request for a suspended judgment (*see Matter of David W., Jr. [David W., Sr.]*, 129 AD3d 1461, 1461 [4th Dept 2015]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

656
CAF 21-00076
PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF XAVIER S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMILY S., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Briana S.-S. (Emily S.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

657

CAF 21-00077

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

IN THE MATTER OF KAYLEE S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

EMILY S., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Briana S.-S. (Emily S.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

658
CAF 21-00140
PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF BRIANA S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICARDO S., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Briana S.-S. (Emily S.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

659
CAF 21-00141
PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF XAVIER S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICARDO S., RESPONDENT-APPELLANT.
(APPEAL NO. 6.)

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Briana S.-S. (Emily S.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

660
CAF 21-00142
PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF KAYLEE S.-S.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICARDO S., RESPONDENT-APPELLANT.
(APPEAL NO. 7.)

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Thomas M. DiMillo, A.J.), entered December 23, 2020 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to the subject child to petitioner.

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

Same memorandum as in *Matter of Briana S.-S. (Emily S.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

665
CA 21-01228
PRESENT: WHALEN, P.J., SMITH, CENTRA, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF 315 SHIP CANAL PARKWAY, LLC,
AND SONWIL DISTRIBUTION CENTER, INC.,
PETITIONERS-APPELLANTS,

V   MEMORANDUM AND ORDER

BUFFALO URBAN DEVELOPMENT CORPORATION AND
UNILAND DEVELOPMENT COMPANY,
RESPONDENTS-RESPONDENTS.

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

HURWITZ & FINE, P.C., BUFFALO (ANDREA SCHILLACI OF COUNSEL), FOR RESPONDENT-RESPONDENT BUFFALO URBAN DEVELOPMENT CORPORATION.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR RESPONDENT-RESPONDENT UNILAND DEVELOPMENT COMPANY.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Dennis E. Ward, J.), entered August 19, 2021 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

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

Memorandum: This matter involves the sale of real property by respondent Buffalo Urban Development Corporation (BUDC) to respondent Uniland Development Company (Uniland). In December 2020, BUDC and Uniland executed a third amendment to their land sale agreement (LSA) approving the expansion of the term “Project” under the LSA to include a ground-mounted photovoltaic solar energy system in lieu of an office or warehouse. Petitioners commenced this CPLR article 78 proceeding seeking to annul BUDC’s determination with respect to the LSA use modification and proposed disposition of the property. Petitioners now appeal from a judgment that dismissed their amended petition for lack of standing.

We agree with respondents that the appeal should be dismissed as moot (*see generally Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 728-729 [2004]; *Matter of Sierra Club v New York State Dept. of Envtl. Conservation*, 169 AD3d 1485, 1486 [4th Dept 2019]). “Litigation over

construction is rendered moot when the progress of the work constitutes a change in circumstances that would prevent the court from rendering a decision that would effectively determine an actual controversy” (*Sierra Club*, 169 AD3d at 1486 [internal quotation marks omitted]). When evaluating claims of mootness, courts consider several factors and “[c]hief among [those factors] has been a challenger’s failure to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation” (*Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173 [2002]). “Factors weighing against mootness may include whether a party proceeded in bad faith and without authority,” whether “novel issues or public interests such as environmental concerns warrant continuing review,” and whether “a challenged modification is readily undone, without undue hardship” (*id.* [internal citations omitted]). Here, petitioners never moved for a preliminary injunction, or otherwise sought to preserve the status quo, pending the outcome of the proceeding (*see Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 729; *Dreikausen*, 98 NY2d at 173; *Sierra Club*, 169 AD3d at 1486-1487; *cf. Town of N. Elba v Grimditch*, 131 AD3d 150, 157 [3d Dept 2015], *lv denied* 26 NY3d 903 [2015]), “nonfeasance that they chalk up to . . . the unlikelihood of success” (*Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 729). Moreover, Uniland has established that construction of the solar energy field, which is nearly complete, was not performed in bad faith or without authority (*see id.*; *Sierra Club*, 169 AD3d at 1487; *cf. Town of N. Elba*, 131 AD3d at 157), and that the work cannot readily be undone without substantial hardship (*see Sierra Club*, 169 AD3d at 1487). Finally, the exception to the mootness doctrine does not apply here (*see Citineighbors Coalition of Historic Carnegie Hill*, 2 NY3d at 730).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

671

TP 22-00275

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

IN THE MATTER OF THE APPLICATION OF
LINDA J. BOLDT, AS VOLUNTARY ADMINISTRATOR
OF THE ESTATE OF DOREEN BARR, DECEASED,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE AND NEW YORK STATE
DEPARTMENT OF HEALTH, RESPONDENTS.

STAMM LAW FIRM, WILLIAMSVILLE (BRADLEY J. STAMM OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS.

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 [Timothy J. Walker, A.J.], entered February 23, 2022) to review a determination of respondents. The determination adjudged that Doreen Barr was not Medicaid-eligible for nursing facility services for a period of approximately nine months.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the amended petition is granted, and the matter is remitted to respondent New York State Office of Temporary and Disability Assistance for further proceedings in accordance with the following memorandum: Petitioner, as voluntary administrator of the estate of her deceased mother, Doreen Barr (decedent), commenced this CPLR article 78 proceeding, which was transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination that decedent was not Medicaid-eligible for nursing facility services for a period of approximately nine months on the ground that decedent had made uncompensated transfers during the 60-month look-back period (*see* Social Services Law § 366 [5] [a], [e] [1] [vi]). The determination of respondent New York State Office of Temporary and Disability Assistance (OTDA) that decedent was not eligible for those services was affirmed by respondent New York State Department of Health.

Pursuant to a personal service agreement (PSA) between petitioner, petitioner's husband and decedent, petitioner and her

husband agreed to provide decedent with personal care services, including cooking, cleaning, washing, shopping and driving decedent to outside appointments, such as doctors' visits. In exchange for those services, petitioner and her husband would be paid $2,500 per month, a sum that the PSA noted was commensurate with the approximate number of hours per month that would be necessary to provide the care at a rate of $20 per hour. While the agreement appeared to contemplate that monthly payments would be made, it also recognized that decedent would be permitted to make payments for the care in advance inasmuch as the PSA contained a clause providing that any prepaid monies must be returned if not earned prior to decedent's death.

From October 2015 until January 2019, when decedent entered a nursing facility, she resided with petitioner and petitioner's husband. Decedent made only one monthly payment to petitioner and her husband in accordance with the PSA. However, as relevant here, in 2015 decedent made four transfers to petitioner totaling more than $40,000 after decedent received cash value for certain insurance policies she owned. Just prior to decedent moving into the nursing home facility, she applied for Medicaid. OTDA approved the application but imposed a penalty period of 8.81477 months based upon the determination that decedent made uncompensated transfers, including the cashed insurance policy transfers, within the look-back period. After a fair hearing, the Administrative Law Judge (ALJ) upheld OTDA's determination. The ALJ noted that the PSA provided for services to be paid on a monthly basis, and found that no credible documentation was provided concerning the daily hours of services actually rendered to decedent.

"In determining the medical assistance eligibility of an institutionalized individual, any transfer of an asset by the individual . . . for less than fair market value made within or after the look-back period shall render the individual ineligible for nursing facility services" for a certain penalty period (Social Services Law § 366 [5] [d] [3]). The look-back period is the "[60]-month period[] immediately preceding the date that an [applicant] is both institutionalized and has applied for medical assistance" (§ 366 [5] [d] [1] [vi]). When such a transfer has occurred, a presumption arises that the transfer "was motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical assistance," and it is the applicant's burden to establish his or her eligibility for Medicaid by rebutting the presumption (*Matter of Mallery v Shah*, 93 AD3d 936, 937 [3d Dept 2012] [internal quotation marks omitted]). As pertinent here, "an applicant may do so by demonstrating that he or she intended to receive fair consideration for the transfers or that the transfers were made exclusively for purposes other than qualifying for Medicaid" (*Matter of Wellner v Jablonka*, 160 AD3d 1261, 1262 [3d Dept 2018]; *see* § 366 [5] [e] [4] [i], [ii]).

Here, petitioner submitted documentary proof of the PSA, which was entered into in 2015, more than three years before decedent entered the nursing home. As noted above, while the PSA contemplated monthly payments for the personal care services, it also contemplated

that decedent may make payments in advance. In addition, petitioner submitted bank statements demonstrating that decedent did not have money to pay for the services until after she received cash value for the insurance policies. Petitioner also submitted a monthly calendar that documented the care provided to decedent during the relevant time period. While the calendar did not provide the number of hours spent on each task, "a daily log of hours worked and services rendered is not necessarily required" (*Matter of Kerner v Monroe County Dept. of Human Servs.*, 75 AD3d 1085, 1087 [4th Dept 2010]). Moreover, the PSA was based on a monthly, not hourly, payment schedule, and the monthly amount was commensurate with fair market value for the type of services performed. On this record, we conclude that the determination that the disputed transfers of the cashed-in insurance policies to petitioner were uncompensated transfers is not supported by substantial evidence.

We therefore annul the determination, grant the amended petition, and remit the matter to OTDA to determine decedent's eligibility for medical assistance benefits following recalculation of the period set forth in Social Services Law § 366 (5).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

681

CAF 21-01102

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

IN THE MATTER OF DESTINY F., SHYQUEST E., AND LAMEEK E.

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

MELISSA F. AND EDWARD F., RESPONDENTS.

TAKARA E., APPELLANT.

MEMORANDUM AND ORDER

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MARZOCCHI OF COUNSEL), FOR PETITIONER-RESPONDENT.

SHARON P. O'HANLON, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered June 30, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, placed the subject children in the custody of petitioner.

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

Memorandum: Non-respondent mother appeals from an order that, inter alia, temporarily removed two of her children from the custody of respondents, modified a prior order temporarily removing her third child from the custody of respondents, and placed all three children in the custody of petitioner during the pendency of an underlying neglect proceeding against respondents. We dismiss the appeal as moot because, while the appeal was pending, Family Court entered an order of fact-finding and disposition determining that respondents neglected the children and placing the children in petitioner's custody. An appeal from an order temporarily removing children from a home during the pendency of a proceeding pursuant to Family Court Act article 10 becomes moot at the point "an order of disposition has been entered" (*Matter of John S. [Monique S.]*, 26 AD3d 870, 870 [4th Dept 2006]). Contrary to the mother's contention, "[i]nasmuch as a temporary order [of removal] is not a finding of wrongdoing, the exception to the mootness doctrine does not apply" (*Matter of Nickolas B. [Katherine F.L.]*, 167 AD3d 1538, 1539 [4th Dept 2018] [internal quotation marks

omitted]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

685

CA 21-01191

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

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND ROCHESTER POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT J. HODGSON OF COUNSEL), AND SHEARMAN & STERLING LLP, WASHINGTON, DC, FOR PETITIONER-APPELLANT.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 10, 2021 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting those parts of the petition seeking disclosure of law enforcement disciplinary records dated on or before June 12, 2020 and seeking disclosure of law enforcement disciplinary records containing unsubstantiated claims or complaints, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Rochester (City) and Rochester Police Department (RPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. Petitioner appeals from a judgment that granted the petition in part and ordered the City and RPD to produce certain police disciplinary records under FOIL, but denied the petition with respect to the production of records from proceedings conducted on or before June 12, 2020 and with respect to records related to unsubstantiated claims or complaints.

Initially, we agree with petitioner that, as respondents correctly concede, respondents did not deny petitioner's FOIL request on the ground that the legislation repealing former Civil Rights Law § 50-a and amending FOIL concerning disciplinary records of law

enforcement agencies (*see* L 2020, ch 96, §§ 1-4 [effective June 12, 2020]) should not be applied retroactively, and thus Supreme Court erred in relying on that theory as a ground for denying the petition in part (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]).

We conclude—for the reasons stated in *Matter of New York Civ. Liberties Union v City of Syracuse* (— AD3d —, — [Nov. 10, 2022] [4th Dept 2022] [decided herewith])—that the court erred in concluding that the personal privacy exemption under Public Officers Law § 87 (2) (b) creates a blanket exemption allowing respondents to categorically withhold the law enforcement disciplinary records at issue. Further, for the reasons stated in *New York Civ. Liberties Union* (— AD3d at —), we reject petitioner's contention that it should be awarded attorneys' fees and costs.

We therefore modify the judgment by granting those parts of the petition seeking law enforcement records dated on or before June 12, 2020 and seeking law enforcement disciplinary records concerning unsubstantiated claims of RPD officer misconduct, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2). Respondents are directed to review the requested law enforcement disciplinary records, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any records or portions thereof that are redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (*see Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

690

CA 21-00796

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

IN THE MATTER OF NEW YORK CIVIL LIBERTIES UNION,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE AND SYRACUSE POLICE DEPARTMENT,
RESPONDENTS-RESPONDENTS.

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, NEW YORK CITY (ROBERT HODGSON OF COUNSEL), AND LATHAM & WATKINS LLP, FOR PETITIONER-APPELLANT.

HANCOCK & ESTABROOK, LLP, SYRACUSE (MARY L. D'AGOSTINO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered May 5, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to particularized and specific justification under Public Officers Law § 87 (2), and granting the petition to that extent, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to compel respondents, City of Syracuse and Syracuse Police Department (SPD), to disclose, pursuant to the Freedom of Information Law ([FOIL] Public Officers Law § 84 *et seq.*), certain law enforcement disciplinary records. As relevant here, petitioner seeks law enforcement disciplinary records concerning open complaints, i.e., those in which an investigation had commenced but the law enforcement disciplinary proceeding had not yet reached a final disposition, and law enforcement disciplinary records concerning closed but unsubstantiated complaints, i.e., those in which it was determined that the allegations of SPD officer misconduct were unfounded or without merit. In opposition, respondents moved to dismiss the petition on the basis that the records sought were categorically exempt from disclosure pursuant to the "personal privacy" exemption under Public Officers Law § 87 (2) (b). Petitioner now appeals from a judgment granting respondents' motion to

dismiss the petition. We agree with petitioner that Supreme Court erred in determining that the records sought are categorically exempt from disclosure and may be withheld in their entirety.

At the outset, we reject respondents' contention that petitioner failed to exhaust its administrative remedies with respect to its contentions on appeal (*see Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 437 [1st Dept 2014]; *Council of Regulated Adult Liq. Licensees v City of N.Y. Police Dept.*, 300 AD2d 17, 18-19 [1st Dept 2002]).

It is well settled that, under FOIL, "[a]ll government records are . . . presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87 (2)" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274-275 [1996]; *see Matter of Abdur-Rashid v New York City Police Dept.*, 31 NY3d 217, 225 [2018], *rearg denied* 31 NY3d 1125 [2018]), that exemptions are to be " 'narrowly construed' " (*Gould*, 89 NY2d at 275; *see Matter of Hawley v Village of Penn Yan*, 35 AD3d 1270, 1271 [4th Dept 2006], *amended on rearg* 38 AD3d 1371 [4th Dept 2007]), that government agencies have the burden to demonstrate that " 'the material requested falls squarely within the ambit of [one] of the exemptions' " (*Abdur-Rashid*, 31 NY3d at 225; *see Matter of National Lawyers Guild, Buffalo Ch. v Erie County Sheriff's Off.*, 196 AD3d 1195, 1196 [4th Dept 2021]), and that those agencies "must articulate 'particularized and specific justification' for not disclosing requested documents" (*Gould*, 89 NY2d at 275; *see Matter of Nix v New York State Div. of Criminal Justice Servs.*, 167 AD3d 1524, 1525 [4th Dept 2018], *lv denied* 33 NY3d 908 [2019]).

Under Public Officers Law § 87 (2) (a), agencies shall disclose records unless they are "specifically exempted from disclosure by state or federal statute." For decades, law enforcement personnel records were wholly and categorically exempt from disclosure inasmuch as a state statute provided that such records "[were] considered confidential and not subject to inspection or review without the express written consent of such [law enforcement] officer . . . except as may be mandated by lawful court order" (former Civil Rights Law § 50-a [1]; *see Matter of New York Civ. Liberties Union v New York City Police Dept.*, 32 NY3d 556, 560 [2018]; *Matter of Prisoners' Legal Servs. of N.Y. v New York State Dept. of Correctional Servs.*, 73 NY2d 26, 29 [1988]). Effective June 12, 2020, the New York State Legislature fully repealed former Civil Rights Law § 50-a (*see* L 2020 ch 96, § 1). Thus, the statutory exemption under Public Officers Law § 87 (2) (a) no longer applies to law enforcement personnel records.

The bill repealing former Civil Rights Law § 50-a also made several amendments to FOIL concerning disciplinary records of law enforcement agencies (*see* L 2020, ch 96, §§ 2-4). Of particular relevance here, Public Officers Law § 86 was amended by adding subdivisions (6) and (7), defining " '[l]aw enforcement disciplinary records' " and a " '[l]aw enforcement disciplinary proceeding.' "

We agree with petitioner that the court erred in determining that the personal privacy exemption under Public Officers Law § 87 (2) (b) allows respondents to categorically withhold the law enforcement disciplinary records at issue. Public Officers Law § 87 (2) (b) provides that an "agency may deny access to records or portions thereof that . . . if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of [section 89 (2)]." The personal privacy exemption "allows agencies and their employees to protect sensitive matters in which there is little or no public interest, like personal information or unsubstantiated allegations, from public disclosure" (*Matter of New York Times Co. v City of New York Off. of the Mayor*, 194 AD3d 157, 165 [1st Dept 2021], *lv denied* 37 NY3d 913 [2021]). The personal privacy exemption "is qualified" by Public Officers Law § 89 (2) (c) (i) (*Matter of New York Comm. for Occupational Safety & Health v Bloomberg*, 72 AD3d 153, 160 [1st Dept 2010]; *see e.g. Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse*, 65 NY2d 294, 298 [1985]; *Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York*, 145 AD3d 1391, 1392-1393 [3d Dept 2016]; *Matter of Obiajulu v City of Rochester*, 213 AD2d 1055, 1056 [4th Dept 1995]), which provides that "disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted" (§ 89 [2] [c] [i]). An agency invoking the personal privacy exemption must "establish that the identifying details [of a record] could not be redacted so as to not constitute an unwarranted invasion of personal privacy" if the record was disclosed (*Matter of Aron Law, PLLC v New York City Fire Dept.*, 191 AD3d 664, 666 [2d Dept 2021]; *see Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392-1393).

Contrary to respondents' contention, the personal privacy exemption "does not . . . categorically exempt . . . documents from disclosure" (*Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1392; *see Matter of Thomas v New York City Dept. of Educ.*, 103 AD3d 495, 497 [1st Dept 2013]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]; *see generally Matter of Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc. v Mills*, 18 NY3d 42, 46 [2011]), even in the case where a FOIL request concerns release of unsubstantiated allegations or complaints of professional misconduct (*see e.g. Matter of Western Suffolk Bd. of Coop. Educ. Servs. v Bay Shore Union Free School Dist.*, 250 AD2d 772, 772-773 [2d Dept 1998]; *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist.*, 220 AD2d 424, 427 [2d Dept 1995]). In order to invoke the personal privacy exemption here, respondents must review each record responsive to petitioner's FOIL request and determine whether any portion of the specific record is exempt as an invasion of personal privacy and, to the extent that any portion of a law enforcement disciplinary record concerning an open or unsubstantiated complaint of SPD officer misconduct can be disclosed *without* resulting in an unwarranted invasion of personal privacy, respondents must release the non-exempt, i.e., properly redacted, portion of the record to petitioner (*see Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 594 [1st

Dept 2016]; *see generally Schenectady County Socy. for the Prevention of Cruelty to Animals, Inc.*, 18 NY3d at 46; *Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 464 [2007]).

Inasmuch as respondents withheld the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct in their entirety and did not articulate any particularized and specific justification for withholding any of the records, we conclude that respondents did not meet their burden of establishing that the personal privacy exemption applies (*see Aron Law, PLLC*, 191 AD3d at 666; *Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393; *Matter of Livson v Town of Greenburgh*, 141 AD3d 658, 661 [2d Dept 2016]). Respondents further failed to establish that "identifying details" in the law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct "could not be redacted so as to not constitute an unwarranted invasion of personal privacy" (*Aron Law, PLLC*, 191 AD3d at 666; *see Police Benevolent Assn. of N.Y. State, Inc.*, 145 AD3d at 1393). Thus, the court erred in granting that part of respondents' motion seeking to dismiss petitioner's request for law enforcement disciplinary records concerning open or unsubstantiated claims of SPD officer misconduct in reliance on the personal privacy exemption under Public Officers Law § 87 (2) (b).

Further, we agree with petitioner that, in the administrative proceeding, respondents did not invoke the exemption under Public Officers Law § 87 (2) (e), and we therefore conclude the court erred in relying on that subdivision in granting respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct (*see Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74-75 [2017]; *Matter of McFadden v McDonald*, 204 AD3d 672, 675 [2d Dept 2022]). "[J]udicial review of an administrative determination is limited to the grounds invoked by the agency and the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis" (*Madeiros*, 30 NY3d at 74 [internal quotation marks omitted]). Consequently, the court erred in relying on Public Officers Law § 87 (2) (e) and we make no determination whether respondents may rely on section 87 (2) (e) to withhold law enforcement disciplinary records.

Although we reject petitioner's contention that in the administrative proceeding respondents failed to invoke the exemption under Public Officers Law § 87 (2) (g) (iii), which applies to inter-agency or intra-agency materials that are not final agency policy or determinations, inasmuch as respondents cited it multiple times in their denial of petitioner's administrative appeal, we nonetheless agree with petitioner that the court erred in relying on that exemption as a categorical basis to grant respondents' motion with respect to petitioner's request for law enforcement disciplinary records concerning open claims of SPD officer misconduct. Respondents failed to meet their burden of establishing that the exemption applies inasmuch as they failed to establish whether law enforcement disciplinary records concerning open claims of SPD officer misconduct

"fall[] wholly or only partially within that exemption" (*Matter of Gedan v Town of Mamaroneck [N.Y.]*, 170 AD3d 833, 834 [2d Dept 2019]; *see Matter of New York 1 News v Office of President of Borough of Staten Is.*, 231 AD2d 524, 525 [2d Dept 1996]; *cf. Matter of Sawma v Collins*, 93 AD3d 1248, 1248-1249 [4th Dept 2012]; *Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 984 [3d Dept 2009], *lv denied* 12 NY3d 712 [2009]).

Further, we agree with petitioner that the court erred in relying upon the statute regarding the confidentiality of materials related to the conduct or discipline of attorneys (*see* Judiciary Law § 90 [10]) and case law regarding the confidentiality of investigations into judicial conduct or discipline (*see Matter of Nichols v Gamso*, 35 NY2d 35, 38 [1974]). Those rules are not applicable to the interpretation of FOIL or its application to disclosure of law enforcement disciplinary records concerning complaints of SPD officer misconduct.

We reject petitioner's contention that the court erred in granting respondents' motion with respect to petitioner's request for attorneys' fees and costs. Inasmuch as this proceeding at this stage concerns a novel interpretation of legislation that both repealed a statute and enacted new provisions to a longstanding statutory scheme, it cannot be said that respondents "had no reasonable basis for denying access" to the records at issue (Public Officers Law § 89 [4] [c]; *cf. New York Times Co.*, 194 AD3d at 166; *see generally Matter of Jewish Press, Inc. v New York City Police Dept.*, 190 AD3d 490, 491 [1st Dept 2021], *lv denied* 37 NY3d 906 [2021]).

We therefore modify the judgment by denying respondents' motion in part, reinstating the petition insofar as it seeks disclosure of law enforcement disciplinary records, subject to redaction pursuant to a particularized and specific justification under Public Officers Law § 87 (2) and granting the petition to that extent. Respondents are directed to review the requested law enforcement disciplinary records concerning open and unsubstantiated claims of SPD officer misconduct, identify those law enforcement disciplinary records or portions thereof that may be redacted or withheld as exempt, and provide the requested law enforcement disciplinary records to petitioner subject to any redactions or exemptions pursuant to a particularized and specific justification for exempting each record or portion thereof. Any claimed redactions and exemptions from disclosure are to be documented in a manner that allows for review by a court (*see Matter of Kirsch v Board of Educ. of Williamsville Cent. Sch. Dist.*, 152 AD3d 1218, 1219-1220 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: November 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

704
CAF 21-00594
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF MEA V.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA F., RESPONDENT,
AND BRANDON V., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered March 4, 2021 in a proceeding pursuant to Family Court Act article 10. The order determined that respondents had abused and neglected the subject child.

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

Same memorandum as in *Matter of Mea V. (Brandon V.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

705.1
CAF 22-01611
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF MEA V.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA F., RESPONDENT-APPELLANT,
(APPEAL NO. 3.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered April 15, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued placement of the subject child with petitioner.

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

Same memorandum as in *Matter of Mea V. (Brandon V.)* ([appeal No. 2] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

705
CAF 21-00720
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF MEA V.

ORLEANS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRANDON V., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF VERONICA REED, SCHENECTADY (VERONICA REED OF COUNSEL), FOR RESPONDENT-APPELLANT.

DANA A. GRABER, ALBION, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered April 15, 2021 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, continued the placement of the subject child with petitioner.

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 10, respondent mother and respondent father each appeal in appeal No. 1 from an order entered after a fact-finding hearing which found, inter alia, that respondents abused and neglected the subject child. In appeal No. 2, the father appeals from an order of disposition with respect to him that continued the child's placement with petitioner. As a preliminary matter, respondents' right of direct appeal from the fact-finding order in appeal No. 1 terminated with the subsequent entry of the orders of disposition, and we therefore dismiss appeal No. 1 (*see Matter of Anthony W. [Anthony W.]*, 200 AD3d 1596, 1596 [4th Dept 2021]). The father's appeal from the order of disposition in appeal No. 2 brings up for review the propriety of the order in appeal No. 1 (*see Matter of Bryleigh E.N. [Derek G.]*, 187 AD3d 1685, 1685 [4th Dept 2020]; *Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]). We exercise our discretion to treat the mother's notice of appeal from the fact-finding order in appeal No. 1 as a valid notice of appeal from the order of disposition pertaining to her in appeal No. 3 (*see generally* CPLR 5520 [c]; *Matter of Threet v Threet*, 79 AD3d 1743, 1743 [4th Dept 2010]).

Respondents contend that they rebutted the presumption of parental culpability and that petitioner thus failed to meet its

burden of showing that respondents abused or neglected the subject child. A prima facie case of child abuse or neglect may be established by evidence that a child sustained an injury that would ordinarily not occur absent an act or omission of respondents and that respondents were the caretakers of the child at the time the injury occurred (*see* Family Ct Act § 1046 [a] [ii]; *Matter of Philip M.*, 82 NY2d 238, 243 [1993]). Although the burden of proof rests with the petitioner, once the petitioner "has established a prima facie case, the burden of going forward shifts to respondents to rebut the evidence of parental culpability" (*Philip M.*, 82 NY2d at 244). To rebut the presumption of parental culpability, the respondents may present evidence to "(1) establish that during the time period when the child was injured, the child was not in respondent[s'] care . . . ; (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omission of respondent[s] . . . ; or (3) counter the evidence that the child had the condition which was the basis for the finding of injury" (*id.* at 244-245). In determining whether to rely on the presumption, "the court should consider such factors as the strength of the prima facie case and the credibility of the witnesses testifying in support of it, the nature of the injury, the age of the child, relevant medical or scientific evidence and the reasonableness of the caretaker[s'] explanation in light of all the circumstances" (*id.* at 246).

Here, respondents do not dispute they were exclusively responsible for the child's care at all relevant times, but they contend that they rebutted the presumption of parental culpability by providing a reasonable explanation for how the child's injuries could have occurred without any act or omission on their part. We reject that contention. Respondents originally claimed to the pediatrician and the Child Protective Services caseworker that the child's injuries, which included 28 rib fractures and an injured lung, were accidental, but none of the medical evidence supported that claim. We conclude that Family Court properly rejected respondents' subsequent claim at trial that the injuries were due to an underlying medical condition: the testimony of respondents' expert witnesses was incredible and their conclusions were not consistent with the other evidence (*see Matter of Peter R.*, 8 AD3d 576, 579-580 [2d Dept 2004], *lv dismissed* 4 NY3d 739 [2004]). We reject the mother's contention on her appeal that the court accorded too much weight to the testimony of petitioner's three experts and improperly discredited respondents' experts. The record supports the court's determination that the testimony of petitioner's three expert medical witnesses was based on credible evidence despite the fact that the testimony differed from that of respondents' medical experts. We therefore see no basis to disturb the court's assessment of the expert testimony (*see Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1616-1617 [4th Dept 2016]; *see also Matter of Robert A. [Kelly K.]*, 109 AD3d 611, 613 [2d Dept 2013]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

713
CA 21-01066
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE JEWISH HOME OF ROCHESTER,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE ESTATE OF JOHANNES BOCHMANN, DECEASED,
DEFENDANT,
AND ROBERT KASE, DEFENDANT-RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (DAVID M. TANG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

EVANS FOX LLP, ROCHESTER (JON E. BONAVILLA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered June 17, 2021. The order, among other things, granted the cross motion of defendant Robert Kase for summary judgment dismissing plaintiff’s amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the second, third, and fourth causes of action against defendant Robert Kase and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a residential skilled nursing facility, commenced this action seeking monetary damages for unpaid charges associated with the care of Johannes Bochmann, a now-deceased resident. Plaintiff appeals from an order that denied its motion for summary judgment on its amended complaint and granted the cross motion of defendant Robert Kase, Bochmann’s power of attorney, for summary judgment dismissing the amended complaint against him.

In connection with Bochmann’s admission to plaintiff’s facility, Kase signed two documents, an application for admission (application agreement) and a long-term care admission agreement (LTC agreement). By signing the application agreement, Kase agreed, inter alia, “that the funds that are currently or have been in the name of [Bochmann] have been or will be used for the care of [Bochmann].” A list of Bochmann’s assets was attached to the application agreement. By signing the LTC agreement, Kase agreed to “maintain accurate records regarding [Bochmann’s] income and resources so that [his] initial and continued eligibility for Medicaid is not jeopardized,” and he agreed

"to file all Medicaid applications and re-certifications on a timely basis and to provide all information requested, cooperating fully with the Department of Social Services."

In his deposition testimony, Kase testified that, during Bochmann's residency with plaintiff, Kase and Bochmann's attorney transferred the majority of Bochmann's monetary assets to Kase, in keeping with Bochmann's desire to transfer as much of those assets to Kase as possible without jeopardizing his Medicaid eligibility. Kase asserted that he used a significant portion of the funds he received to pay plaintiff for Bochmann's care. The transfers, however, resulted in the denial of the first application for Medicaid eligibility for Bochmann. Plaintiff, through a third party, subsequently applied for Medicaid benefits on Bochmann's behalf, but Bochmann was still deemed ineligible for several more months and died before receiving benefits.

Plaintiff asserted five causes of action against Kase, alleging that he breached the application agreement and the LTC agreement and that he fraudulently conveyed Bochmann's monetary assets pursuant to Debtor and Creditor Law former §§ 273, 274, and 276.

As an initial matter, by failing to raise the issue on appeal, plaintiff has abandoned any challenge to that part of the order granting the cross motion insofar as it sought summary judgment dismissing the fifth cause of action against Kase, which is premised on Debtor and Creditor Law former § 274 (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Contrary to plaintiff's contention, Supreme Court properly granted the cross motion with respect to plaintiff's first cause of action against Kase, which alleged that Kase breached the LTC agreement by failing to timely apply for Bochmann's Medicaid benefits. Nothing in the LTC agreement provided that Kase could be held personally liable if any acts or omissions on his part caused or contributed to the nonpayment of the nursing home's fees by Medicaid, and the LTC agreement did not serve as a third-party guarantee of payment (*cf. Wedgewood Care Ctr., Inc. v Sassouni*, 68 AD3d 979, 980-981 [2d Dept 2009]).

We agree with plaintiff, however, that the court erred in granting the cross motion with respect to plaintiff's second cause of action against Kase, for breach of the application agreement. Although the Federal Nursing Home Reform Act prohibits agreements compelling third parties to guarantee a nursing home resident's costs out of the third party's own assets, it does not prohibit agreements whereby a third party agrees to use the resident's own assets to pay for such costs (*see* 42 USC § 1396r [c] [5] [A] [ii]; [B] [ii]; *see also* 10 NYCRR 415.3 [b] [1], [6]). A party responsible for the assets of a nursing home resident "may be held personally liable for the cost of [a patient's] care if it [is] shown that [he or she] breached the terms of [an] agreement [with the nursing home] by impeding the nursing home from collecting its fees from the [patient's] funds or resources over which [he or she] exercised control" (*Presbyterian Home*

for Cent. NY, Inc. v Thompson, 136 AD3d 1421, 1422 [4th Dept 2016] [internal quotation marks omitted]; *see Sunshine Care Corp. v Warrick*, 100 AD3d 981, 982 [2d Dept 2012]). Here, Kase failed to meet his initial burden on the cross motion with respect to that cause of action because his own submissions raised an issue of fact whether he retained Bochmann's assets and could thus be held liable for failing to use them for Bochmann's care in contravention of the terms of the application agreement. We therefore modify the order accordingly. We reject plaintiff's related contention that the court erred in denying its motion with respect to its second cause of action against Kase. Plaintiff failed to meet its initial burden on the motion inasmuch as it failed to establish the amount of Bochmann's assets, if any, retained by Kase but not used for Bochmann's care.

Plaintiff also contends that the court erred in granting the cross motion and denying the motion with respect to plaintiff's third and fourth causes of action against Kase, which alleged fraudulent conveyance pursuant to Debtor and Creditor Law former §§ 276 and 273, respectively. We conclude that the court erred only insofar as it granted the cross motion with respect to the third and fourth causes of action against Kase, and we further modify the order accordingly.

Initially, we note that, contrary to Kase's assertion, claims pursuant to Debtor and Creditor Law former §§ 273 and 276 may be stated against an attorney-in-fact who has rendered a nursing home resident insolvent through uncompensated transfers (*see Kaleida Health v Hyland*, 200 AD3d 1654, 1655 [4th Dept 2021]).

With respect to plaintiff's third cause of action, Debtor and Creditor Law former § 276 provided that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Triable issues of fact may be found to exist where, even absent direct evidence of fraud, certain "badges of fraud" exist, such as a close relationship between the parties involved in the transfer, the inadequacy of consideration, the transferor's knowledge of the creditor's or a future creditor's claims, and the retention of control of property by the transferor after the conveyance (*Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997] [internal quotation marks omitted]). Intent to defraud is typically a question of fact that will preclude summary judgment (*see Jensen v Jensen*, 256 AD2d 1162, 1162 [4th Dept 1998]), and here we conclude that, in light of the indirect evidence of fraud, the court erred in granting that part of the cross motion seeking summary judgment dismissing plaintiff's third cause of action against Kase. We further conclude that the court properly denied plaintiff's motion for summary judgment on the third cause of action because there are triable issues of fact whether Kase actually intended to defraud plaintiff (*see generally Haines v West*, 176 AD3d 1619, 1620 [4th Dept 2019]).

As to plaintiff's fourth cause of action, pursuant to Debtor and Creditor Law former § 273 and as relevant on appeal, "[e]very

conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” Although plaintiff specifically based its fourth cause of action against Kase on an alleged transfer of $88,600, there are questions of fact on this record whether the specific transfer identified by plaintiff occurred such that it could be voided pursuant to former section § 273, precluding summary judgment in favor of either party.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

720
KA 21-01413
PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered June 2, 2021. The judgment convicted defendant upon a jury verdict of course of sexual conduct against a child in the first degree, rape in the second degree 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 one count each of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the second degree (§ 130.30 [1]), and two counts of endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, we conclude that he received effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a " 'defendant must demonstrate that his [or her] attorney failed to provide meaningful representation' " (*People v Williams*, 206 AD3d 1625, 1626 [4th Dept 2022], *lv denied* 38 NY3d 1154 [2022], quoting *People v Caban*, 5 NY3d 143, 152 [2005]). The defendant "bears the ultimate burden of showing . . . the absence of strategic or other legitimate explanations for counsel's challenged actions" (*People v Lopez-Mendoza*, 33 NY3d 565, 572 [2019] [internal quotation marks omitted]; *see People v Bradford*, 204 AD3d 1483, 1485 [4th Dept 2022]). Here, defendant failed to make such a showing (*see generally Bradford*, 204 AD3d at 1485). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]), we conclude that defense counsel provided competent and meaningful representation, which included a successful pretrial motion to dismiss count one of the indictment as duplicitous and the presentation of a cogent defense (*see People v Singleton*, 203 AD3d 1671, 1672-1673 [4th Dept 2022], *lv denied* 38 NY3d 1074 [2022]).

Although defendant contends that his conviction is not supported by legally sufficient evidence, his motion to dismiss at the close of the People's case did not preserve for our review his specific challenge on appeal to the sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). In addition, he failed to renew that motion after presenting proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Bubis*, 204 AD3d 1492, 1494 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]; *People v Douglas*, 85 AD3d 1585, 1586 [4th Dept 2011]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We further reject defendant's contention that his sentence is unduly harsh and severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

725
CA 21-00893
PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

CHRISTY LEE DYBALSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE CORTRIGHT FAMILY IRREVOCABLE TRUST DATED JULY 12, 2007, JUDITH VARGA, INDIVIDUALLY AND AS TRUSTEE OF THE CORTRIGHT FAMILY IRREVOCABLE TRUST DATED JULY 12, 2007, ROGER BROWN, DIANNE BROWN, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

LIPPES MATHIAS LLP, BUFFALO (THOMAS J. GAFFNEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered June 11, 2021. The order denied the motion of defendants-appellants to dismiss plaintiff's complaint against them.

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

Memorandum: In this action seeking, inter alia, a judgment declaring the beneficial interests in The Cortright Family Irrevocable Trust dated July 12, 2007 (Trust), defendants-appellants (defendants) appeal from an order denying their motion to dismiss the complaint against them pursuant to CPLR 3211 (a) (1). We affirm.

Contrary to defendants' contention, we conclude that Supreme Court properly denied the motion. On a motion to dismiss pursuant to CPLR 3211, the court must "liberally construe the complaint . . . , and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion . . . [The court must] also accord plaintiff[] the benefit of every possible inference . . . Dismissal under CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks omitted]).

Defendants moved to dismiss the complaint against them on the grounds that plaintiff violated the in terrorem clause of the Trust

Agreement, thereby forfeiting her interest in the Trust property, and that plaintiff's claims are defeated by Section 3.06 of the Trust Agreement. Although "in terrorem clauses are enforceable, they are not favored and [must be] strictly construed" (*Matter of Singer*, 13 NY3d 447, 451 [2009], *rearg denied* 14 NY3d 795 [2010] [internal quotation marks omitted]; *see Matter of Neva M. Strom Irrevocable Trust III*, 203 AD3d 1255, 1256 [3d Dept 2022]). "The paramount consideration in construing these types of clauses is to effectuate the intent of the decedent[s] or grantor[s] and the purpose of the trust" (*Neva M. Strom Irrevocable Trust III*, 203 AD3d at 1256 [internal quotation marks omitted]; *see Singer*, 13 NY3d at 451). "[T]he trust instrument is to be construed as written and the [settlors'] intention determined solely from the unambiguous language of the instrument itself" (*Golden Gate Yacht Club v Société Nautique de Genève*, 12 NY3d 248, 255 [2009] [internal quotation marks omitted]; *see Massey-Hughes v Massey*, 200 AD3d 1684, 1686 [4th Dept 2021]). Here, defendants have not established that plaintiff violated the in terrorem clause of the Trust Agreement, because, contrary to defendants' contention, "plaintiff's action does not assert any interest in the [T]rust other than provided by the express terms thereof and does not contest, dispute, or call into question the validity of the [T]rust [A]greement" (*Boles v Lanham*, 55 AD3d 647, 647 [2d Dept 2008]). To the contrary, plaintiff's action seeks enforcement of paragraph one of Section 3.06 of the Trust Agreement, which limits the grantors' "power to appoint all or any portion of the principal and undistributed income" to the grantors' lineal descendants alone. We reject defendants' contrary interpretation of Section 3.06 (*see generally Cece & Co. Ltd. v U.S. Bank N.A.*, 153 AD3d 275, 281 [1st Dept 2017]). We conclude that defendants failed to conclusively establish that the language of the Trust Agreement was a complete defense to plaintiff's claims as a matter of law.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

731
CA 21-01599
PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, WINSLOW, AND BANNISTER, JJ.

KENNETH SPENCE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER KITCHENS AND EDEN EMERGENCY
SQUAD, INC., DEFENDANTS-RESPONDENTS.

CAMPBELL & ASSOCIATES, HAMBURG (JOHN T. RYAN OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

PENINO & MOYNIHAN, LLP, WHITE PLAINS (MELISSA L. VINCTON OF COUNSEL),
FOR DEFENDANT-RESPONDENT CHRISTOPHER KITCHENS.

LIPPMAN O'CONNOR, BUFFALO (KEVIN M. O'NEILL OF COUNSEL), FOR
DEFENDANT-RESPONDENT EDEN EMERGENCY SQUAD, INC.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered October 22, 2021. The order, among other things, determined that defendant Christopher Kitchens was operating an authorized emergency vehicle at the time of the subject accident and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first ordering paragraph and striking the language after the word "denied" in the second through fourth ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries that he allegedly sustained when his vehicle and a vehicle driven by Christopher Kitchens (defendant) collided. At the time of the accident, defendant was a volunteer member of defendant Eden Emergency Squad, Inc. (Eden Emergency), a volunteer ambulance service, and was responding to a call. Defendant was driving his personally-owned pickup truck behind plaintiff's vehicle in the southbound lane of a two-lane highway and attempted to pass plaintiff's vehicle on the left. When their vehicles collided, plaintiff was attempting to make a left turn from the southbound lane across the northbound lane into a driveway. Plaintiff alleged that the accident occurred because of defendant's negligence and that Eden Emergency was vicariously liable. After discovery, defendant moved and Eden Emergency cross-moved for, inter alia, summary judgment dismissing the complaint against them contending, among other things, that defendant's conduct was measured by the "reckless disregard"

standard of care under Vehicle and Traffic Law § 1104 (e) and that his operation of his vehicle was not reckless as a matter of law. Plaintiff cross-moved for partial summary judgment on the issue of negligence, contending that negligence rather than reckless disregard is the applicable standard of care and that defendant was negligent as a matter of law. Supreme Court denied the motion and cross motions, concluding that although defendant was operating an authorized emergency vehicle at the time of the accident and that the reckless disregard standard of care applied, there are triable issues of fact precluding judgment to either plaintiff or defendants. Plaintiff appeals, and we modify.

As an initial matter, plaintiff's contention that defendants are not entitled to assert the affirmative defense of emergency operation under Vehicle and Traffic Law § 1104 because it was not pleaded in the answers is raised for the first time on appeal and, therefore, that contention is not properly before us (*see generally Klepanchuk v County of Monroe*, 129 AD3d 1609, 1610 [4th Dept 2015], *lv denied* 26 NY3d 915 [2015]).

We agree with plaintiff, however, that he met his initial burden on his cross motion of establishing that defendant was not operating an "authorized emergency vehicle" at the time of the accident and thus that the reckless disregard standard of care does not apply. " '[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) . . . applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)' " (*Torres-Cummings v Niagara Falls Police Dept.*, 193 AD3d 1372, 1374 [4th Dept 2021], quoting *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). An "authorized emergency vehicle" includes "emergency ambulance service vehicle[s]" (§ 101), which are defined as "an appropriately equipped motor vehicle owned or operated by an ambulance service . . . and used for the purpose of transporting emergency medical personnel and equipment to sick or injured persons" (§ 115-c). "Ambulance service means an individual, partnership, association, corporation, [or] municipality . . . engaged in providing emergency medical care and the transportation of sick or injured persons by motor vehicle . . . to, from, or between general hospitals or other health care facilities" (Public Health Law § 3001 [2]).

Here, plaintiff submitted evidence that, at the time of the accident, defendant was driving his personally-owned vehicle, which was not affiliated with Eden Emergency (*cf. People v Levy*, 188 Misc 2d 103, 104-105 [App Term, 2d Dept 2001]). The vehicle also did not comply with Vehicle and Traffic Law § 1104 (c), which requires authorized emergency vehicles to be equipped with "at least one red light." Moreover, at the time of the accident, defendant's vehicle was not being "operated by" Eden Emergency because, while defendant was a volunteer with Eden Emergency, he was not on call at the time of the incident (§ 115-c). Further, defendant did not qualify as an ambulance service. Defendant was not an "individual . . . engaged in providing emergency medical care and the transportation of sick or injured persons" (Public Health Law § 3001 [2]). We also note that

defendant was not an emergency medical technician (*see generally* § 3001 [6]). In opposition, defendants failed to raise an issue of fact whether defendant's vehicle was an authorized emergency vehicle. As a result, the court erred in determining that defendant was operating an authorized emergency vehicle and that his conduct is governed by the reckless disregard standard of care in section 1104 (e), rather than the ordinary negligence standard of care (*see generally McLoughlin v City of Syracuse*, 206 AD3d 1600, 1600-1601 [4th Dept 2022]; *LoGrasso v City of Tonawanda*, 87 AD3d 1390, 1391 [4th Dept 2011]). We therefore modify the order accordingly.

Nevertheless, we reject plaintiff's contention that the court erred in denying his cross motion for summary judgment on the issue of defendant's negligence. "[I]t is well settled that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Deering v Deering*, 134 AD3d 1497, 1499 [4th Dept 2015] [internal quotation marks omitted]). Further, no vehicle shall pass another vehicle on the left "unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the operation of any vehicle approaching from the opposite direction *or* any vehicle overtaken" (Vehicle and Traffic Law § 1124 [emphasis added]).

Here, plaintiff and a police officer who witnessed the accident testified at their depositions that plaintiff stopped his vehicle in the center of the southbound lane with his left turn signal activated to make a left-hand turn, while waiting for oncoming traffic to clear. Plaintiff testified that other southbound vehicles were proceeding past plaintiff on the right shoulder. Plaintiff also submitted the deposition testimony of a police officer who did not see the collision, but testified that he saw the involved vehicles immediately before the accident, including seeing plaintiff's vehicle "poised" to turn left and the "aftermath" of the collision. That officer testified that, in his judgment, defendant's action of passing plaintiff's vehicle on the left in the northbound lane was improper. Additionally, plaintiff submitted defendant's deposition testimony, in which defendant provided a different account of the event. Defendant testified that, at the time of the accident, plaintiff's turn signal had not been activated and that plaintiff had not stopped his vehicle in the southbound lane. According to defendant, plaintiff's vehicle had moved completely out of the southbound lane and onto the shoulder, like the other southbound vehicles that had pulled over to allow defendant to pass. When defendant proceeded to pass them on the left while his vehicle was straddling the center line of the road, he saw plaintiff's vehicle turn left from the right shoulder of the southbound lane, at which point defendant tried to move further left into the northbound lane before plaintiff's car collided with defendant's vehicle. Thus, although plaintiff proffered compelling evidence that defendant acted negligently in the manner he operated his vehicle, plaintiff's own submissions raised triable issues of fact whether defendant was negligent, and the burden never shifted to defendants (*see Carnevale v Bommer*, 175 AD3d 881, 882 [4th Dept 2019];

see generally Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

739

KA 21-00506

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

BRANDON HEMINGWAY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB 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 October 21, 2019. The judgment convicted defendant upon his plea of guilty of criminal sexual act in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant was previously convicted upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [1]). On a prior appeal, we reversed the judgment of conviction and vacated his plea because County Court failed to advise him that his sentence would include a period of postrelease supervision (PRS) (*People v Hemingway*, 166 AD3d 1524, 1525 [4th Dept 2018]). We remitted the matter to County Court for further proceedings on the indictment. Upon remittal, defendant again pleaded guilty to criminal sexual act in the first degree, and was sentenced to 15 years of incarceration plus five years of PRS. Defendant now appeals from the judgment of conviction rendered as a result of that plea.

As defendant contends and the People correctly concede, his waiver of the right to appeal is unenforceable (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* 140 S Ct 2634, — US — [2020]) and the court failed to determine whether defendant should be afforded youthful offender treatment (*see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]; *People v Rudolph*, 21 NY3d 497, 499-501 [2013]).

We further agree with defendant that defense counsel improperly took a position adverse to defendant on his pro se motion to withdraw his plea and provided him with inaccurate advice about the legal consequences of our prior ruling. Several months after defendant's

plea was entered, while waiting for his mitigation report to be completed, defendant submitted a pro se motion seeking to withdraw his plea. Defense counsel refused to adopt defendant's pro se motion and, in response to questioning by the court, explained that the reason therefor was that he did not see any grounds for the motion. Defendant ultimately withdrew his motion and the court imposed sentence.

"It is well settled that a defendant has a right to the effective assistance of counsel on his or her motion to withdraw a guilty plea" (*People v Deliser*, 21 NY3d 964, 966 [2013]). Although defense counsel has no duty to support the pro se motion of a defendant to withdraw a plea of guilty, defense counsel deprives a defendant of effective assistance of counsel by taking a position adverse to defendant (*see People v Lewis*, 286 AD2d 934, 934 [4th Dept 2001]). Defense counsel "takes a position adverse to his [or her] client when stating that the defendant's motion lacks merit . . . , or that the defendant, who is challenging the voluntariness of [the] guilty plea, 'made a knowing plea . . . [that] was in his best interest' " (*People v Washington*, 25 NY3d 1091, 1095 [2015], quoting *People v Deliser*, 21 NY3d 964, 966 [2013]). When defense counsel takes a position adverse to his or her client, "a conflict of interest arises, and the court must assign a new attorney to represent the defendant on the motion" (*Deliser*, 21 NY3d at 967).

Here, by stating that there were no grounds for defendant's pro se motion, defense counsel essentially said that it lacked merit, which constitutes taking a position adverse to defendant (*see People v Faulkner*, 168 AD3d 1317, 1318-1319 [3d Dept 2019]; *see also People v Lee*, 188 AD3d 1685, 1685-1686 [4th Dept 2020]; *People v Colson*, 160 AD3d 579, 579-580 [1st Dept 2018]).

We also agree with defendant that his attorney gave him erroneous information about the effect of our prior ruling. It appears from the record that defense counsel advised defendant that the issues raised by defendant in his pro se motion to withdraw his plea had already been decided against him in the prior appeal. The court agreed with defense counsel's interpretation of our ruling. Both defense counsel and the court were incorrect. In the prior appeal, defendant did not raise, and we did not address, any of the contentions advanced by defendant in his pro se motion to withdraw his plea. Although defendant at sentencing withdrew his pro se motion to withdraw his plea, we cannot conclude from the record that his decision to do so was not likely affected by the inaccurate advice he received from counsel.

We therefore hold the case, reserve decision, and remit the matter to County Court for assignment of counsel, a de novo determination of defendant's pro se motion to withdraw his plea and, if necessary, to make and state for the record a determination of whether defendant should be afforded youthful offender status (*see Lewis*, 286 AD2d at 934; *see generally People v Polanco*, 186 AD3d 1109,

1109 [4th Dept 2020]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

754
KA 16-01581
PRESENT: SMITH, J.P., LINDLEY, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE M. BENNETT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered July 25, 2016. The appeal was held by this Court by order entered February 7, 2020, decision was reserved and the matter was remitted to Supreme Court, Ontario County, for further proceedings (180 AD3d 1357 [4th Dept 2020]). The proceedings were held and completed.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentences imposed on the 10 counts of criminal possession of a weapon in the third degree and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Ontario County, for resentencing on counts 7 through 16 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of 6 counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [2], [3]), 10 counts of criminal possession of a weapon in the third degree (§ 265.02 [8]), and 1 count of criminal possession of marihuana in the fourth degree (former § 221.15). We previously held this case, reserved decision, and remitted the matter to Supreme Court for a ruling on defendant's motion for a trial order of dismissal, on which the court had reserved decision but failed to rule (*People v Bennett*, 180 AD3d 1357, 1358 [4th Dept 2020]). Upon remittal, the court denied the motion.

Defendant's contention that the evidence is legally insufficient to support the conviction of criminal possession of a weapon in the second and third degrees is preserved only with respect to the issue of possession (*see generally People v Gray*, 86 NY2d 10, 19 [1995]; *People v Jackson*, 159 AD3d 1372, 1373 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018]), and we reject the contention to that extent (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Further,

viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). To the extent there is conflicting testimony concerning defendant's ability to access the weapons in question, we conclude that it merely "presented an issue of credibility for the jury to resolve" (*People v Boyd*, 153 AD3d 1608, 1610 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018] [internal quotation marks omitted]).

Defendant contends that defense counsel was ineffective for failing to renew his request for a redacted copy of the confidential informant affidavit used in support of a search warrant application. We reject that contention. Any renewed request had little or no chance of success, inasmuch as defendant made no showing at the time of his initial request that he was entitled to that information (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Castillo*, 80 NY2d 578, 583 [1992], *cert denied* 507 US 1033 [1993]; *People v Wade*, 38 AD3d 1315, 1315-1316 [4th Dept 2007], *lv denied* 8 NY3d 992 [2007]). Defendant also contends that defense counsel was ineffective for failing to assert specific arguments in support of his renewed motion for a trial order of dismissal. We reject that contention because the record establishes that defense counsel did, in fact, make specific arguments in support of the renewed motion. Even assuming, arguendo, that defense counsel had failed to do so, we note that there is no requirement that defense counsel reiterate the specific arguments raised on the original motion for a trial order of dismissal upon renewal of that motion in order to preserve those arguments for our review (*see generally People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]). Defendant's contention that he was deprived of effective assistance of counsel based on defense counsel's failure to call a certain witness to testify at trial involves matters outside the record and therefore must be raised pursuant to a CPL 440.10 motion (*see People v Kaminski*, 109 AD3d 1186, 1186 [4th Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *see also People v Griffin*, 204 AD3d 1385, 1386 [4th Dept 2022]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit. The alleged testimony of the proposed witness—i.e., that he told defendant that he could possess the firearms—is irrelevant because defendant's belief regarding the legality of his actions is not an element of or a defense to the weapons possession offenses (*see generally* Penal Law §§ 265.02 [8]; 265.03 [2], [3]).

Defendant further contends that we should modify the judgment pursuant to the newly enacted Marihuana Regulation and Taxation Act (Penal Law art 222) by applying it retroactively and vacating his conviction of criminal possession of marihuana in the fourth degree. We reject that contention and conclude that defendant's contention is not properly before us (*see People v Hall*, 202 AD3d 1485, 1485-1486 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]). The proper mechanism

for vacating his marihuana conviction is through the process detailed in CPL 440.46-a, which requires defendant to first "petition the court of conviction" for any such relief (CPL 440.46-a [2] [a]) and is not automatic. Should the court deny defendant's CPL 440.46-a motion, this Court may review the court's order denying the same on appeal therefrom (*see Hall*, 202 AD3d at 1486). In light of the procedure outlined by CPL 440.46-a, we reject defendant's contention that Penal Law article 222 should be applied retroactively to require vacatur of the marihuana conviction on direct appeal (*see People v Ramos*, 202 AD3d 410, 413 [1st Dept 2022], *lv denied* 38 NY3d 953 [2022], *reconsideration denied* 38 NY3d 1135 [2022]; *see generally People v Vaughn*, 203 AD3d 1729, 1730 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, as we previously noted (*see Bennett*, 180 AD3d at 1358), and as the People correctly concede, the indeterminate terms of incarceration imposed on the criminal possession of a weapon in the third degree counts is illegal (*see* Penal Law §§ 70.02 [1] [c]; [2] [c]; 265.02 [8]; *see also People v Goston*, 9 AD3d 905, 907 [4th Dept 2004], *lv denied* 3 NY3d 706 [2004]). We therefore modify the judgment by vacating the sentences imposed on counts 7 through 16 of the indictment, and we remit the matter to Supreme Court for resentencing on those counts.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

755

KA 21-00471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH BARBER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered March 24, 2021. The judgment convicted defendant upon his 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 guilty plea of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). 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 People v Carr*, 207 AD3d 1249, 1250 [4th Dept 2022], *lv denied* — NY3d — [Sept. 23, 2022]; *see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The valid waiver of the right to appeal encompasses defendant's 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: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

757

KA 18-01372

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CEDRICK L. MITCHELL, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (DREW R. DUBRIN 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 May 16, 2018. The judgment convicted defendant after a nonjury trial of grand larceny in the fourth degree, unauthorized use of a vehicle in the third degree, unlawful imprisonment in the second degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of unauthorized use of a vehicle in the third degree and dismissing count two of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of grand larceny in the fourth degree (Penal Law § 155.30 [8]), unauthorized use of a vehicle in the third degree (§ 165.05 [1]), unlawful imprisonment in the second degree (§ 135.05), and assault in the third degree (§ 120.00 [1]). Contrary to defendant's contention, his conviction of grand larceny in the fourth degree is based upon sufficient evidence inasmuch as there is a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that when defendant took the vehicle from the victim, he " 'did so with the intent to deprive the [victim] of [her] vehicle within the meaning of Penal Law § 155.00 (3)' " (*People v Hickey*, 171 AD3d 1465, 1466 [4th Dept 2019], *lv denied* 33 NY3d 1105 [2019]).

Contrary to defendant's remaining contention, the People met their burden of establishing the amount of restitution, by a preponderance of the evidence, through the victim's testimony at the restitution hearing and supporting documentation (*see People v Pugliese*, 113 AD3d 1112, 1112-1113 [4th Dept 2014], *lv denied* 23 NY3d

1066 [2014]).

We note, however, that the part of the judgment convicting defendant of unauthorized use of a vehicle in the third degree must be reversed and count two of the indictment dismissed because that offense is a lesser inclusory concurrent count of count one, grand larceny in the fourth degree (*see Hickey*, 171 AD3d at 1466-1467; *see generally People v McDonald*, 189 AD3d 2162, 2163 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]). We therefore modify the judgment accordingly.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

760
KA 21-00472
PRESENT: WHALEN, P.J., NEMOYER, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH BARBER, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered March 24, 2021. The judgment convicted defendant upon his plea of guilty of driving while ability impaired by drugs and 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 guilty plea of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and driving while ability impaired by drugs as a class D felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [ii]). 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 People v Carr*, 207 AD3d 1249, 1250 [4th Dept 2022], *lv denied* — NY3d — [Sept. 23, 2022]; *see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). The valid waiver of the right to appeal encompasses defendant's 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: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

763

KA 21-00549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON B. OSGOOD, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (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 (Kristina Karle, J.), rendered February 24, 2021. The judgment convicted defendant upon his plea of guilty of burglary in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20), defendant contends that 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]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the bargained-for sentence (*see Lopez*, 6 NY3d at 255-256).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

765
CAF 21-01615
PRESENT: WHALEN, P.J., NEMOYER, CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF KRISTEN M. GRIMES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

FELIX A. MEDERO, JR., RESPONDENT-RESPONDENT.

ALEXANDER KOROTKIN, ROCHESTER, FOR PETITIONER-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ELIZABETH D. TAFFE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Yates County (Jason L. Cook, J.), entered July 28, 2021 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objections to an order of the Support Magistrate.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner mother appeals from an order denying her written objections to an order of the Support Magistrate, which dismissed her petition for modification of her child support obligation. During the pendency of this appeal, the subject child turned 21 years old and, therefore, the mother's obligation to pay child support ceased (*see* Family Ct Act § 413 [1] [a]; *Matter of Milano v Anderson*, 192 AD3d 1668, 1669 [4th Dept 2021]). Moreover, even if the mother succeeded on this appeal, she "would have no avenue to regain any sums [s]he might have overpaid in child support" (*Matter of Frederick-Kane v Potter*, 187 AD3d 1436, 1436 [3d Dept 2020]). "[T]here is a 'strong public policy against restitution or recoupment of support overpayments' " (*Johnson v Chapin*, 12 NY3d 461, 466 [2009], *rearg denied* 13 NY3d 888 [2009]), and we conclude that there is "no basis to depart from that policy here" (*Frederick-Kane*, 187 AD3d at 1437). Under the circumstances of this case, " 'the rights of the parties will [not] be directly affected by the determination of [this] appeal' " (*id.*, quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). We therefore dismiss the appeal as moot (*see Milano*, 192 AD3d at 1669).

Entered: November 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

767

CA 22-00137

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

SHANE CHRISTOPHER BUCZEK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF EVANS, TOWN OF CHEEKTOWAGA, TOWN OF BRANT, ERNEST P. MASULLO, NATHAN A. MILLER, PETER A. SMITH, GRANT ZAJAS, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

SHANE CHRISTOPHER BUCZEK, PLAINTIFF-APPELLANT PRO SE.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (KARL ERICH DANIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TOWN OF EVANS, ERNEST P. MASULLO, NATHAN A. MILLER, PETER A. SMITH AND GRANT ZAJAS.

COLUCCI & GALLAHER, P.C., BUFFALO (MARC SMITH OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF CHEEKTOWAGA.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (SARAH E. HANSEN OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF BRANT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered July 2, 2020. The order, among other things, dismissed plaintiff’s complaint.

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

Memorandum: In this action for, inter alia, malicious prosecution and violation of plaintiff’s civil rights pursuant to 42 USC § 1983, plaintiff appeals from an order that granted the motions of defendants Town of Evans and Town of Brant to dismiss the complaint pursuant to CPLR 3211 and the Town of Cheektowaga’s motion for summary judgment dismissing the complaint. We affirm.

As limited by his appellate brief, plaintiff challenges only those parts of the order that granted the motions with respect to his causes of action for malicious prosecution and under 42 USC § 1983. In that brief, however, plaintiff failed to challenge Supreme Court’s first and independently dispositive ground for granting those parts of the motions and dismissing those causes of action. Thus, by failing to address the basis for the court’s determination, plaintiff effectively abandoned any challenge to the granting of those parts of

the motions (*see Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 206 AD3d 1688, 1689 [4th Dept 2022]; *Haher v Pelusio*, 156 AD3d 1381, 1382 [4th Dept 2017]). To the extent that plaintiff attempts to raise new contentions on appeal for the first time in his reply brief, those contentions are not properly before us (*see Solvay Bank v Feher Rubbish Removal, Inc.*, 187 AD3d 1596, 1597 [4th Dept 2020]; *Becker-Manning, Inc. v Common Council of City of Utica*, 114 AD3d 1143, 1144 [4th Dept 2014]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

768
CA 21-01464
PRESENT: WHALEN, P.J., NEMOYER, CURRAN, BANNISTER, AND MONTOUR, JJ.

MICHAEL J. TARSEL AND SUZANNE M. TARSEL,
PLAINTIFFS-RESPONDENTS,

V ORDER

JAMES J. TROMBINO, DEFENDANT-APPELLANT.

PULLANO & FARROW, ROCHESTER (MALLORY K. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 30, 2021. The order, inter alia, ordered defendant to pay punitive damages to plaintiffs in an amount to be determined after discovery and a hearing.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

776

KA 19-02105

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN L. SMITH, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLISON V. MCMAHON 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 (Kristina Karle, J.), rendered June 19, 2019. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that his waiver of the right to appeal is invalid and thus 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 County Court's "oral waiver colloquy and the written waiver signed by defendant together 'mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal . . . , and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Shanks*, 37 NY3d 244, 252-253 [2021]; *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020]). Nevertheless, considering defendant's extensive criminal record, which includes five prior felony convictions, we conclude that the negotiated sentence is not unduly harsh or severe.

Entered: November 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

777

KA 18-00892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS D. ANDREWS, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), 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 October 30, 2017. The judgment convicted defendant upon a jury verdict of sexual abuse in the first degree (two counts) and sexual abuse in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of sexual abuse in the first degree (Penal Law § 130.65 [1], [4]) and two counts of sexual abuse in the second degree (§ 130.60 [2]). Defendant failed to preserve for our review his contentions that the indictment was duplicitous (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Riley*, 182 AD3d 1017, 1017 [4th Dept 2020], *lv denied* 35 NY3d 1069 [2020]) and that the indictment, as amplified by the bill of particulars, was insufficiently specific (*see generally People v Waldron*, 162 AD2d 485, 486 [2d Dept 1990]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice.

To the extent defendant has preserved the issue for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]; *People v Ferguson*, 177 AD3d 1247, 1248 [4th Dept 2019]) and viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support his conviction (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we likewise reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Goodson*, 144 AD3d 1515, 1515 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017]).

We agree with defendant, however, that County Court erred in precluding him from calling a witness who would testify that the complainant offered to make a false allegation of abuse against the witness's boyfriend. "Questioning concerning prior false allegations of rape or sexual abuse is not always precluded . . . , and the determination whether to allow such questioning rests within the discretion of the trial court" (*People v Bridgeland*, 19 AD3d 1122, 1123 [4th Dept 2005] [internal quotation marks omitted]). Evidence of a complainant's prior false allegations of rape or sexual abuse is admissible to impeach the complainant's credibility where a "defendant establishe[s] that the [prior] allegation may have been false[, and] . . . that the particulars of the complaints, the circumstances or manner of the alleged assaults, or the currency of the complaints were such as to suggest a pattern casting substantial doubt on the validity of the charges made by the complainant" (*People v Diaz*, 85 AD3d 1047, 1050 [2d Dept 2011], *affd* 20 NY3d 569 [2013] [internal quotation marks omitted]; *see People v Halmond*, 52 AD3d 1278, 1278-1279 [4th Dept 2008], *lv denied* 11 NY3d 737 [2008]). Here, based on the proffer made at trial, defendant's proposed witness would have testified that the complainant offered to knowingly make a false allegation against the witness's boyfriend and that this conduct took place around the same time as the first incident alleged against defendant and just months before the second such incident. Further, per defense counsel's proffer, the nature and circumstances of the allegations against defendant and the offered allegation against the witness's boyfriend were sufficiently similar to "suggest a pattern casting substantial doubt on the validity of the charges" (*Diaz*, 20 NY3d at 576).

At trial, the evidence against defendant was not overwhelming, the conviction rested largely—if not entirely—on the testimony of the complainant, and the proposed witness precluded by the court was the sole witness defendant sought to call. Under these circumstances, we conclude that the court abused its discretion in precluding the defendant from calling that witness (*see Bridgeland*, 19 AD3d at 1123), that the error was not harmless, and that a new trial must be granted (*see Diaz*, 20 NY3d at 576).

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

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

782

KA 21-00609

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

FREDDY L. SAPP, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (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 (Frederick G. Reed, A.J.), rendered January 28, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]). We reject defendant's contention that he did not validly waive the right to appeal. Contrary to defendant's contention, County Court's colloquy established that the right to appeal was "separate and distinct" from those rights automatically forfeited by pleading guilty (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Cromie*, 187 AD3d 1659, 1659 [4th Dept 2020], *lv denied* 36 NY3d 971 [2020]) and did not "utterly mischaracterize[] the nature of the right . . . defendant was being asked to cede" (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020] [internal quotation marks omitted]; *see Cromie*, 187 AD3d at 1659). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *Cromie*, 187 AD3d at 1660).

Although defendant's further contention that his plea was not knowingly, voluntarily, and intelligently entered survives his valid waiver of the right to appeal (*see People v Woods*, 126 AD3d 1543, 1543 [4th Dept 2015], *lv denied* 27 NY3d 970 [2016]), defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Guantero*, 100

AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

786
CA 21-01555
PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUR, JJ.

THOMAS C. WILMOT, SR., THOMAS C. WILMOT, JR.,
AND LORETTA W. CONROY,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

TONY KIRIK, DEFENDANT-APPELLANT-RESPONDENT,
AND COUNTY OF MONROE, DEFENDANT-RESPONDENT-APPELLANT.

ROSENHOUSE LAW FIRM, ROCHESTER (MICHAEL A. ROSENHOUSE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

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

Appeal and cross appeals from a judgment (denominated order) of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered October 22, 2021. The judgment, among other things, set aside the judgment of foreclosure of the property at issue and vacated the referee’s deed issued to defendant Tony Kirik.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

787

CA 21-01324

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

FLORENCE CASKET COMPANY, PLAINTIFF-RESPONDENT,

V ORDER

VINCENT D. IOCOVOZZI, DEFENDANT,
AND V.J. IOCOVOZZI FUNERAL HOME, INC.,
DEFENDANT-APPELLANT.

MICHELE E. DETRAGLIA, UTICA, FOR DEFENDANT-APPELLANT.

KARL E. MANNE, HERKIMER, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered July 6, 2021. The judgment awarded plaintiff money damages against defendant V.J. Iocovozzi Funeral Home, Inc.

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

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

792

CA 22-00245

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

MERCHANTS PREFERRED INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JUNIOR M. CAMPBELL, DOING BUSINESS AS
JMC QUALITY AIR, ET AL., DEFENDANTS,
AND ROSE CHARLEUS, DEFENDANT-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (BRIAN D. BARNAS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 15, 2022. The order granted in part the motion of defendant Rose Charleus to compel the production of certain documents and, in effect, denied the cross motion of plaintiff for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in its entirety and granting the cross motion, and as modified the order is affirmed without costs.

Memorandum: Defendant Rose Charleus was injured in an automobile accident when her vehicle collided with a vehicle that was covered by a policy of insurance issued by plaintiff. After Charleus commenced a personal injury action arising from that collision, plaintiff commenced the instant action seeking to disclaim coverage due to the non-cooperation of its insured. In response to Charleus's first notice for discovery and production of documents in this action, plaintiff disclosed certain materials but withheld portions of its insurance claim file relating to the personal injury action on the ground that the documents were material prepared in anticipation of litigation, were protected by attorney client privilege, and were otherwise not relevant to the action to disclaim coverage. Charleus moved to compel production of the withheld documents, and plaintiff cross-moved for a protective order. After reviewing the withheld materials in camera, Supreme Court granted the motion in part by ordering plaintiff to disclose certain withheld portions of its claim file and, in effect, denied the cross motion. Plaintiff appeals.

"[A]n insurance company's claim file is conditionally exempt from disclosure as material prepared in anticipation of litigation" (*Litvinov v Hodson*, 74 AD3d 1884, 1886 [4th Dept 2010]; *see* CPLR 3101 [d] [2]). Nevertheless, material prepared in anticipation of litigation may be subject to disclosure upon "a party's showing that he or she is in substantial need of the material and is unable to obtain the substantial equivalent of the material by other means without undue hardship" (*Teran v Ast*, 164 AD3d 1496, 1498 [2d Dept 2018]; *see Litvinov*, 74 AD3d at 1886). Here, we conclude that the materials sought by Charleus and ordered by the court to be disclosed following its in camera review constitute material prepared in anticipation of litigation (*see Lamberson v Village of Allegany*, 158 AD2d 943, 943 [4th Dept 1990]) and were prepared at a time after plaintiff had already determined to reject and defend against the claim made by Charleus (*cf. Advanced Chimney, Inc. v Graziano*, 153 AD3d 478, 480 [2d Dept 2017]).

Because the materials sought by Charleus and ordered to be disclosed by the court's order were prepared in anticipation of litigation and because Charleus has not made a showing justifying disclosure (*see generally Teran*, 164 AD3d at 1499; *Lamberson*, 158 AD2d at 944), we modify the order by denying the motion in its entirety and granting the cross motion.

In light of our determination, we need not reach plaintiff's remaining contentions.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

793
CA 22-00067
PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUR, JJ.

TODD HOPKINS, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT C. MORREALE AND 2121 LOCKPORT ROAD, LLC,
DEFENDANTS-APPELLANTS.

GERBER CIANO KELLY BRADY, LLP, BUFFALO (ARLOW LINTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HUTCHESON, AFFRONTI & DEISINGER, P.C., NIAGARA FALLS (MARK R. AFFRONTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered October 15, 2021. The order, insofar as appealed from, denied the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 5, 2022,

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

Entered: November 10, 2022 Ann Dillon Flynn

Clerk of the Court

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

794
CA 21-00701
PRESENT: LINDLEY, J.P., NEMOYER, WINSLOW, BANNISTER, AND MONTOUR, JJ.

WALTER P. SMITH, PLAINTIFF-RESPONDENT,

V ORDER

PENNY L. SMITH, DEFENDANT-APPELLANT.

VERSACE LAW OFFICE, PC, ROME (MEADE H. VERSACE OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Herkimer County (Charles C. Merrell, J.), entered April 8, 2021 in a divorce action. The judgment, among other things, determined the amount of spousal maintenance and awarded plaintiff attorney’s fees.

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

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

795

TP 22-00675

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

IN THE MATTER OF TROY LEE KENNEDY, PETITIONER,

V   ORDER

ALFRED P. MONETGARI, ACTING SUPERINTENDENT,
RESPONDENT.

TROY LEE KENNEDY, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [David A. Murad, J.], entered March 31, 2022) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

796
KA 18-02279
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON DAVIS, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TONYA PLANK 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 (Thomas E. Moran, J.), rendered October 1, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Although we agree with defendant that, as the People correctly concede, he did not validly waive his right to appeal (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

798
KA 16-02334
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIAN CLINKSCALES, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered December 6, 2016. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]) in connection with an incident during which defendant hit the victim—his mother—in the head with a hammer. We affirm.

Defendant contends that Supreme Court erred in permitting the victim to testify about certain prior bad acts by defendant (*see generally People v Molineux*, 168 NY 264, 293-294 [1901]). Specifically, he contends that the court erred in admitting testimony about a prior incident where he had engaged in domestic violence against the victim, and testimony that, in the month before the attack, he frequently argued with the victim about how she had sent him to a juvenile detention facility following the prior incident of domestic violence. We reject that contention. The court properly admitted the testimony in question "to complete the narrative of the events charged in the indictment . . . , and [to] provide[] necessary background information" (*People v Feliciano*, 196 AD3d 1030, 1031 [4th Dept 2021], *lv denied* 37 NY3d 1059 [2021] [internal quotation marks omitted]; *see People v Nieves-Cruz*, 200 AD3d 1588, 1590-1591 [4th Dept 2021], *lv denied* — NY3d — [2022]). The court also properly admitted that testimony to establish defendant's motive to attack the victim (*People v Resto*, 147 AD3d 1331, 1332-1333 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]).

Contrary to defendant's contention, the court did not abuse its discretion in determining that the probative value of the challenged *Molineux* testimony outweighed its potential for prejudice (*see generally People v Cass*, 18 NY3d 553, 560 [2012]) and, moreover, "the court's prompt limiting instruction[s] ameliorated any prejudice" (*People v Emmons*, 192 AD3d 1658, 1659 [4th Dept 2021], *lv denied* 37 NY3d 992 [2021]; *see People v Holmes*, 104 AD3d 1288, 1289 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]).

Finally, the sentence is not unduly harsh or severe.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

800
KA 18-00564
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK D. FULTON, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered February 9, 2018. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Contrary to defendant's contention, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), and affording them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that the evidence is legally sufficient to establish that defendant acted in concert with his two codefendants to steal property. Specifically, based on the evidence that defendant watched the initial stages of the theft and appeared to be acting as a lookout, accompanied a codefendant who left the store with the stolen property, assisted that codefendant in loading the property into a car, and was apprehended in that car with the codefendants and the stolen property, "[t]he jury could reasonably have inferred that, by reason of his conduct, defendant had the requisite intent to commit a larceny" (*People v Farmer*, 156 AD2d 1003, 1004 [4th Dept 1989], *lv denied* 75 NY2d 868 [1990]; *see People v Strauss*, 155 AD3d 1317, 1318 [3d Dept 2017], *lv denied* 31 NY3d 1122 [2018]; *People v Middleton*, 151 AD3d 491, 492 [1st Dept 2017], *lv denied* 29 NY3d 1131 [2017]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's additional contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve his contention that County Court should have precluded a mall security guard's testimony under the best evidence rule (*see People v Steinhilber*, 133 AD3d 798, 799 [2d Dept 2015], *lv denied* 27 NY3d 1155 [2016]). In any event, that contention lacks merit. The evidence at trial established that the security cameras that the guard used to observe defendant in the parking lot also recorded the incident, but the system later failed, causing the loss of the video that the system made of the event. Thus, because the People introduced the security guard's testimony to establish the events that he observed, which are facts "existing independently of the . . . recording, 'the best evidence rule was inapplicable and the [events] could be testified to by anyone who' " observed them (*People v Vernay*, 174 AD3d 1485, 1486 [4th Dept 2019]; *see People v Lofton*, 226 AD2d 1082, 1082 [4th Dept 1996], *lv denied* 88 NY2d 938 [1996], *reconsideration denied* 88 NY2d 1022 [1996]).

We reject defendant's further contention that the court erred in refusing to substitute counsel in place of his assigned attorney. A court's duty to consider a motion to substitute counsel is invoked only when a defendant makes a "seemingly serious request[]" for new counsel (*People v Porto*, 16 NY3d 93, 100 [2010] [internal quotation marks omitted]; *see People v Sides*, 75 NY2d 822, 824 [1990]). Only where a defendant makes "specific factual allegations of serious complaints about counsel" must the court make a "minimal inquiry" into "the nature of the disagreement or its potential for resolution" (*Porto*, 16 NY3d at 100 [internal quotation marks omitted]; *see People v Gibson*, 126 AD3d 1300, 1301-1302 [4th Dept 2015]), and the court is required to substitute counsel only where good cause is shown (*see Porto*, 16 NY3d at 100; *Sides*, 75 NY2d at 824; *Gibson*, 126 AD3d at 1302).

Here, even assuming, arguendo, that defendant made "specific factual allegations of serious complaints about counsel" (*People v White*, 202 AD3d 1481, 1482 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022] [internal quotation marks omitted]), we conclude that the court "conducted the requisite 'minimal inquiry' to determine whether substitution of counsel was warranted" (*People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018], *lv denied* 32 NY3d 936 [2018], quoting *Sides*, 75 NY2d at 825). The record establishes that the court on several occasions "allowed defendant to air his concerns about defense counsel, and . . . reasonably concluded that defendant's vague and generic objections had no merit or substance" (*People v Linares*, 2 NY3d 507, 511 [2004]), and "properly concluded that defense counsel was 'reasonably likely to afford . . . defendant effective assistance' of counsel" (*People v Bradford*, 118 AD3d 1254, 1255 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014], quoting *People v Medina*, 44 NY2d 199, 208 [1978]; *see Chess*, 162 AD3d at 1579).

Defendant contends that the court was required to replace a juror during deliberations because the juror sent a note to the court and made statements that, according to defendant, suggested that she might have been prejudiced against him. Because "defendant never requested that the juror[] in question be discharged . . . , his current

contention in this regard has not been preserved for appellate review" (*People v Fernandez*, 269 AD2d 167, 167 [1st Dept 2000], *lv denied* 95 NY2d 796 [2000]; *cf. People v Spencer*, 29 NY3d 302, 311 n 2 [2017], *rearg denied* 31 NY3d 1074 [2018]). In any event, there was no basis upon which the court was required to dismiss the sworn juror as "grossly unqualified to serve in the case" (CPL 270.35 [1]). Although the juror initially expressed some concern over her well being, she ultimately assured the court in unequivocal terms that she would be fair and impartial and would follow the court's instructions (*see generally People v Buford*, 69 NY2d 290, 297-299 [1987]; *People v Buchholz*, 23 AD3d 1093, 1094 [4th Dept 2005], *lv denied* 6 NY3d 846 [2006]).

Defendant's contention that he was denied effective assistance of counsel lacks merit. With respect to defendant's claim that defense counsel was ineffective in failing to move to replace the sworn juror in question, defendant " 'failed to establish that defense counsel lacked a legitimate strategy in choosing not to challenge th[e] . . . juror[]' " (*People v Carpenter*, 187 AD3d 1556, 1557 [4th Dept 2020], *lv denied* 36 NY3d 970 [2020]; *see also People v Maffei*, 35 NY3d 264, 273 [2020]). In addition, it is well settled that "[t]here can be no denial of effective assistance of . . . counsel arising from [defense] counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]) and, for the reasons discussed above, such a motion would have been subject to denial. For the same reason, we reject defendant's claim that counsel was ineffective in failing to move to preclude the security guard's testimony pursuant to the best evidence rule. With respect to defendant's remaining allegations of ineffective assistance of counsel, the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

801
CA 21-00356
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND WINSLOW, JJ.

S.P., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

M.P., DEFENDANT-RESPONDENT.

S.P., PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered February 1, 2021. The order fined plaintiff $1,000 upon two findings of contempt.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the contempt adjudications are vacated.

Memorandum: In this post-divorce child custody action, plaintiff mother appeals pro se from an order that fined her $1,000 upon findings effectively adjudicating her in criminal contempt pursuant to Judiciary Law § 750 (A) (3). We now reverse and vacate the contempt adjudications.

Preliminarily, we conclude that the mother's challenge to the summary contempt adjudications is properly raised via direct appeal from the order under the circumstances of this case. Although a direct appeal from an order punishing a person summarily for contempt committed in the immediate view and presence of the court ordinarily does not lie and a challenge must generally be brought pursuant to CPLR article 78 to allow for development of the record (*see* Judiciary Law §§ 752, 755; *see e.g. Matter of Cahn v Vario*, 32 AD2d 1035, 1035 [2d Dept 1969]), an appeal from such an order is appropriately entertained where, as here, there exists an adequate record for appellate review (*see People v Sanders*, 58 AD2d 525, 525 [1st Dept 1977]; *People v Clinton*, 42 AD2d 815, 815 [3d Dept 1973]; *Matter of Dillon v Comello*, 34 AD2d 1097, 1098 [4th Dept 1970]; *People v Zweig*, 32 AD2d 569, 570 [2d Dept 1969]).

With respect to the merits, "[b]ecause contempt is a drastic remedy, . . . strict adherence to procedural requirements is mandated" (*Rennert v Rennert*, 192 AD3d 1513, 1515 [4th Dept 2021] [internal quotation marks omitted]). Here, we conclude that the court committed reversible error by failing to afford the mother the requisite "opportunity, after being 'advised that [she] was in peril of being adjudged in contempt, to offer any reason in law or fact why that

judgment should not be pronounced' " (*Matter of Scott v Hughes*, 106 AD2d 355, 356 [1st Dept 1984], quoting *Matter of Katz v Murtagh*, 28 NY2d 234, 238 [1971]; *see Matter of Rodriguez v Feinberg*, 40 NY2d 994, 995 [1976]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

805
CA 21-01603
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

IN THE MATTER OF JESSICA KELLY,
PETITIONER-PLAINTIFF-APPELLANT,

V ORDER

NEW YORK STATE UNIFIED COURT SYSTEM, LAWRENCE K.
MARKS, AS CHIEF ADMINISTRATIVE JUDGE OF COURTS
OF STATE OF NEW YORK, ANDREW B. ISENBERG, AS
DISTRICT EXECUTIVE OF EIGHTH JUDICIAL DISTRICT,
AND TASHA E. MOORE, AS DEPUTY DISTRICT EXECUTIVE
OF EIGHTH JUDICIAL DISTRICT,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY
(THOMAS MORELLI OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM OF
COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 28, 2021 in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, among other things, dismissed the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

806

CA 21-01507

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

NIGISTI WOLDEAB-YOHANNES, PLAINTIFF,

V ORDER

RAIF ZENELOVIC, DEFENDANT.

RAIF ZENELOVIC, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

TESFAMICHAEL YOHANNES, THIRD-PARTY
DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY C. SENDZIAK OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

BARTH CONDREN LLP, BUFFALO (BREANNA C. REILLY OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered September 23, 2021. The order denied the motion of third-party defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

810
CA 21-01698
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, AND WINSLOW, JJ.

RAQUEL BRIOSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, ERIE CANAL HARBOR DEVELOPMENT CORP., LECHASE CONSTRUCTION SERVICES, LLC, PINTO CONSTRUCTION SERVICES, INC., AND BE OUR GUEST, LTD., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HAGERTY & BRADY, BUFFALO (DANIEL J. BRADY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (BETHANY RUBIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ERIE CANAL HARBOR DEVELOPMENT CORP., LECHASE CONSTRUCTION SERVICES, LLC, AND BE OUR GUEST, LTD.

BARCLAY DAMON LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT PINTO CONSTRUCTION SERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 27, 2021. The order, among other things, denied plaintiff’s motion for partial summary judgment and granted defendant Pinto Construction Services, Inc.’s cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion of defendant Pinto Construction Services, Inc. in part and reinstating the complaint against that defendant insofar as the complaint, as amplified by the bill of particulars, alleges that defendant Pinto Construction Services, Inc. created and had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action to recover damages for injuries she sustained when she tripped and fell over a construction sign that was lying on a sidewalk across from a museum where construction was taking place. Plaintiff appeals from an order that, inter alia, denied her motion seeking partial summary judgment on the issue of liability against defendants City of Buffalo (City), Erie Canal Harbor Development Corp. (ECHDC), LeChase Construction Services, LLC (LeChase), and Pinto Construction Services, Inc. (Pinto) and dismissing the affirmative defense of comparative

negligence raised by all defendants in their answers, and granted Pinto's cross motion seeking, inter alia, summary judgment dismissing the complaint as against it.

Contrary to plaintiff's contention, we conclude that Supreme Court properly denied her motion insofar as it sought summary judgment on the issue of liability against the City, ECHDC, LeChase, and Pinto. Plaintiff failed to establish as a matter of law that those defendants either created or had actual or constructive notice of the construction sign over which she tripped (*see generally Hansford v Wellsby*, 149 AD3d 1603, 1603 [4th Dept 2017]; *Del Carmen Cuque v Amin*, 125 AD3d 1490, 1491 [4th Dept 2015]; *Dapp v Larson*, 240 AD2d 918, 918 [3d Dept 1997]). We also reject plaintiff's contention that the court erred in denying her motion with respect to the affirmative defense of comparative negligence. Plaintiff failed to meet her initial burden on her motion of establishing "a total absence of comparative negligence as a matter of law" (*Dasher v Wegmans Food Mkts.*, 305 AD2d 1019, 1019 [4th Dept 2003]; *see Reichmuth v Family Video Movie Club, Inc.*, 201 AD3d 1348, 1349 [4th Dept 2022]).

We agree with plaintiff, however, that the court erred in granting those parts of Pinto's cross motion seeking summary judgment dismissing the complaint against it insofar as the complaint, as amplified by the bill of particulars, alleges that it had constructive notice of the allegedly dangerous condition and that it created that condition, and we therefore 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'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, 1395-1396 [4th Dept 2021]; *Salvania v University of Rochester*, 137 AD3d 1607, 1609 [4th Dept 2016]). Here, Pinto failed to meet its initial burden on its cross motion with respect to constructive notice because its submissions "failed to establish as a matter of law that the [dangerous] condition [was] not visible and apparent or that [it] had not existed for a sufficient length of time before the accident to permit [Pinto] or [its] employees to discover and remedy [it]" (*Chamberlain v Church of the Holy Family*, 160 AD3d 1399, 1401 [4th Dept 2018] [internal quotation marks omitted]; *see St. John v Westwood-Squibb Pharms., Inc.*, 138 AD3d 1501, 1503 [4th Dept 2016]). Testimony from Pinto's superintendent that Pinto had a general policy of taking down and storing its construction signs at the end of each workday was insufficient to establish that Pinto lacked constructive notice of the dangerous condition because Pinto failed to establish that it had complied with that general policy prior to the occurrence of the incident in question (*see Arghittu-Atmekjian*, 193 AD3d at 1396; *Farrauto v Bon-Ton Dept. Stores, Inc.*, 143 AD3d 1292, 1293 [4th Dept 2016]; *Salvania*, 137 AD3d at 1609).

Pinto also failed to establish as a matter of law that it did not create the allegedly dangerous condition because its own submissions raise triable issues of fact with respect to that issue (*see Britt v*

Northern Dev. II, 199 AD3d 1434, 1436 [4th Dept 2021]). There is no dispute that Pinto's submissions established that the sign plaintiff tripped over belonged to Pinto. Although the deposition testimony from Pinto's superintendent established that, at the time of the accident, Pinto had not been present at the work site for about a week, he did not know how the sign ended up on the ground or how long it had been there, and he only speculated that the sign may have been used by another contractor who failed to properly put it away. Viewed in the light most favorable to plaintiff (*see Gronski v County of Monroe*, 18 NY3d 374, 381 [2011], *rearg denied* 19 NY3d 856 [2012]), the aforementioned evidence raises questions of fact whether Pinto was responsible for the sign's presence on the sidewalk. Because Pinto failed to meet its initial burden on the cross motion with respect to constructive notice and the creation of the dangerous condition, the burden never shifted to plaintiff with respect to those issues, and denial of the cross motion with respect to those issues "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]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

811

CA 22-00648

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

RAQUEL BRIOSO, PLAINTIFF-APPELLANT,

V   ORDER

CITY OF BUFFALO, ERIE CANAL HARBOR DEVELOPMENT CORP., LECHASE CONSTRUCTION SERVICES, LLC, PINTO CONSTRUCTION SERVICES, INC., AND BE OUR GUEST, LTD., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HAGERTY & BRADY, BUFFALO (DANIEL J. BRADY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (BETHANY RUBIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ERIE CANAL HARBOR DEVELOPMENT CORP., LECHASE CONSTRUCTION SERVICES, LLC, AND BE OUR GUEST, LTD.

BARCLAY DAMON LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT PINTO CONSTRUCTION SERVICES, INC.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered April 19, 2022. The order, among other things, granted the motion of defendants City of Buffalo, Erie Canal Harbor Development Corp., LeChase Construction Services, LLC, and Be Our Guest, Ltd., for leave to reargue and, upon reargument, granted in part the cross motion of those defendants for summary judgment.

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

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

812
CA 21-01294
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

STEPHANIE RUFFINO, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND MVP NETWORK CONSULTING, LLC,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (RICHARD J. ZIELINSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 8, 2021. The order, insofar as appealed from, granted the motion of defendant MVP Network Consulting, LLC for summary judgment and dismissed the complaint against that defendant.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

813
CA 21-01550
PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

STEPHANIE RUFFINO, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND MVP NETWORK CONSULTING, LLC,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (RICHARD J. ZIELINSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 18, 2021. The order granted the motion of plaintiff for leave to reargue her opposition to the motion of defendant MVP Network Consulting, LLC for summary judgment, and upon reargument, adhered to the prior order granting the motion of that defendant.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

815

KA 21-01131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES ROSS, 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 (Vincent M. Dinolfo, J.), rendered December 9, 2020. The order denied the petition of defendant to modify his risk level 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 denying his petition pursuant to Correction Law § 168-o (2) seeking to modify the prior determination that he is a level three risk pursuant to the Sex Offender Registration Act (§ 168 *et seq.*). We affirm. Contrary to defendant's contention, he failed to meet his " 'burden of proving the facts supporting the requested modification by clear and convincing evidence' " (*People v Higgins*, 55 AD3d 1303, 1303 [4th Dept 2008], quoting § 168-o [2]; *see People v Bentley*, 186 AD3d 1135, 1136 [4th Dept 2020], *lv denied* 36 NY3d 903 [2020]; *People v Anthony*, 171 AD3d 1412, 1413-1414 [3d Dept 2019]). Here, the evidence at the hearing on the petition failed to establish that defendant completed sex offender treatment. In addition, the evidence demonstrated that after defendant was initially adjudicated a level three risk, defendant was convicted of murder based on his attack on his ex-girlfriend in front of her young children. We conclude that defendant failed to submit clear and convincing evidence that conditions changed subsequent to the initial risk level determination warranting the requested modification (*see Bentley*, 186 AD3d at 1136; *see generally People v Knox*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Perry*, 174 AD3d 1234, 1236 [3d Dept 2019], *lv denied* 34 NY3d 905 [2019]).

We have considered defendant's remaining contention, and we

conclude that it does not require modification or reversal of the order.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

817

KA 20-00825

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL CLAVIJO, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (HELEN SYME OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered September 12, 2019. The judgment convicted defendant upon a nonjury verdict of kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of kidnapping in the second degree (Penal Law § 135.20). As defendant correctly concedes, by failing to renew his motion to dismiss the indictment at the close of proof, defendant failed to preserve for our review his contention that the evidence is not legally sufficient to support the conviction (*see People v Simmons*, 133 AD3d 1275, 1277 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]).

Contrary to defendant's further contention, we conclude that, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Vail*, 174 AD3d 1365, 1366-1367 [4th Dept 2019]). Among other things, the proof at trial demonstrated that defendant, while armed with a handgun, led his 17-year-old victim to defendant's recording studio in order to question the victim about another handgun, also belonging to defendant, that had gone missing. In the recording studio, defendant promptly bound the victim's hands behind the victim's back with zip ties, threatened him, questioned him about the missing weapon, and suggested that he would kill the victim if he did not cooperate. Although the victim informed defendant that another man had moved the handgun from its usual location, defendant did not cut the zip ties and allow the victim to leave until several hours had elapsed, and only after law enforcement officers, who had been contacted by the

victim's concerned girlfriend, questioned defendant, who lied to officers as to the victim's whereabouts. Contrary to defendant's further contention, the discrepancies in the testimony of the People's witnesses merely presented credibility issues that County Court, as trier of fact, reasonably and justifiably resolved in the People's favor (*see generally People v Graves*, 163 AD3d 16, 23 [4th Dept 2018], *lv denied* 35 NY3d 970 [2020]), and nothing about that testimony rendered it incredible as a matter of law (*see generally People v O'Neill*, 169 AD3d 1515, 1515-1516 [4th Dept 2019]).

Contrary to defendant's final contention, the sentence is not unduly harsh or severe.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

818
KA 18-02220
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY STEWART, DEFENDANT-APPELLANT.

JILL L. PAPERNO, ACTING PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Stephen T. Miller, A.J.), rendered August 2, 2018. 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: On appeal 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]), defendant contends that his sentence is unduly harsh and severe and that the waiver of the right to appeal does not foreclose his challenge to the severity of his sentence. As the People correctly concede, defendant did not validly waive his right to appeal "because County Court's oral colloquy utterly mischaracterized the nature of the right to appeal . . . , inasmuch as the court's advisement as to the rights relinquished [and retained by defendant] was incorrect and irredeemable under the circumstances" (*People v Carter*, 200 AD3d 1719, 1719 [4th Dept 2021], *lv denied* 38 NY3d 949 [2022] [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 562, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Crogan*, 181 AD3d 1212, 1212 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]). We nevertheless perceive no basis in the record for the exercise of our authority to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

820
CA 21-01434
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

MICHAEL GALLO, PLAINTIFF-RESPONDENT,

V ORDER

HANI KOZMAN, M.D., DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (ADAM P. CAREY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEFRANCISCO & FALGIATANO, LLP, EAST SYRACUSE (CHARLES L. FALGIATANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered September 21, 2021. The order denied 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 for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

822

CA 21-01546

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

SUMAN TOOR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL LOTEMPLE AND RETROTECH, INC.,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, ROCHESTER (VALERIE L. BARBIC OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered September 20, 2021. The order, insofar as appealed from, denied in part the motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint, as amplified by the bill of particulars, to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was struck by a vehicle driven by defendant Samuel LoTemple and owned by defendant Retrotech, Inc. In her complaint, as amplified by the bill of particulars, plaintiff alleged that she sustained a serious injury within the meaning of Insurance Law § 5102 (d) under, inter alia, the significant limitation of use and 90/180-day categories. Defendants moved for summary judgment dismissing the complaint, and they now appeal from an order that, among other things, denied their motion with respect to the significant limitation of use and 90/180-day categories of serious injury.

Contrary to defendants' contention, they failed to meet their initial burden with respect to the significant limitation of use category of serious injury. The reports of defendants' medical experts did not establish that plaintiff's injuries are the result of preexisting degenerative disease inasmuch as they " 'fail[ed] to account for evidence that plaintiff had no complaints of pain [in the allegedly affected areas] prior to the accident' " (*Baldauf v Gambino*, 177 AD3d 1307, 1308 [4th Dept 2019]; *see Shah v Nowakowski*, 203 AD3d 1737, 1738 [4th Dept 2022]; *Crane v Glover*, 151 AD3d 1841, 1842 [4th Dept 2017]). Further, although defendants contend that plaintiff's

injuries are not "significant" as that term is used in Insurance Law § 5102 (d), their own submissions in support of their motion raised triable issues of fact with respect to whether plaintiff's injuries are significant (*see Baldauf*, 177 AD3d at 1308). In light of defendants' failure to meet their initial burden with respect to that category of serious injury, there is no need to consider the sufficiency of plaintiff's opposition thereto (*see Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]).

We agree with defendants, however, that Supreme Court erred in denying their motion with respect to the 90/180-day category of serious injury, and we therefore modify the order accordingly. " 'To qualify as a serious injury under the 90/180[-day] category, there must be objective evidence of a medically determined impairment or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent' " (*Baldauf*, 177 AD3d at 1308). An injured plaintiff must be prevented " 'from performing substantially all of the material acts which constituted his [or her] usual daily activities' for at least 90 out of 180 days following the accident" (*Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021], quoting *Licari v Elliott*, 57 NY2d 230, 238 [1982]). Here, defendants met their initial burden by submitting plaintiff's deposition testimony, which established that although plaintiff was limited in certain daily activities, she was able to perform others. In response, plaintiff did not raise an issue of fact (*see generally Pastuszynski v Lofaso*, 140 AD3d 1710, 1711 [4th Dept 2016]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

823

CA 22-00548

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

NICHOLAS SMITH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MDA CONSULTING ENGINEERS, PLLC,
DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (CAROL R. FINOCCHIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

DOLCE PANEPINTO, P.C., BUFFALO (AARON C. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered March 23, 2022. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained after falling off of a foundation wall while erecting a salt storage shed for the Town of Mansfield (Town). Defendant had contracted with the Town to assist in preparing a bid package, solicit bids, assist the Town in obtaining grant money from the State, and review the submitted bids for the salt storage shed project. Plaintiff commenced the instant action asserting causes of action against defendant for violations of Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence. Defendant appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint.

Initially, to the extent that Supreme Court's denial of the motion was premised on defendant's failure to promptly file a statement of material facts as previously required by 22 NYCRR 202.8-g (former [a]), we substitute our discretion, which may be exercised by the Appellate Division "even though there has been no abuse of discretion by the lower branch of the court" (*Phoenix Mut. Life Ins. Co. v Conway*, 11 NY2d 367, 370 [1962] [internal quotation marks omitted]; *see Chamberlin v Samaritan Med. Ctr.*, 249 AD2d 956, 957 [4th Dept 1998]), to deem that mistake corrected by defendant's late filing (*see* CPLR 2001). As defendant asserts, the affidavit of its attorney was the functional equivalent of a statement of material facts, there

was no prejudice to plaintiff, and defendant rectified its omission in a timely manner. We also note that the regulation was amended several months after the order was entered requiring that statements of material facts be provided only if directed by the court and providing courts with several remedies in the event of a failure by the proponent of summary judgment to provide the statement (*see* 22 NYCRR 202.8-g [e]). Further, at least one other Department of the Appellate Division has been hesitant to require "blind adherence to the procedure set forth in 22 NYCRR 202.8-g" even before the amendment (*Leberman v Instantwhip Foods, Inc.*, 207 AD3d 850, 852 [3d Dept 2022] [internal quotation marks omitted]).

Regarding the merits, we agree with defendant, which was undisputedly not an owner or a contractor, that it met its initial burden on the motion with respect to the Labor Law § 240 (1) cause of action by establishing that it was not an agent of the Town. "An agency relationship for the purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job" (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292-293 [2003]). "Thus, unless a defendant has supervisory control and authority over the work being done when the plaintiff is injured, there is no statutory agency conferring liability under the Labor Law" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]). Pursuant to the express terms of the contract between the Town and the nonparty contractor—i.e., plaintiff's employer—as well as the terms of the contract between the Town and defendant, defendant had no control over the means or methods of the performance of the work by the contractor, and it also had no control over safety precautions for the workers at the construction site (*see Hastedt v Bovis Lend Lease Holdings, Inc.*, 152 AD3d 1159, 1162 [4th Dept 2017]; *Phillips v Wilmorite, Inc.*, 281 AD2d 945, 946 [4th Dept 2001]). The deposition testimony submitted by defendant established the same. In opposition, plaintiff failed to raise a triable issue of fact whether defendant was liable as an agent of the Town (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

For those same reasons, it was error to deny defendant's motion with respect to the Labor Law § 241 (6) cause of action (*see Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271 [4th Dept 2014]; *Phillips*, 281 AD2d at 946). Defendant also established that it did not actually direct or control the work that brought about plaintiff's injuries, and plaintiff raised no issue of fact with respect thereto. Therefore, it was error to deny defendant's motion with respect to the Labor Law § 200 and common-law negligence causes of action (*see Bausenwein v Allison*, 126 AD3d 1466, 1468 [4th Dept 2015]; *Suconota v Knickerbocker Props., LLC*, 116 AD3d 508, 508-509 [1st Dept 2014]).

Entered: November 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

824
CA 21-01498
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

RONALD R. BENJAMIN, PLAINTIFF-APPELLANT,

V ORDER

PAUL G. FERRARA, ESQ., AND COSTELLO,
COONEY & FEARON, PLLC, DEFENDANTS-RESPONDENTS.

RONALD R. BENJAMIN, PLAINTIFF-APPELLANT PRO SE.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL R. ROSE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered September 7, 2021. The order, insofar as appealed from, granted that part of the motion of defendants seeking to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

827
CA 21-01194
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

MEDLOCK CROSSING SHOPPING CENTER DULUTH, GA.
LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TT MEDLOCK CROSSING, LLC, ET AL., DEFENDANTS,
AND WILLIAM P. ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered July 22, 2021. The order and judgment, inter alia, granted the motion of plaintiff for summary judgment against defendant William P. Allen.

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

Memorandum: In 2010, plaintiff leased its premises to defendant TT Medlock Crossing, LLC (TT Medlock) for the purpose of opening a restaurant. Defendants Gavin H. Abadi and William P. Allen signed a personal guarantee of the lease. Among other things, the guarantee rendered Abadi and Allen jointly and severally liable, and extended their obligation to any subsequent modifications, extensions, and assignments of the lease. In 2018, TT Medlock extended the term of the lease and assigned its interest thereunder to another entity, defendant MK Ameritaco Corp., which undisputedly proceeded to breach the lease by failing to pay rent pursuant to its terms. Plaintiff commenced this action seeking damages for breach of a written lease against a number of defendants, including TT Medlock, MK Ameritaco Corp., Abadi, and Allen, although only Allen filed an answer.

Plaintiff thereafter moved for summary judgment against Allen as to both liability and damages. In appeal No. 1, Allen appeals from an order and judgment granting plaintiff’s motion and awarding damages and attorneys’ fees. Allen subsequently moved pursuant to CPLR 2221 for leave to renew and reargue his opposition to plaintiff’s motion, and submitted an affidavit that he contended constituted new evidence establishing that his signature appearing on the 2018 lease extension

and assignment was a forgery. Supreme Court determined that Allen's motion was in reality only a motion to reargue, and it denied the motion. In appeal No. 2, Allen appeals from the order denying his motion.

In appeal No. 1, Allen does not dispute that plaintiff met its initial burden on its summary judgment motion, and contrary to Allen's contention, we conclude that he failed to raise an issue of fact in opposition (*see generally Buffalo & Erie County Regional Dev. Corp. v World Auto Parts*, 306 AD2d 857, 858 [4th Dept 2003]). A written guarantee " 'that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank Intl.," N.Y. Branch v Navarro*, 25 NY3d 485, 493 [2015], quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Here, the terms of the 2010 guarantee that Allen undisputedly signed unambiguously extended his responsibility to the 2018 lease extension and assignment (*see generally Boulevard Mall v Knight*, 300 AD2d 1017, 1019 [4th Dept 2002]). Although Allen claims that a portion of the language appearing on the 2010 guarantee submitted by plaintiff was not present on the document that he signed, that disputed provision, by its limited terms, is irrelevant to the present circumstances and has no bearing on the extent of Allen's obligations under the guarantee as related to the 2018 lease extension and assignment. Allen on appeal does not otherwise contend that the 2010 guarantee is unenforceable. Contrary to Allen's further contention, even assuming, arguendo, that he did not sign the 2018 lease extension and assignment as an "original guarantor," we conclude that the 2010 guarantee, standing alone, was sufficient to establish a guarantee of the subsequent extension and assignment (*see id.*).

Contrary to Allen's contention in appeal No. 2, the court properly deemed Allen's motion to be one for only reargument and no appeal lies from an order denying leave to reargue (*see Autry v Children's Hosp. of Buffalo*, 270 AD2d 845, 846 [4th Dept 2000]; *see generally Corter-Longwell v Juliano*, 200 AD3d 1578, 1579 [4th Dept 2021]).

Entered: November 10, 2022 Ann Dillon Flynn
Clerk of the Court

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

828
CA 21-01677
PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND WINSLOW, JJ.

MEDLOCK CROSSING SHOPPING CENTER DULUTH, GA.
LIMITED PARTNERSHIP, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TT MEDLOCK CROSSING, LLC, ET AL., DEFENDANTS,
AND WILLIAM P. ALLEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (CURTIS A. JOHNSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), dated September 24, 2021. The order denied the motion of defendant William P. Allen for leave to reargue his opposition to plaintiff’s prior motion for summary judgment.

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

Same memorandum as in *Medlock Crossing Shopping Ctr. Duluth, GA. Ltd. Partnership v TT Medlock Crossing, LLC* ([appeal No. 1] — AD3d — [Nov. 10, 2022] [4th Dept 2022]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

835

KA 20-01302

PRESENT: SMITH, J.P., LINDLEY, CURRAN, BANNISTER, AND MONTOUR, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN SHAFFER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 26, 2020. The judgment convicted defendant upon a plea of guilty of criminal obstruction of breathing or blood circulation and endangering the welfare of a child.

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 criminal obstruction of breathing or blood circulation (Penal Law § 121.11 [a]) and endangering the welfare of a child (§ 260.10 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

We agree with defendant, however, that the uniform sentence and commitment sheet incorrectly states that defendant was sentenced for a felony when in fact he was sentenced for two class A misdemeanors, and fails to reflect that he was sentenced to a split sentence that included three years' probation. Thus, the uniform sentence and commitment sheet must be amended to correct those errors (*see generally People v Range*, 199 AD3d 1356, 1358 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]; *People v Lewis*, 185 AD3d 1542, 1543-1544 [4th Dept 2020], *lv denied* 35 NY3d 1114 [2020]).

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

849
KA 17-00835
PRESENT: SMITH, J.P., PERADOTTO, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY RAMOS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 26, 2017. The appeal was held by this Court by order entered June 12, 2020, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (184 AD3d 1203 [4th Dept 2020]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of strangulation in the second degree (Penal Law § 121.12). We previously held the case, reserved decision, and remitted the matter to Supreme Court to afford defendant a reasonable opportunity to present contentions in support of his motion to withdraw his plea (*People v Ramos*, 184 AD3d 1203, 1204 [4th Dept 2020]). Upon remittal, the court again denied defendant's motion to withdraw his plea, but defendant now withdraws his contention of error with respect to the court's denial of that motion.

We reject defendant's contention that the court erred in failing to apprehend the extent of its discretion in imposing the period of postrelease supervision. We conclude that the court's statements at the plea proceeding regarding the imposition of a three-year period of postrelease supervision "do[ ] not, without more, indicate that the court erroneously believed that it lacked discretion to impose a shorter period" (*People v Porter*, 9 AD3d 887, 887 [4th Dept 2004], *lv denied* 3 NY3d 710 [2004]).

Even assuming, arguendo, that defendant is correct that his waiver of the right to appeal is invalid, and thus does not preclude our review of his challenge to the severity of his sentence (*see*

People v Seay, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we nevertheless conclude that the sentence is not unduly harsh or severe. However, as defendant contends and the People correctly concede, to the extent that statements made by the court at the proceeding upon remittal were an attempt by the court to modify defendant's sentence to run the sentence consecutively to a sentence on defendant's federal conviction, the court was without authority to do so (*see* CPL 430.10; *People v Richardson*, 100 NY2d 847, 853 [2003]; *Matter of Budelmann v Leone*, 48 AD3d 1206, 1207 [4th Dept 2008]).

Defendant's remaining contention concerning the order of protection in favor of his children extends beyond the scope of the remittal and was not raised by defendant prior to remittal (*see People v Pressley*, 170 AD3d 1645, 1645 [4th Dept 2019], *lv denied* 33 NY3d 1072 [2019]; *People v Butler*, 75 AD3d 1105, 1105 [4th Dept 2010], *lv denied* 15 NY3d 919 [2010]). Even assuming, arguendo, that the contention is properly before us, we would conclude that it is without merit.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

868

CA 21-01617

PRESENT: SMITH, J.P., PERADOTTO, CURRAN, WINSLOW, AND MONTOUR, JJ.

JENNIFER BURRY, AS EXECUTOR OF THE ESTATE OF
THERESA BURRY, DECEASED, AND JENNIFER BURRY,
INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V ORDER

DANIEL ALEXANDER, M.D., FINGER LAKES HEALTH,
DOING BUSINESS AS FINGER LAKES BONE AND
JOINT, LLP, DOING BUSINESS AS FINGER LAKES HEALTH,
DEFENDANTS-APPELLANTS,
ERIN WILKINSON, P.A., ET AL., DEFENDANTS.

BROWN, GRUTTADARO & PRATO, PLLC, ROCHESTER (DENNIS GRUTTADARO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MANGAN LOUIS LLP, NEW YORK CITY (MICHAEL G. MANGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William K. Taylor, J.), entered April 8, 2021. The order denied the motion of defendants Daniel Alexander, M.D., Erin Wilkinson, P.A., and Finger Lakes Health, doing business as Finger Lakes Bone and Joint, LLP, doing business as Finger Lakes Health for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

886
CA 22-00410
PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, WINSLOW, AND BANNISTER, JJ.

TIFFANY L. EVERHART, PLAINTIFF-APPELLANT,

V   ORDER

ROBERT E. EVERHART, III, DEFENDANT-RESPONDENT.

GABRIELE LAW, PLLC, BUFFALO (VANESSA C. GABRIELE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARNEY & BARNEY, ROCHESTER (BRIAN J. BARNEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

MARGARET RESTON, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Monroe County (John B. Gallagher, Jr., J.), entered March 1, 2022 in a divorce action. The order, inter alia, awarded plaintiff temporary maintenance and child support.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 3, 2022,

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

Entered: November 10, 2022   Ann Dillon Flynn
Clerk of the Court

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

899

CAF 21-00712

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

IN THE MATTER OF ELIZABETH F.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

NICOLE F., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

ANAISS RIJO LELONEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO
(RUSSELL E. FOX OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 22, 2020 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had neglected the subject child.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court

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

900
CAF 21-00713
PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND BANNISTER, JJ.

IN THE MATTER OF JOSHUA A. AND REBECCA A.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

NICOLE F., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

ANAISS RIJO LELONEK, BUFFALO, FOR PETITIONER-RESPONDENT.

JENNIFER Z. BLACKHALL, CHEEKTOWAGA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 22, 2020 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had neglected the subject children.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court.

Entered: November 10, 2022

Ann Dillon Flynn
Clerk of the Court