SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 5, 2023

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. ERIN M. PERADOTTO

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MAY 5, 2023

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

949

CA 22-01075

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

JACKIE WEISBROD-MOORE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CAYUGA COUNTY, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BARCLAY DAMON LLP, SYRACUSE (ALAN R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HERMAN LAW FIRM, NEW YORK CITY (JEFFREY M. HERMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HON. SYLVIA O. HINDS-RADIX, CORPORATION COUNSEL, NEW YORK CITY (JANET L. ZALEON OF COUNSEL), FOR THE CITY OF NEW YORK, AMICUS CURIAE.

Appeal from an order of the Supreme Court, Cayuga County (Deborah A. Chimes, J.), entered February 2, 2022. The order denied the motion of defendant Cayuga County to dismiss the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint against defendant Cayuga County is dismissed.

Memorandum: Plaintiff commenced this action under the Child Victims Act (*see* CPLR 214-g) seeking damages as a result of sexual and physical abuse that she allegedly sustained while in foster care between 1975 and 1982. In lieu of an answer, defendant Cayuga County (County) moved to dismiss the complaint against it, claiming, inter alia, that it was immune from liability based upon the doctrine of governmental function immunity because its relevant actions were discretionary in nature. The County further contended that, even if its actions were ministerial, it was nevertheless entitled to dismissal of the complaint against it because plaintiff failed to allege the existence of a special duty, which is necessary for the imposition of liability against a municipal defendant acting in a governmental capacity. Supreme Court denied the motion, and the County now appeals. We reverse.

This appeal requires us to apply well-established rules to determine whether a municipal defendant is subject to tort liability. Where, as here, a "negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a

governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *see Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022]). "If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (*Applewhite*, 21 NY3d at 425). On the other hand, "if the action challenged in the litigation is governmental, the existence of a special duty is an element of the plaintiff's negligence cause of action" (*Connolly v Long Is. Power Auth.*, 30 NY3d 719, 727 [2018]; *see Ferreira*, 38 NY3d at 308). Stated another way, if the action challenged is governmental, a plaintiff must establish that the duty allegedly breached by the municipality was " 'more than that owed [to] the public generally' " (*Ferreira*, 38 NY3d at 313, quoting *Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

The Court of Appeals has explained that such a special duty can be formed in three ways, i.e., "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v Seide*, 2 NY3d 186, 199-200 [2004]; *see Maldovan v County of Erie*, 39 NY3d 166, 171 [2022], *rearg denied* 39 NY3d 1067 [2023]).

Further, even if a plaintiff satisfies their burden of demonstrating that a special duty exists, a municipality will nevertheless be immune from tort liability based upon the governmental function immunity defense if the municipality was performing discretionary rather than ministerial acts (*see Turturro v City of New York*, 28 NY3d 469, 478-479 [2016]; *Valdez v City of New York*, 18 NY3d 69, 75-77 [2011]). In short, "[g]overnmental action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean v City of New York*, 12 NY3d 194, 203 [2009]).

Applying those rules to the present matter, we note at the outset that there is no dispute between the parties that the County was acting in a governmental capacity in administering the foster care system within the municipality and supervising plaintiff's foster care (*see generally Kochanski v City of New York*, 76 AD3d 1050, 1052 [2d Dept 2010]). We therefore agree with the County that plaintiff is required to establish that it owed her a special duty. For the reasons that follow, we conclude that plaintiff failed to set forth allegations of a special duty sufficient to survive the County's motion to dismiss (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, only the first two ways in which a special duty may arise are at issue. With respect to the first of those ways, the Court of Appeals has explained that, to form a special duty " 'through breach of a statutory duty, the governing statute must authorize a private right of action. One may be fairly implied when (1) the plaintiff is

one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme' " (*McLean*, 12 NY3d at 200, quoting *Pelaez*, 2 NY3d at 200). " 'If one of these prerequisites is lacking, the claim will fail' " (*id.*). In this case, we conclude that the complaint contains sufficient allegations with respect to the first two components of the test based on the County's duties under the Social Services Law. Indeed, plaintiff, as a foster child, is a member of the class for whose benefit the relevant provisions of the Social Services Law were enacted. Also, affording plaintiff a private right of action would promote the legislative purpose of those statutes. Therefore, the issue whether plaintiff can establish the existence of a special duty based upon the County's alleged violation of its statutory duties turns on whether affording her a private right of action would be consistent with the legislative scheme.

In *Mark G. v Sabol* (93 NY2d 710 [1999]), the Court of Appeals analyzed provisions in the Social Services Law designed to protect foster children and to prevent child abuse generally and concluded that a private right of action was not consistent with the legislative scheme (*see id.* at 720-722; *see also McLean*, 12 NY3d at 201). Notably, in *McLean*, the Court of Appeals cited *Mark G.* approvingly (*see McLean*, 12 NY3d at 201). We therefore conclude that plaintiff cannot establish a special duty based upon the County's alleged violation of its duties under the Social Services Law. We note that, to the extent that there is case law in the First and Second Departments that would support a contrary conclusion, we decline to follow those cases (*see e.g. George v Windham*, 169 AD3d 876, 877 [2d Dept 2019]; *Sean M. v City of New York*, 20 AD3d 146, 158-160 [1st Dept 2005]; *Bartels v County of Westchester*, 76 AD2d 517, 520-521 [2d Dept 1980]).

We further conclude, with respect to the second way in which a special duty may be shown, that plaintiff cannot establish the requisite special relationship between the parties based upon the County's alleged voluntary assumption of a duty that generated justifiable reliance on her part (*see Maldovan*, 39 NY3d at 172). To establish such a special relationship, a plaintiff must show "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *see Applewhite*, 21 NY3d at 430-431). " '[A]ll four elements must be present for a special duty to attach' " (*Maldovan*, 39 NY3d at 172, quoting *Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 715 [2017]).

Initially, as discussed above, the complaint contains allegations relating to the County's failure to meet its obligations to foster children pursuant to the Social Services Law. It is well established, however, that "[t]he failure to perform a statutory duty, or the

negligent performance of that duty, cannot be equated with the breach of a duty voluntarily assumed" (*Estate of M.D. v State of New York*, 199 AD3d 754, 757 [2d Dept 2021] [internal quotation marks omitted]; *see Pelaez*, 2 NY3d at 202-203). Even assuming, arguendo, that plaintiff sufficiently alleged the existence of a duty on the part of the County apart from its statutory obligations, we nevertheless conclude that plaintiff failed to set forth allegations that, if proven, would establish each of the four elements articulated in *Cuffy* (*see Maldovan*, 39 NY3d at 172).

In light of our determination that plaintiff failed to sufficiently allege the existence of a special duty owed to her by the County, the County's additional contention that it is immune from liability based upon the governmental function immunity defense is academic.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

973

CA 21-01774

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF ELGIN LEMMON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF SCIPIO AND ZONING BOARD OF APPEALS
FOR TOWN OF SCIPIO, RESPONDENTS-RESPONDENTS.

YOUNG/SOMMER LLC, ALBANY (JOSEPH F. CASTIGLIONE OF COUNSEL), FOR PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (RICHARD L. WEBER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered December 9, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition and dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to challenge the determination of respondent Zoning Board of Appeals for the Town of Scipio (ZBA) to deny his appeal from an "order to remedy violation" issued by the Code Enforcement Officer (CEO) of respondent Town of Scipio (Town). The CEO had determined that petitioner violated section 110-3 of the Town of Scipio Zoning Law (Zoning Code) by parking his camper trailer on his property within 250 feet of the side and rear property lines. Supreme Court granted respondents' motion to dismiss the petition, and petitioner appeals. We agree with petitioner that the court erred in granting the motion and that the court should have granted his petition.

Addressing first petitioner's procedural contentions, we conclude that the ZBA did not violate the Open Meetings Law (Public Officers Law § 103 [a]). The documentary evidence establishes that everything related to petitioner's appeal was handled in a public session (*see generally Matter of Zehner v Board of Educ. of Jordan-Elbridge Cent. School Dist.*, 91 AD3d 1349, 1349-1350 [4th Dept 2012]). Petitioner did not "allege or present any evidence that a quorum met or consulted

with its counsel outside of a public meeting, or that these discussions, if any, were part of an effort to thwart public scrutiny of their process in deliberate violation of the Open Meetings Law" (*Matter of Haverstraw Owners Professionals & Entrepreneurs ["H.O.P.E."] v Town of Ramapo Zoning Bd. of Appeals*, 151 AD3d 724, 725 [2d Dept 2017]). Inasmuch as there was no violation of Public Officers Law § 103 (a), we reject petitioner's contention that he is entitled to statutory attorney's fees or any additional statutory relief (*see* Public Officers Law § 107 [2]).

Although petitioner correctly contends that the ZBA violated section 116-4 (D) (2) of the Zoning Code when it permitted an absent member to vote on petitioner's application, and that it violated section 116-4 (E) (2) by failing to issue "findings and conclusions" with respect to its vote, such technical violations were "of no consequence" to the ultimate determination (*Smithson v Ilion Hous. Auth.*, 130 AD2d 965, 967 [4th Dept 1987], *affd* 72 NY2d 1034 [1988]). We thus conclude that the "nonprejudicial, technical violation[s]" of the Zoning Code had no effect on the ultimate outcome of the matter (*Matter of Specht v Town of Cornwall*, 13 AD3d 380, 381 [2d Dept 2004]).

With respect to the merits, generally, "[i]t is well settled that [l]ocal zoning boards have broad discretion, and [a] determination of a zoning board should be sustained on judicial review if it has a rational basis and is supported by substantial evidence . . . The interpretation by a zoning board of its governing code is generally entitled to great deference by the courts" (*Matter of Fox v Town of Geneva Zoning Bd. of Appeals*, 176 AD3d 1576, 1577 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Freck v Town of Porter*, 158 AD3d 1163, 1164-1165 [4th Dept 2018], *lv denied* 32 NY3d 903 [2018]; *see generally Matter of Emmerling v Town of Richmond Zoning Bd. of Appeals*, 67 AD3d 1467, 1467-1468 [4th Dept 2009]). In the end, "[s]o long as its interpretation is neither 'irrational, unreasonable nor inconsistent with the governing statute,' it will be upheld" (*Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 419 [1998]). "Where, however, the question is one of pure legal interpretation of [a zoning code's] terms, deference to the zoning board is not required" (*Fox*, 176 AD3d at 1578 [internal quotation marks omitted]; *see Emmerling*, 67 AD3d at 1468). "[T]he ultimate responsibility of interpreting the law is with the court" (*Matter of Turner v Andersen*, 50 AD3d 1562, 1562 [4th Dept 2008] [internal quotation marks omitted]).

Here, we agree with petitioner that respondents' interpretation of the Zoning Code is irrational and unreasonable (*see generally New York Botanical Garden*, 91 NY2d at 419). The "order to remedy violation" stated that petitioner violated the setback requirement set forth in section 110-3 of the Town's Zoning Code, which limits "[t]he number of tents, trailers, houseboats, recreational vehicles, or other portable shelters *in a camp*" (emphasis added). The Zoning Code, however, defines a "[c]amp" as "[a]ny temporary or portable shelter, such as a tent, *recreational vehicle, or trailer*" (§ 103-2 [emphasis

added]). Respondents do not explain how a trailer or recreational vehicle can constitute both a "[c]amp" as defined in section 103-2 as well as a shelter "in a camp," as defined in section 110-3, and the Zoning Code does not have additional provisions that clarify the issue.

The Zoning Code provides that "[c]amp structures" must be set back at least 250 feet from the property lines of a "camp" (§ 110-3), and defines a "[s]tructure" as "[m]aterials assembled, constructed or erected *at a fixed location* including a building, the use of which requires location on the ground or attachment to something having location on the ground" (§ 103-2 [emphasis added]). Although petitioner concedes that his trailer was less than 250 feet from his property line, there can be no dispute that petitioner's trailer could be moved, i.e., it was not "at a fixed location" on his property (§ 103-2). Thus, the trailer does not qualify as a "[s]tructure" as defined in the Zoning Code, and we therefore conclude that the trailer cannot be in violation of the setback requirement for structures set forth in section 110-3.

Moreover, in order for petitioner's trailer to be located too close to the property line of a camp in violation of section 110-3, petitioner's property must be understood as a "camp" within the meaning of section 110-3 despite the fact that a camp is defined elsewhere in the Zoning Code as a "temporary or portable shelter, such as a tent, recreational vehicle, or trailer" (§ 103-2). Thus, under respondents' interpretation of the Zoning Code, petitioner committed a violation by putting a "temporary or portable shelter, such as a tent, recreational vehicle, or trailer" (i.e., a camp) inside another "temporary or portable shelter, such as a tent, recreational vehicle, or trailer," which is irrational and unreasonable (*see generally New York Botanical Garden*, 91 NY2d at 419).

We therefore reverse the judgment, deny the motion, reinstate the petition, grant the petition and annul the determination.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

991

CA 22-00393

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

IN THE MATTER OF WILLIAM A. WOOD, MONIKA WOOD, WARD MICHAEL HANSFORD, ANITA DENISE YEE-HANSFORD, DAVID M. KOENIG AND GEORGINA MACMAHON, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF PAINTED POST, PAINTED POST PLANNING BOARD, PAINTED POST DEVELOPMENT LLC, AND TYOGA CONTAINER CO., RESPONDENTS-RESPONDENTS.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (HENRY A. ZOMERFELD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS VILLAGE OF PAINTED POST, PAINTED POST PLANNING BOARD, AND PAINTED POST DEVELOPMENT LLC.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered August 26, 2021 in a proceeding pursuant to CPLR article 78. The judgment granted respondents' motion to dismiss the amended petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul a determination of respondent Painted Post Planning Board (Planning Board) granting the application of respondent Tyoga Container Co. (Tyoga) for site plan approval for construction and operation of a warehouse and trucking distribution facility on a parcel of land located in respondent Village of Painted Post (Village). The petition was filed against the Village, the Planning Board, and Tyoga, who jointly answered and asserted among their objections in point of law that the petition should be dismissed for failure to timely name the title owner of the parcel as a respondent. Supreme Court granted petitioners' subsequent motion for permission to amend the petition to add respondent Painted Post Development LLC (PPD) and reserved decision on the motion to dismiss until PPD had an opportunity to answer. After petitioners filed their amended petition, respondents answered jointly and moved to dismiss the amended petition based on petitioners' failure to timely join a necessary party. The court granted respondents' motion, and petitioners now appeal. We affirm.

We reject petitioners' contention that the court erred in determining that PPD was a necessary party. Even assuming, arguendo, that the record supports petitioners' contention that PPD entered into a contract to sell the subject parcel to Tyoga and that Tyoga was thus a contract vendee and the parcel's "equitable owner" (*Bean v Walker*, 95 AD2d 70, 72 [4th Dept 1983]), we conclude that PPD, as the parcel's title owner, remained a necessary party to the litigation pursuant to CPLR 1001 (a) (*see Matter of Ferruggia v Zoning Bd. of Appeals of Town of Warwick*, 5 AD3d 682, 682-683 [2d Dept 2004]; *Matter of Artrip v Incorporated Vil. of Piermont*, 267 AD2d 457, 457-458 [2d Dept 1999]; *see also Franklin Park Plaza, LLC v V & J Natl. Enters., LLC*, 57 AD3d 1450, 1452 [4th Dept 2008]).

We further conclude that the court properly granted respondents' motion based on petitioners' failure to timely commence the proceeding against PPD. It is undisputed that petitioners failed to commence their article 78 proceeding against PPD within 30 days after the Planning Board's decision was filed with the village clerk (*see* Village Law § 7-725-a [11]; *Matter of Citizens Against Sprawl-Mart v City of Niagara Falls*, 35 AD3d 1190, 1191 [4th Dept 2006], *lv dismissed* 9 NY3d 858 [2007]), and we reject petitioners' contention that PPD was properly added after the expiration of the statute of limitations under the relation back doctrine. In order for the relation back doctrine to apply, a petitioner is required to establish that "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the additional party knew or should have known that, but for a mistake by the [petitioner] as to the identity of the proper parties, the action would have been brought against the additional party as well" (*Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193-1194 [4th Dept 2013]; *see Buran v Coupal*, 87 NY2d 173, 178 [1995]). We conclude that the relation back doctrine does not apply here inasmuch as petitioners' error was a mistake of law not encompassed by the doctrine (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 45 AD3d 1099, 1099-1100 [3d Dept 2007], *affd* 11 NY3d 725 [2008]; *Doe v HMO-CNY*, 14 AD3d 102, 106 [4th Dept 2004]). Petitioners simply "failed to appreciate that [PPD was] legally required to be named in proceedings of this type" (*Windy Ridge Farm*, 45 AD3d at 1100; *see Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 AD3d 1474, 1476 [3d Dept 2014]).

In light of our determination, we do not address petitioners' remaining contentions (*see Windy Ridge Farm*, 45 AD3d at 1100; *Matter of Jim Ludtka Sporting Goods, Inc. v City of Buffalo School Dist.*, 48 AD3d 1103, 1104 [4th Dept 2008], *lv denied* 11 NY3d 704 [2008]; *Matter of Baker v Town of Roxbury*, 220 AD2d 961, 964 [3d Dept 1995], *lv denied* 87 NY2d 807 [1996]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

993

CA 21-01495

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

IN THE MATTER OF DANIEL B. PETERSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF ALEXANDRIA, RESPONDENT-RESPONDENT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (GREGORY D. ERIKSEN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 28, 2021. The judgment, inter alia, dismissed the petition.

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

Memorandum: Petitioner commenced this special proceeding seeking, with respect to the only remaining cause of action in the petition, a summary investigation pursuant to General Municipal Law § 4 into certain financial affairs of respondent Town of Alexandria (Town). In support thereof, petitioner presented to Supreme Court the requisite affidavits of property owners who paid taxes on real property within the Town in the past year, alleging that moneys of the Town consisting of sewer and water funds were being unlawfully or corruptly expended. Following proceedings on the petition, the court, upon consideration of the pleadings and submissions, dismissed the petition on the ground that the allegations had not been substantially proved and also denied petitioner's motion brought by order to show cause seeking injunctive and other relief. Petitioner appeals, and we now affirm.

General Municipal Law § 4, which is the same as its predecessor statute (*see* General Municipal Law former § 3; *Matter of Taxpayers of Plattsburgh*, 157 NY 78, 81-82 [1898]; *Matter of Village of Victory*, 111 AD3d 987, 988 [3d Dept 2013]), provides that, upon presentation of the requisite affidavits followed by required notice to the applicable officers of the subject town or village, the court "shall make a summary investigation into the financial affairs of such town or village, and the accounts of such officers, and, in [its] discretion, may appoint experts to make such investigation, and may cause the

result thereof to be published in such manner as [it] may deem proper." The statute further provides that "[t]he costs incurred in such investigation shall be taxed by the [court], and paid, upon [its] order, by the officers whose expenditures are investigated, if the facts in such affidavit be substantially proved, and otherwise, by the [property owners] making such affidavit. If [the court] shall be satisfied that any of the moneys of such town or village are being unlawfully or corruptly expended, or are being appropriated for purposes to which they are not properly applicable, or are improvidently squandered or wasted, [it] shall forthwith grant an order restraining such unlawful or corrupt expenditure, or such other improper use of such moneys" (General Municipal Law § 4).

Petitioner contends that, after appointing an expert accounting firm to perform the investigation and receiving its report, the court erred in permitting the Town to retain its own expert accountant and in considering the report prepared by that accountant. We reject that contention. The statute commits the appointment of experts to the discretion of the court (*see* General Municipal Law § 4), and the court was entitled in this special proceeding to require the submission of additional proof (*see* CPLR 409 [a]; *see generally Village of Victory*, 111 AD3d at 988-989). We cannot conclude on this record that the court abused its discretion either in permitting the Town to retain its own expert accountant or in considering the report prepared by that accountant, particularly in view of petitioner's involvement in the selection of the court-appointed expert accounting firm, which included interviewing that firm and several others, specifically recommending and requesting that the court appoint the subject expert accounting firm, and signing the corresponding engagement agreement, as well as the fact that petitioner worked with the accounting firm by providing it with documentation (*see generally Taxpayers of Plattsburgh*, 157 NY at 88; *Matter of Town of Eastchester*, 6 NYS 120, 121 [Sup Ct, Gen Term, 2d Dept 1889]).

Contrary to petitioner's related contention, we conclude that the court, in evaluating whether the allegations were substantially proved, was not required to simply accept the findings in the report of the expert accounting firm. That report "was not conclusive, but was merely for the information of the conscience of the court" (*Taxpayers of Plattsburgh*, 157 NY at 88). Upon our review of the record, we further conclude that the court did not abuse its discretion in determining that the allegations had not been "substantially proved" (General Municipal Law § 4; *see Taxpayers of Plattsburgh*, 157 NY at 84-87), and the court thus properly dismissed the petition. Inasmuch as " 'injunctive relief is simply not available when the [petitioner] does not have any remaining substantive cause of action,' " dismissal of the remaining substantive cause of action in the petition mandated denial of petitioner's motion seeking injunctive relief (*EnergyMark, LLC v New Wave Energy Corp.*, 186 AD3d 1022, 1024 [4th Dept 2020]; *see Pickard v Campbell*, 207 AD3d 1105, 1110 [4th Dept 2022], *lv denied* 39 NY3d 910 [2023]).

We have considered petitioner's remaining contentions, and we conclude that they do not require modification or reversal of the

judgment.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00144

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

COREY BROWN AND MARJORIE BROWN, PLAINTIFFS,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., INDIVIDUALLY AND DOING BUSINESS AS WAL-MART, ET AL., DEFENDANTS.

WAL-MART STORES, INC., INDIVIDUALLY AND DOING BUSINESS AS WAL-MART, THIRD-PARTY PLAINTIFF-APPELLANT,

V

TOWN OF AMHERST, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY A. WADSWORTH OF COUNSEL), AND BROWN HUTCHINSON LLP, FOR THIRD-PARTY PLAINTIFF-APPELLANT.

MICHAEL J. WILLETT, BUFFALO, FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered December 27, 2021. The order granted the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Same memorandum as in *Brown v Wal-Mart Stores, Inc.* ([appeal No. 2] — AD3d — [May 5, 2023][4th Dept 2023]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00145

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

COREY BROWN AND MARJORIE BROWN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., INDIVIDUALLY AND DOING
BUSINESS AS WAL-MART, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

WAL-MART STORES, INC., INDIVIDUALLY AND DOING
BUSINESS AS WAL-MART, THIRD-PARTY
PLAINTIFF-APPELLANT,

V

TOWN OF AMHERST, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HARTER SECREST & EMERY LLP, ROCHESTER (JEFFREY A. WADSWORTH OF COUNSEL), AND BROWN HUTCHINSON LLP, FOR DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT.

COLLINS & COLLINS, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

MICHAEL J. WILLETT, BUFFALO, FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered January 24, 2022. The order denied the motion of defendant-third-party plaintiff Wal-Mart Stores, Inc., individually and doing business as Wal-Mart for summary judgment dismissing the amended complaint against it and dismissing the counterclaim of the third-party defendant.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint and third-party counterclaim against defendant-third-party plaintiff are dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Corey Brown (plaintiff) sustained when he was struck by a vehicle operated by an officer employed by the Town of Amherst Police Department (APD). At the time of the incident, APD police officers had been summoned to a store owned and operated by defendant-

third-party plaintiff, Wal-Mart Stores, Inc., individually and doing business as Wal-Mart (now known as Walmart, Inc.) ("Walmart"), in connection with a suspected theft of merchandise. Plaintiff, who was an off-duty officer for the APD, responded to the scene, as did several on-duty officers. They conferred with a Walmart asset protection associate (APA) outside of the store. Once the suspect, nonresponding defendant Ronald Kerling, left the store without paying for the merchandise, the APA confronted him, at which point Kerling fled. APD officers pursued Kerling in vehicles and on foot. In the course of the pursuit, plaintiff, who was on foot, was struck by a vehicle operated by another APD officer, causing plaintiff serious injuries.

Plaintiffs commenced this action, contending, as relevant here, that Walmart negligently trained its APAs in the proper methods of dealing with those unlawfully taking merchandise and thus was vicariously liable for the negligent actions of the APA, which included the APA's alleged failure to follow internal protocols. In a third cause of action, plaintiffs also alleged that Walmart's actions "constitute[d] a violation of New York General Obligations Law § 11-106," which provides injured officers with the right to seek compensation for injuries they sustain if those injuries were caused by, inter alia, the neglect of anyone other than a co-employee or the employer of the officer. Walmart answered and subsequently commenced a third-party action against third-party defendant Town of Amherst (Town) seeking contribution and indemnification on the ground that it was the Town's employee, i.e., the other APD officer, who was responsible for plaintiff's injuries. The Town answered and asserted a counterclaim against Walmart seeking to be reimbursed for money it paid to plaintiff as a result of Walmart's alleged negligence (*see* General Municipal Law § 207-c [6]).

Following extensive discovery, the Town moved for summary judgment dismissing the third-party complaint, and Walmart moved for summary judgment dismissing the amended complaint and third-party counterclaim against it. In appeal No. 1, Walmart appeals from an order granting the Town's motion. In appeal No. 2, Walmart appeals from a separate order denying its motion based on Supreme Court's determination that triable issues of fact had been raised by plaintiffs and the Town.

Addressing first appeal No. 2, Walmart contends that it owed no duty to plaintiff and that the court thus erred in denying its motion. We agree. "Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff . . . 'Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm' " (*Safa v Bay Ridge Auto*, 84 AD3d 1344, 1345-1346 [2d Dept 2011], quoting *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001], *rearg denied* 96 NY2d 938 [2001]; *see generally Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 342 [1928], *rearg denied* 249 NY 511 [1928]). "[T]he definition of the existence and scope of an alleged tortfeasor's duty is usually a legal, policy-laden declaration reserved for Judges to make prior to submitting anything to

fact-finding or jury consideration" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 585 [1994]; *see Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 997 [2016]), and that determination is made "by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (*Gilson v Metropolitan Opera*, 5 NY3d 574, 576-577 [2005] [internal quotation marks omitted]).

Here, plaintiffs rely on two theories of duty. First, they contend that Walmart, as the property owner, had a general duty "to take reasonable steps to minimize the foreseeable danger to those unwary souls who might venture onto the premises," i.e., to protect plaintiff from the dangers associated with the criminal activity of Kerling and the alleged negligence of the Walmart employee in summoning the police (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518 [1980]). Second, plaintiffs contend that Walmart assumed a duty to plaintiff as a result of its internal policies (*see generally id.* at 522).

Addressing first the general duty to protect plaintiff, we recognize that, although "landlords and permittees have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety" (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]; *see Nallan*, 50 NY2d at 519). In our view, prior thefts at the Walmart store do not bear a sufficient relationship to what occurred in this instance—a negligent motor vehicle accident between plaintiff and his coworker—so as to create a duty flowing from Walmart to plaintiff (*see Milton v I.B.P.O.E. of the World Forest City Lodge, #180*, 121 AD3d 1391, 1394 [3d Dept 2014]; *see also Mulvihill v Wegmans Food Mkts.*, 266 AD2d 851, 851 [4th Dept 1999]; *Polomie v Golub Corp.*, 226 AD2d 979, 980-981 [3d Dept 1996]).

Addressing next the allegation that Walmart assumed a duty to plaintiff, we note that plaintiffs' contention is that the APA violated Walmart's internal policy and, as a result, the APA should not have summoned the police to address the suspected criminal activities of Kerling. Plaintiffs contend, through an expert, that the APA should have either informed the suspect that he should leave or "should have simply let the suspect go" and not summoned the police until *after* the suspect had left the store. Regardless of whether the APA violated Walmart's internal policy, any alleged violation of Walmart's internal policy did not create a duty flowing from Walmart to plaintiff. The purpose of the internal policy was to protect "the physical well-being of [s]uspects, customers and Walmart associates." Plaintiff was an off-duty police officer responding to an alleged criminal event who never entered the store. He was not one of those covered by the goal of the policies (*cf. Raburn v Wal-Mart Stores, Inc.*, 776 So 2d 137, 138 [Ala Civ App 1999]; *Colombo v Wal-Mart Stores, Inc.*, 303 Ill App 3d 932, 933, 709 NE2d 301, 302 [1999], *appeal denied* 185 Ill 2d 620, 720 NE2d 1090 [1999]). Moreover, there is no evidence that plaintiff knew of and relied to his detriment on

Walmart's internal policies (*see Arroyo v We Transp., Inc*., 118 AD3d 648, 649 [2d Dept 2014]; *Safa*, 84 AD3d at 1346).

Finally, we note that there is no basis to conclude that Walmart had any control over plaintiff or his coworker, i.e., the actual tortfeasor, such that Walmart should be held to owe a duty to plaintiff (*see Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]; *see also Matter of New York City Asbestos Litig*., 5 NY3d 486, 493-494 [2005]; *Gilson*, 5 NY3d at 577; *see generally Pulka v Edelman*, 40 NY2d 781, 783-785 [1976], *rearg denied* 41 NY2d 901 [1977]).

We therefore reverse the order in appeal No. 2, grant Walmart's motion, and dismiss the amended complaint and third-party counterclaim against it. In light of our determination, we do not address Walmart's remaining contentions in appeal No. 2. Inasmuch as our determination in appeal No. 2 renders Walmart's appeal from the order in appeal No. 1 academic, we affirm the order in appeal No. 1.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00113

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

LG 101 DOE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL M. WOS, DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP,
NONPARTY-APPELLANT.

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

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered November 12, 2021. The order, among other things, granted the cross-motion of defendant to strike from the complaint certain language used to denote defendant and sealed the complaint filed August 9, 2021 and awarded defendant costs and attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the ninth ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: In this action pursuant to the Child Victims Act (CVA), plaintiff appeals from an order that, inter alia, granted defendant's cross-motion seeking, pursuant to CPLR 3024 (b), to strike certain language used to denote defendant in the complaint and seeking to seal the original complaint. Nonparty Lipsitz Green Scime Cambria LLP (counsel) appeals from so much of the order as directed it to pay $750 in counsel fees and $45 in filing fees.

Initially, we note that, although no appeal lies as of right from an order granting or denying a motion to strike scandalous or prejudicial matter from a pleading (*see* CPLR 5701 [b] [3]), Supreme Court granted plaintiff leave to appeal from that part of its determination (*see* CPLR 5701 [c]; *see generally Pisula v Roman Catholic Archdiocese of N.Y.*, 201 AD3d 88, 98 [2d Dept 2021]). With respect to the merits, we conclude, contrary to plaintiff's contention on her appeal, that the court did not abuse its discretion in granting that part of the cross-motion seeking to strike language from the

complaint (*see Matter of Albany Law School v New York State Off. of Mental Retardation & Dev. Disabilities*, 19 NY3d 106, 126 [2012]; *Pisula*, 201 AD3d at 97-98; *Bristol Harbour Assoc. v Home Ins. Co.*, 244 AD2d 885, 886 [4th Dept 1997]). Pursuant to CPLR 3024 (b), "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "[I]t is generally held that the test under this section is whether the allegation is relevant, in an evidentiary sense, to the controversy and, therefore, admissible at trial" (*Wegman v Dairylea Coop.*, 50 AD2d 108, 111 [4th Dept 1975], *lv dismissed* 38 NY2d 710, 918 [1976]). Although "factual averments about sexual abuse are necessary in any action where those allegations form the predicate for an award of damages, to state a cause of action generally and pursuant to the CVA specifically" (*Pisula*, 201 AD3d at 99), the language struck by the court does not contain any factual averments necessary to plaintiff's causes of action. Further, the court's decision to strike the inflammatory language does not preclude plaintiff from attempting to prove at the trial stage that defendant committed acts of sexual abuse against her. We thus conclude that "there is no prejudice to plaintiff as a result of the order, whereas if [the language is] not stricken prejudice may result to defendant" (*Wegman*, 50 AD2d at 111; *see Pisula*, 201 AD3d at 97).

We further conclude, however, that the court erred in granting that part of the cross-motion seeking to seal the complaint without making "a written finding of good cause, . . . specify[ing] the grounds thereof," as required by 22 NYCRR 216.1 (a) (*see City of Buffalo City Sch. Dist. v LPCiminelli, Inc.*, 159 AD3d 1468, 1471-1472 [4th Dept 2018]). We therefore modify the order accordingly, and we remit the matter to Supreme Court to determine whether good cause exists to seal the complaint.

Finally, counsel contends on its appeal that the court erred in directing it to pay costs to defendant's attorneys. To the extent that counsel's contention is preserved, we conclude that it is without merit. A court may grant an award of costs resulting from frivolous conduct (22 NYCRR 130-1.1 [a]). "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (*Marshall v Marshall*, 198 AD3d 1288, 1289-1290 [4th Dept 2021] [internal quotation marks omitted]; *see* 22 NYCRR 130-1.1 [c]). The determination whether to grant an award of costs rests within the sound discretion of the trial court (*see* 22 NYCRR 130-1.1 [a]; *U.S. Bank N.A. v Nunez*, 208 AD3d 711, 713-714 [2d Dept 2022]; *Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1512-1513 [4th Dept 2014]; *Citibank [S.D.] v Coughlin*, 274 AD2d 658, 660 [3d Dept 2000], *lv dismissed* 95 NY2d 916 [2000]). Here, we discern no abuse of discretion (*see generally Divito v Fiandach*, 160 AD3d 1404, 1405 [4th Dept 2018]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 21-01787

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

ROSALIE SAWYER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARGARET A. SPITTLER, DEFENDANT-RESPONDENT.

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

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered November 12, 2021. The order, among other things, granted the motion of defendant to strike from the amended complaint certain language used to denote defendant and sealed the amended complaint filed August 16, 2021 and the complaint filed July 30, 2021.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this action pursuant to the Child Victims Act (CVA), plaintiff appeals from an order that, inter alia, granted defendant's motion seeking, pursuant to CPLR 3024 (b), to strike certain language used to denote defendant in the amended complaint and seeking to seal the original complaint and the amended complaint.

Initially, we note that, although no appeal lies as of right from an order granting or denying a motion to strike scandalous or prejudicial matter from a pleading (*see* CPLR 5701 [b] [3]), Supreme Court granted plaintiff leave to appeal from that part of its determination (*see* CPLR 5701 [c]; *see generally Pisula v Roman Catholic Archdiocese of N.Y.*, 201 AD3d 88, 98 [2d Dept 2021]). With respect to the merits, we conclude, for the reasons stated in *LG 101 Doe v Wos* (— AD3d — [May 5, 2023] [4th Dept 2023]), that the court did not abuse its discretion in granting that part of the motion seeking to strike language from the amended complaint.

We further conclude, however, that the court erred in granting that part of the motion seeking to seal the complaint and amended complaint without making "a written finding of good cause, . . .

specify[ing] the grounds thereof," as required by 22 NYCRR 216.1 (a) (*see City of Buffalo City Sch. Dist. v LPCiminelli, Inc.*, 159 AD3d 1468, 1471-1472 [4th Dept 2018]). We therefore modify the order accordingly, and we remit the matter to Supreme Court to determine whether good cause exists to seal the complaint and amended complaint.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 21-01785

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

MICHAEL SINSEL, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THOMAS GARDNER, JR., DEFENDANT-RESPONDENT.

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

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered November 12, 2021. The order, among other things, granted the motion of defendant to strike from the complaint certain language used to denote defendant and sealed the complaint filed August 3, 2021.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth ordering paragraph and as modified the order is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In this action pursuant to the Child Victims Act (CVA), plaintiff appeals from an order that, inter alia, granted defendant's motion seeking, pursuant to CPLR 3024 (b), to strike certain language used to denote defendant in the complaint and seeking to seal the complaint.

Initially, we note that, although no appeal lies as of right from an order granting or denying a motion to strike scandalous or prejudicial matter from a pleading (*see* CPLR 5701 [b] [3]), Supreme Court granted plaintiff leave to appeal from that part of its determination (*see* CPLR 5701 [c]; *see generally Pisula v Roman Catholic Archdiocese of N.Y.*, 201 AD3d 88, 98 [2d Dept 2021]). With respect to the merits, we conclude, for the reasons stated in *LG 101 Doe v Wos* (— AD3d — [May 5, 2023] [4th Dept 2023]), that the court did not abuse its discretion in granting that part of the motion seeking to strike language from the complaint.

We further conclude, however, that the court erred in granting that part of the motion seeking to seal the complaint without making "a written finding of good cause, . . . specify[ing] the grounds thereof," as required by 22 NYCRR 216.1 (a) (*see City of Buffalo City Sch. Dist. v LPCiminelli, Inc.*, 159 AD3d 1468, 1471-1472 [4th Dept

2018]). We therefore modify the order accordingly, and we remit the matter to Supreme Court to determine whether good cause exists to seal the complaint.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00614

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND MONTOUR, JJ.

RACHEL ECKERT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CAROLETTE MEADOWS, NATHAN BOYD, CAPUCINE PHILSON, JANATE INGRAM, DEBRA JORDAN AND EVILYS TORRES, DEFENDANTS-RESPONDENTS.

RACHEL ECKERT, PLAINTIFF-APPELLANT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 25, 2021. The order denied plaintiff's application for permission to proceed as a poor person.

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

Memorandum: Plaintiff submitted a poor person application pursuant to CPLR 1101 seeking to pursue an action for, inter alia, damages arising from various acts of libel and slander committed by defendants that allegedly injured plaintiff's reputation and business. Supreme Court denied the application, determining that plaintiff "failed to make . . . [a] sufficient showing of a meritorious cause of action." Plaintiff, pro se, appeals, and we reverse.

Pursuant to CPLR 1101, a civil litigant seeking permission to proceed as a poor person when commencing an action must establish that the litigant is unable to pay the costs, fees and expenses necessary to prosecute the action and, inter alia, set forth "sufficient facts so that the merit of the contentions can be ascertained" (CPLR 1101 [a]). With respect to the potential merits of the action, a court "should merely satisfy itself that the [action] is not frivolous or, stated another way, that the [action] has arguable merit" (*Nicholas v Reason*, 79 AD2d 1113, 1113 [4th Dept 1981]; *see Popal v Slovis*, 82 AD3d 1670, 1671 [4th Dept 2011], *lv dismissed* 17 NY3d 842 [2011]; *Matter of Young v Monroe County Clerk's Off.*, 46 AD3d 1379, 1380 [4th Dept 2007]). "Although the determination whether to grant permission to proceed as a poor person lies within the sound discretion of the . . . court," we conclude under the circumstances here that the court abused its discretion in denying the application (*Young*, 46 AD3d at 1380; *see Popal*, 82 AD3d at 1671; *cf. Jefferson v Stubbe*, 107 AD3d 1424, 1424 [4th Dept 2013], *appeal dismissed & lv denied* 22 NY3d 928

[2013]).

To the extent that plaintiff contends in her appellate brief and in her post-argument submissions that the court erroneously dismissed the amended complaint, we note that her contention is not properly before us inasmuch as the order on this appeal did not dismiss the amended complaint and there is no indication in the record that the amended complaint has been dismissed (*see generally Matter of Streiff v Streiff*, 199 AD3d 1370, 1372 [4th Dept 2021]; *Caudill v Rochester Inst. of Tech.*, 125 AD3d 1392, 1393 [4th Dept 2015]).

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00783

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, MONTOUR, AND OGDEN, JJ.

CHRISTINE PRESTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DALE R. NICHOLS, DEFENDANT-APPELLANT.

BOYLAN CODE LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHENEY LAW FIRM, PLLC, GENEVA (DAVID D. BENZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered April 15, 2022. The order denied the motion of defendant to dismiss plaintiff's first through third causes of action and to cancel a notice of pendency.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part, dismissing the first and second causes of action and cancelling the notice of pendency and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, to enforce an alleged oral agreement to sell real property and seeking money damages for fraudulent inducement and unjust enrichment. Defendant appeals from an order that denied his pre-answer motion to dismiss plaintiff's first, second, and third causes of action and to cancel the notice of pendency. We agree with defendant that Supreme Court erred in denying that part of his motion with respect to the first cause of action, which seeks to enforce the alleged oral agreement, inasmuch as that cause of action is barred by the statute of frauds (*see* General Obligations Law § 5-703 [1], [2]). We therefore modify the order accordingly. Initially, "[a]n e-mail sent by a party, under which the sending party's name is typed, can constitute a [signed] writing for [the] purposes of the statute of frauds" (*Agosta v Fast Sys. Corp.*, 136 AD3d 694, 695 [2d Dept 2016] [internal quotation marks omitted]; *see Ehlenfield v Kingsbury*, 206 AD3d 1671, 1673 [4th Dept 2022]). Here, however, not one of the text messages or emails submitted by plaintiff contains a signature block or other electronic signature of defendant. Those communications are therefore "clearly inadequate, since [they were] not subscribed, even electronically, by the defendant[] who [is] the part[y] to be charged, or by anyone purporting to act in [his] behalf" (*Leist v Tugendhaft*,

64 AD3d 687, 688 [2d Dept 2009]). We further agree with defendant that the doctrine of part performance does not apply to defeat the affirmative defense of the statute of frauds (*see* § 5-703 [4]; CPLR 3211 [a] [5]). Under the circumstances of this case, plaintiff's actions in paying property taxes and related expenses, including making renovations to a sunroom on the property, "were not 'unequivocally referable' to an agreement to purchase the property to warrant invoking the doctrine of part performance" (*Congdon v Everett*, 63 AD3d 1541, 1542 [4th Dept 2009]; *see Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]).

Inasmuch as plaintiff's remaining causes of action seek monetary damages only, "the action no longer [is] one in which the judgment demanded would affect title to, or the possession, use, or enjoyment of, real property" (*DeCaro v East of E., LLC*, 95 AD3d 1163, 1164 [2d Dept 2012]; *see* CPLR 6501, 6514 [a]; *Renfro v Herrald*, 206 AD3d 1573, 1573-1574 [4th Dept 2022]). The notice of pendency should therefore be cancelled (*see DeCaro*, 95 AD3d at 1164), and we therefore further modify the order accordingly. Defendant requests that this Court award him the costs and expenses associated with such cancellation. Although section 6514 (c) of the CPLR provides that a "court, in an order cancelling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation," we conclude that the circumstances of this case do not warrant the imposition of a discretionary award (*see DeCaro*, 95 AD3d at 1164).

Plaintiff did not oppose that part of the motion seeking to dismiss her second cause of action, for fraudulent inducement, and she has therefore abandoned that cause of action (*see Allington v Templeton Found.*, 167 AD3d 1437, 1439 [4th Dept 2018]; *Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]). The court therefore erred in denying that part of the motion seeking to dismiss that cause of action. We thus further modify the order accordingly. We have reviewed defendant's remaining contention and conclude that it does not warrant reversal or further modification of the order.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-00330

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN KING, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered February 20, 2020. The judgment convicted defendant upon a jury verdict of assault in the second degree, criminal possession of a weapon in the third degree, endangering the welfare of a child (two counts), menacing in the second degree (two counts), menacing a police officer or peace officer and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, that part of the motion dated January 27, 2020, seeking to dismiss the indictment pursuant to CPL 30.30 is granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [2]), arising from a series of events during which defendant, among other things, stabbed his estranged wife several times. In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL 440.10 to vacate the judgment in appeal No. 1.

Defendant was initially charged by felony and misdemeanor complaints on September 5, 2018, and later charged with various offenses by indictment filed March 14, 2019, on which date the People first announced readiness for trial. The matter then proceeded with pretrial discovery and plea negotiations, the latter of which were ultimately unsuccessful, and trial was eventually scheduled to commence on January 27, 2020. In the meantime, the new discovery requirements embodied in CPL article 245 and other reforms related thereto became effective on January 1, 2020.

On the morning of the first day of trial as scheduled, defendant moved in writing for an order, inter alia, dismissing the indictment pursuant to CPL 30.30 on the ground that the People were not ready for trial within the applicable time period because, contrary to CPL 245.50 as then in effect, the People had failed to serve and file the requisite certificate of compliance with their discovery obligations. The People thereafter purportedly attempted to serve upon defendant, and may have sought to file with Supreme Court, a certificate of compliance. Following argument on the issue, the court denied that part of defendant's motion seeking to dismiss the indictment, reasoning that the People were not required to abide by the newly effective discovery obligations under CPL article 245 and related speedy trial requirements under CPL 30.30 because they had already announced readiness under the prior law and the statutory changes were not made "retroactive."

Defendant now contends in appeal No. 1 that the court erred in denying that part of his motion seeking to dismiss the indictment pursuant to CPL 30.30 because, upon the effective date of CPL article 245, the People were returned to a state of unreadiness, and the People's subsequent attempt to serve and file a certificate of compliance did not occur until after the time to declare trial readiness had expired. We agree.

By way of relevant background, in April 2019, as part of a suite of criminal justice reforms, the legislature amended the speedy trial provisions of CPL 30.30 (*see* L 2019, ch 59, § 1, part KKK) and repealed CPL former article 240 and replaced it with CPL article 245 (*see* L 2019, ch 59, § 1, part LLL), all of which was made effective on January 1, 2020 (*see generally People v Galindo*, 38 NY3d 199, 203 [2022]; *People v Elmore*, 211 AD3d 1536, 1537 [4th Dept 2022]). Thus, "[d]iscovery in criminal actions is now governed by the new CPL article 245, which . . . provides for 'automatic' disclosure by the People to the defendant of 'all items and information that relate to the subject matter of the case' that are in the People's possession or control" (*People v Bonifacio*, 179 AD3d 977, 977-978 [2d Dept 2020], quoting CPL 245.20 [1]). Following amendments not material to our analysis, CPL article 245 currently provides that, "[w]hen the prosecution has provided the discovery required by [CPL 245.20 (1)]" with certain exceptions not relevant here, the People must "serve upon the defendant and file with the court a certificate of compliance" (CPL 245.50 [1]). In the certificate of compliance, the People are required to "state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery" and to "identify the items provided" (*id.*). Critically, the statute ties the People's adherence to their discovery obligations and the corresponding certificate of compliance requirement to their trial readiness by providing that, "[n]otwithstanding the provisions of any other law, absent an individualized finding of special circumstances in the instant case by the court before which the charge is pending, the prosecution shall not be deemed ready for trial for purposes of [CPL] 30.30 . . . until it has filed a proper certificate

pursuant to [CPL 245.50 (1)]" (CPL 245.50 [3]; *see* CPL 30.30 [5]; *People v Brown*, 214 AD3d 823, 824 [2d Dept 2023]).

With respect to the applicability of the reforms to pending prosecutions, it is well established that, when an action is "already pending," a newly enacted statute that effects a procedural change "is applicable even then if directed to the litigation in future steps and stages"; however, the statute "is inapplicable, unless in exceptional conditions, where the effect is to reach backward, and nullify by relation the things already done" (*Matter of Berkovitz v Arbib & Houlberg, Inc.*, 230 NY 261, 270 [1921]). Consequently, "while procedural changes are, in the absence of words of exclusion, deemed applicable to *subsequent* proceedings in pending actions . . . , it takes a clear expression of the legislative purpose to justify a retrospective application of even a procedural statute so as to affect proceedings *previously taken* in such actions" (*Simonson v International Bank*, 14 NY2d 281, 289 [1964] [internal quotation marks omitted]; *see People v McFadden*, 189 AD3d 2086, 2087 [4th Dept 2020], *lv denied* 36 NY3d 1099 [2021]). Applying those principles, courts, including this Court, have determined that "[t]he relevant provisions of CPL 30.30 and CPL article 245 constituted such [procedural] changes and, as such, applied to proceedings taken in [pending] matter[s] after January 1, 2020" (*People v Robbins*, 206 AD3d 1069, 1071 [3d Dept 2022], *lv denied* 39 NY3d 942 [2022]; *see Elmore*, 211 AD3d at 1537; *People v Hewitt*, 201 AD3d 1041, 1042-1043 [3d Dept 2022], *lv denied* 38 NY3d 928 [2022]; *see also Brown*, 214 AD3d at 824; *People v Torres*, 205 AD3d 524, 525-526 [1st Dept 2022], *lv denied* 39 NY3d 942 [2022]). Stated differently, "the procedures outlined in CPL article 245 became applicable to [pending] action[s] as soon as that article became effective" (*Elmore*, 211 AD3d at 1537).

The People and the dissent nonetheless assert, consistent with the court's reasoning in denying that part of defendant's motion seeking to dismiss the indictment, that the People did not need to abide by the newly effective discovery obligations under CPL article 245 and related speedy trial provisions under CPL 30.30—most prominently the certificate of compliance requirement—because mandating compliance with the statutory changes in pending actions would improperly require "retroactive" application of the reforms and nullify acts previously taken by the People. We reject those assertions.

First, contrary to the People's assertion, we conclude that the Court of Appeals' decision in *Galindo* does not govern the outcome here. There, "[t]he issue presented on . . . appeal [was] whether CPL 30.30 (1) (e), added to the speedy trial statute and made effective while [the] defendant's direct appeal was pending before the Appellate Term, applie[d] to his case" (*Galindo*, 38 NY3d at 201). The subject amendment to CPL 30.30 provided—in abrogation of the previous interpretation of the statute that excluded traffic infractions from the criminal action subject to dismissal on statutory speedy trial grounds—that the maximum times for prosecutorial readiness would now apply to accusatory instruments charging traffic infractions jointly

with a felony, misdemeanor, or violation (*see Galindo*, 38 NY3d at 201-206). The Court of Appeals concluded, however, that the Appellate Term had erred in applying the amendment retroactively on appeal to a prosecution that had been commenced and taken to judgment several years before the effective date of the criminal justice reforms (*see id.* at 201-202, 206-208). The Court of Appeals reasoned that the text of the amendment did not require retroactive application of the statute and that the legislative delays in abrogating the prior decades-old rule and postponing the effective date of the amendment weighed against retroactive application (*see id.* at 207). In sum, "there [was] no indication of legislative urgency for CPL 30.30 (1) (e) to 'reach back' and impose an immediate effect on pending matters and no basis to conclude that the amendment should be applied retroactively" (*id.*). The Court of Appeals thus concluded that, "because the amended statute was not in effect when the criminal action against [the] defendant was commenced, CPL 30.30 (1) (e) ha[d] no application to [the] defendant's direct appeal from that judgment of conviction" (*id.*; *see id.* at 202, 206-207).

Galindo thus involved a retroactivity analysis in a criminal prosecution that had already gone to judgment years prior and was pending on appeal when the amendment to CPL 30.30 became effective, whereas the case currently before us involves the application of newly enacted procedural requirements that became effective while the prosecution was pending before the trial court (*see e.g. Brown*, 214 AD3d at 824; *Elmore*, 211 AD3d at 1537; *Robbins*, 206 AD3d at 1071). Consequently, the case before us is governed by the aforementioned legal principles for the application of newly enacted procedural laws to pending actions (*see e.g. Simonson*, 14 NY2d at 289; *Berkovitz*, 230 NY at 270). Moreover, and critical to the analysis in *Galindo*, "CPL 30.30 (1) (e) created a new speedy trial right" upon which a defendant could obtain dismissal of traffic infraction charges (*People v Ali*, 71 Misc 3d 25, 27 [App Term, 1st Dept 2021], *lv denied* 37 NY3d 990 [2021]). Stated differently, the amendment to CPL 30.30 imposed upon the People a statutory speedy trial obligation with respect to traffic infractions charged jointly with a felony, misdemeanor, or violation that theretofore did not exist under applicable case law (*see Galindo*, 38 NY3d at 204-205, 207). Those circumstances explain the Court of Appeals' conclusion that, in addition to not applying retroactively to cases pending on appeal, "the legislature intended that CPL 30.30 (1) (e) apply to criminal actions commenced on or after the effective date of the amendment" (*id.* at 202), i.e., that particular statutory amendment also does not "impose an immediate effect on pending matters" (*id.* at 207). To hold otherwise would have allowed CPL 30.30 (1) (e) to improperly "reach backward" and start the People's speedy trial time on already-commenced prosecutions that included traffic infractions which, at the time of commencement, had no speedy trial obligation applicable to such infractions (*Berkovitz*, 230 NY at 270; *see Galindo*, 38 NY3d at 207). The Court of Appeals was, in other words, concerned in *Galindo* that application of CPL 30.30 (1) (e) in pending prosecutions would violate the retrospective component of the pending case analysis (*see Simonson*, 14 NY2d at 289), and thus linked the applicability of that particular new statutory provision to the

commencement date of the criminal action (*see Berkovitz*, 230 NY at 270). Inasmuch as the addition of the CPL 30.30 (1) (e) speedy trial obligation is distinct from the forward-looking discovery obligations required under CPL article 245 and the corresponding certificate of compliance requirement, we reject the People's assertion in the case before us that the *Galindo* Court's "analysis of the legislative intent [behind CPL 30.30 (1) (e)] applies equally to CPL article 245."

Second, with respect to the effect of CPL 245.50 (3) on pending prosecutions in which the People had previously announced readiness for trial, we agree with the courts that have concluded that the People "were placed in a state of nonreadiness on January 1, 2020, the effective date of CPL article 245, as a matter of law, [where] no [certificate of compliance] had been filed as of that date" (*People v Vasquez*, 75 Misc 3d 49, 52 [App Term, 2d Dept, 9th & 10th Jud Dists 2022], *lv denied* 39 NY3d 965 [2022]; *see People v Dobrzenski*, 69 Misc 3d 333, 339 [Utica City Ct 2020]; *People v Adrovic*, 69 Misc 3d 563, 567-568 [Crim Ct, Kings County 2020]; *People v Villamar*, 69 Misc 3d 842, 849 [Crim Ct, NY County 2020]; *People v Roland*, 67 Misc 3d 330, 335 [Crim Ct, Kings County 2020]; *People v Nge*, 67 Misc 3d 650, 654 [Crim Ct, Kings County 2020]). That interpretation flows directly from the text of the new statute. The legislature was clear in stating that, as of January 1, 2020, the service and filing of a certificate of compliance became a prerequisite for trial readiness for purposes of CPL 30.30 *"[n]otwithstanding the provisions of any other law"* (CPL 245.50 [3] [emphasis added]). In our view, "[t]he meaning of the statute's notwithstanding clause is plainly understood and clearly supersedes any inconsistent provisions of state law" (*Matter of State of New York v John S.*, 23 NY3d 326, 341 [2014] [internal quotation marks and emphasis omitted]). Consequently, notwithstanding compliance with the provisions of any other law that would have rendered the People ready for trial, as of the effective date of CPL article 245, the People "reverted to a state of unreadiness and could not be deemed ready until filing the certificate of compliance required by CPL 245.50" (*Adrovic*, 69 Misc 3d at 568).

Contrary to the dissent's assertion, application of the certificate of compliance requirement where the People had previously announced readiness for trial does not violate the principle that a newly enacted procedural law may not "nullify . . . things already done" (*Berkovitz*, 230 NY at 270). "[T]he changes in the law effective as of January 1, 2020, do not invalidate the People's previous statements of readiness"—i.e., those previous statements, so long as not illusory, remain effective to stop the speedy trial calculation during the pre-amendment period (*Adrovic*, 69 Misc 3d at 567-568; *see e.g. Villamar*, 69 Misc 3d at 846-847). But, as of January 1, 2020, "the legislature . . . reset the People's readiness status by tying it to the fulfillment of their obligations under the new discovery laws" (*Villamar*, 69 Misc 3d at 847). Consequently, as of the effective date of CPL article 245, the People had no longer "done all that [was] required of them to bring the case to a point where it may be tried" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]) until they filed a proper certificate of compliance (*see* CPL

245.50 [3]; *Vasquez*, 75 Misc 3d at 52).

In this case, inasmuch as the record establishes that the People were not timely ready for trial, the court erred in denying that part of defendant's motion to dismiss the indictment pursuant to CPL 30.30. " 'CPL 30.30 (1) . . . correlates the applicable time period to the highest grade of offense charged in a criminal action' " (*Galindo*, 38 NY3d at 205, quoting *People v Cooper*, 98 NY2d 541, 546 [2002]). Thus, "[i]n felony cases such as this one, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (CPL 30.30 [1] [a]). Whether the People have satisfied this obligation is generally determined by computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for an exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992], *rearg denied* 81 NY2d 1068 [1993]). "[A] defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]). The People then "bear the burden of demonstrating sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]; *see Allard*, 28 NY3d at 45).

Here, the criminal action was commenced on September 5, 2018, when the felony and misdemeanor complaints were filed (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]; *People v Harrison*, 171 AD3d 1481, 1482 [4th Dept 2019]). Inasmuch as defendant's charges included felonies, the People were permitted no more than six calendar months of delay or, in this case, 181 days (*see* CPL 30.30 [1] [a]; *Cortes*, 80 NY2d at 207 n 3; *People v Session*, 206 AD3d 1678, 1680 [4th Dept 2022]; *see also People v Chavis*, 91 NY2d 500, 504 n 3 [1998]; *People v Stiles*, 70 NY2d 765, 767 [1987]).

Regarding the first period of prereadiness delay, we conclude that the People should be charged with 189 days. Defendant was charged by felony and misdemeanor complaints on September 5, 2018, and the People announced readiness for trial on March 14, 2019, when the indictment was filed. The day the felony and misdemeanor complaints were filed is excluded from the time calculations (*see Stiles*, 70 NY2d at 767; *Harrison*, 171 AD3d at 1482), and thus the first period of prereadiness delay is 189 days (*see Session*, 206 AD3d at 1680). With respect to the second period of prereadiness delay—i.e., after the People reverted to a state of unreadiness upon the effective date of CPL article 245—we conclude that the People should be charged with 26 days. The People were placed in a state of unreadiness on January 1, 2020 (*see e.g. Vasquez*, 75 Misc 3d at 52), and even assuming, arguendo, that the People thereafter filed a proper certificate of compliance on January 27, 2020, and validly stated readiness for trial at that time (*see* CPL 30.30 [5]), we conclude that the second period of prereadiness delay amounted to 26 days (*see e.g. Villamar*, 69 Misc 3d at 848).

Consequently, the total amount of prereadiness delay chargeable to the People is 215 days. Even assuming, arguendo, that the People established that the 15-day period inclusive of February 21, 2019, through March 7, 2019, was chargeable to defendant on the ground that he waived his speedy trial rights pursuant to CPL 30.30 with respect to that period in exchange for which the People agreed to postpone their grand jury presentation in order to accommodate defendant's request to testify (*see People v Waldron*, 6 NY3d 463, 467-468 [2006]; *People v Lewis*, 177 AD3d 1351, 1352-1353 [4th Dept 2019], *lv denied* 34 NY3d 1130 [2020], *reconsideration denied* 35 NY3d 971 [2020]) and further that the 15-day period inclusive of January 1, 2020, through January 15, 2020, was excludable as a reasonable period of delay to comply with the new statutory equivalent of a demand to produce (*see* CPL 30.30 [4] [a]) or an exceptional circumstance arising from the change in the discovery requirements (*see* CPL 30.30 [4] [g]), we conclude that the total excludable time of 30 days would mean that the People were ready for trial at 185 days, several days beyond the 181 days allowable in this case (*see* CPL 30.30 [1] [a]; *Session*, 206 AD3d at 1680). The People thus violated defendant's statutory right to a speedy trial.

Based on the foregoing, we reverse the judgment in appeal No. 1, grant that part of defendant's motion seeking to dismiss the indictment pursuant to CPL 30.30, and dismiss the indictment (*see People v Johnson*, 174 AD3d 1510, 1512 [4th Dept 2019]; *Harrison*, 171 AD3d at 1484). In light of our determination in appeal No. 1, we do not address defendant's remaining contentions therein, and we dismiss as moot defendant's appeal from the order in appeal No. 2 (*see People v Wilson*, 5 NY3d 778, 779 n [2005]; *People v Tucker*, 139 AD3d 1399, 1401 [4th Dept 2016]; *People v Dealmeida*, 124 AD3d 1405, 1407 [4th Dept 2015]).

All concur except OGDEN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent from the majority's conclusion in appeal No. 1 that Supreme Court erred when it denied that part of defendant's January 27, 2020 motion seeking to dismiss the indictment. In my view, the statutory amendments to CPL 30.30 and article 245 should not be applied in a manner that renders illusory the People's readiness for trial or takes their case out of a postreadiness posture. Where a proceeding is "already pending," a newly enacted statute that effects a procedural change "is applicable . . . if directed to the litigation in future steps and stages . . . It is inapplicable, unless in exceptional conditions, where the effect is to reach backward, and nullify by relation the things already done" (*Matter of Berkovitz v Arbib & Houlberg, Inc.*, 230 NY 261, 270 [1921]; *see Simonson v International Bank*, 14 NY2d 281, 289 [1964]). Consistent with *Berkovitz*, in cases in which the People had not yet announced their readiness for trial at the time the statutory amendments became effective, the People could not do so unless or until they complied with the new discovery obligations and the filing of a certificate of compliance (*see* CPL 30.30 [5]; 245.50 [1], [3]). Here, however, the People complied with their obligations to be ready for trial as required under the prior version of CPL 30.30 when they announced their trial readiness on

March 14, 2019. Because this case was, therefore, in a postreadiness posture at that time, any new legislation affecting the People's readiness would have the effect of reaching backward. The effect of the majority's conclusion then, i.e., that the statutory amendments upon taking effect thereby took pending, trial-ready cases out of a postreadiness posture, rendering the People unready for trial, is to improperly nullify a "thing[] already done" (*Berkovitz*, 230 NY at 270).

In my view, the Court of Appeals' analysis in *People v Galindo* (38 NY3d 199 [2022]) applies and controls. I simply do not agree with the majority that, because the legislature included the language "[n]otwithstanding the provisions of any other law," the legislature intended to have the People revert to a state of unreadiness in cases such as the one before us (CPL 245.50 [3] [emphasis added]). The Court of Appeals has been very clear. "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Galindo*, 38 NY3d at 207 [internal quotation marks omitted]; *see Matter of Thomas v Bethlehem Steel Corp.*, 63 NY2d 150, 154 [1984]). To be sure, "[t]he primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the [l]egislature" (*Galindo*, 38 NY3d at 203 [internal quotation marks omitted]), and I am not convinced that the legislature intended to have the statutory amendments applied retroactively to those cases where, as here, the People legally declared their readiness for trial prior to the effective date of those amendments.

I have considered defendant's remaining contentions in appeal No. 1 and conclude that, except with respect to defendant's sentence, they do not require reversal or modification of the judgment. With respect to defendant's sentence, although I reject defendant's contention that the sentence is unduly harsh and severe, I agree with defendant that the court erred in directing that the definite sentences imposed on counts 4 and 5 of the indictment, which were misdemeanor counts of endangering the welfare of a child, shall run consecutively to the remaining sentences (*see* Penal Law § 70.35). I would therefore modify the judgment by directing that the definite sentences imposed on counts 4 and 5 shall run concurrently with the remaining sentences, and otherwise affirm. Finally, I have considered defendant's contentions with respect to appeal No. 2 and, inasmuch as I conclude that they do not warrant reversal or modification of the order in that appeal, I would affirm that order.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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KA 21-01800

PRESENT: PERADOTTO, J.P., LINDLEY, BANNISTER, MONTOUR, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN KING, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), entered November 17, 2021. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL article 440.

It is hereby ORDERED that said appeal is dismissed.

Same memorandum as in *People v King* ([appeal No. 1] — AD3d — [May 5, 2023] [4th Dept 2023]).

All concur except Ogden, J., who dissents and votes to affirm in accordance with the same dissenting memorandum as in *People v King* ([appeal No. 1]) — AD3d — [May 5, 2023] [4th Dept 2023]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 20-00600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMERSON TOHAFIJIAN, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

MARK S. SINKIEWICZ, DISTRICT ATTORNEY, WATERLOO (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Richard M. Healy, A.J.), rendered February 15, 2019. The judgment convicted defendant upon a jury verdict of, inter alia, murder in the first degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of murder in the first degree (Penal Law § 125.27 [1] [a] [v], [vii], [viii]; [b]). Defendant's conviction arises from a double homicide where he allegedly shot and killed his former girlfriend, who had recently accused him of rape, as well as another individual who was merely present at the time defendant shot and killed the former girlfriend. Defendant also allegedly shot and injured a third individual during the same encounter. We affirm.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, there were two witnesses who identified defendant as the shooter, both of whom had known him for years. The identification testimony was corroborated by cell phone data and surveillance videos, which confirmed that defendant was present at the crime scene at the time of the double homicide. In addition, other, largely uncontroverted, witness testimony established that defendant obtained a rifle on the day of the murders, and that he had previously expressed his desire to kill his former girlfriend and to commit suicide thereafter. Even assuming, arguendo, that an acquittal 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 that

there were "inconsistencies in [witness] testimony, [those inconsistencies] were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*People v Cirino*, 203 AD3d 1661, 1663 [4th Dept 2022], *lv denied* 38 NY3d 1132 [2022] [internal quotation marks omitted]; *see People v Thomas*, 176 AD3d 1639, 1640-1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]).

Defendant also contends that he was denied effective assistance of counsel based on a series of alleged errors by his two trial attorneys. We reject that contention. With respect to defendant's assertion that defense counsel were ineffective for failing to request that County Court instruct the jury on murder in the second degree as a lesser included offense, "[i]t is well settled that '[a] defendant is not denied effective assistance of trial counsel [where defense] counsel does not make a[n] . . . argument that has little or no chance of success' " (*People v March*, 89 AD3d 1496, 1497 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Bubis*, 204 AD3d 1492, 1494 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). Here, viewing the evidence in the light most favorable to defendant (*see People v Martin*, 59 NY2d 704, 705 [1983]), we conclude that there is no reasonable view thereof to support a finding that defendant committed the lesser offense but not the greater (*see generally* CPL 300.50 [1]; *People v Glover*, 57 NY2d 61, 63-64 [1982]).

Defendant also contends that defense counsel were ineffective to the extent that they failed to oppose the court's instruction to the jury regarding defendant's suicide attempt and whether that conduct demonstrated his consciousness of guilt. During the People's direct case, defense counsel unsuccessfully objected to the introduction of evidence of the suicide attempt on the ground that defendant's conduct could have had an innocent explanation, and the court's jury instruction on consciousness of guilt included a directive to consider whether defendant's conduct had an innocent explanation (*see generally* CJI2d[NY] Consciousness of Guilt). Thus, in light of the fact that the evidence had already been admitted over their objection, defense counsel had a legitimate strategic reason for not objecting to the instruction because it reiterated their point that there could have been an innocent explanation for defendant's attempted suicide (*see generally People v Benevento*, 91 NY2d 708, 711-712 [1998]).

We also reject defendant's contention that defense counsel were ineffective by proceeding to sentencing without first reviewing the presentence report. Any argument for a more lenient sentence based on the contents of that report had little or no chance of success given the particularly heinous underlying facts of this case (*see People v Defilippis*, 210 AD3d 1004, 1005 [2d Dept 2022], *lv denied* 39 NY3d 1078 [2023]; *see also People v Rodriguez*, 199 AD3d 1458, 1459 [4th Dept 2021], *lv denied* 37 NY3d 1164 [2022]). In any event, the failure of defense counsel to review the presentence report here did not amount to ineffective assistance because they made a strategic choice to focus on defendant's CPL 330.30 motion, rather than to make any futile arguments about the length of the sentence (*see generally Benevento*,

91 NY2d at 711-712).

With respect to defendant's remaining allegations of ineffective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve his challenge to the venue of the trial inasmuch as he failed to renew his motion for a change of venue during jury selection (*see People v Hardy*, 38 AD3d 1169, 1170 [4th Dept 2007], *lv denied* 9 NY3d 865 [2007]; *People v Bosket*, 216 AD2d 791, 793 n 2 [3d Dept 1995]; *see generally People v Parker*, 60 NY2d 714, 715 [1983]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that he was denied a fair trial by prosecutorial misconduct. Defendant failed to preserve his contention to the extent that he alleges that the prosecutor improperly used evidence after promising not to do so, and that the prosecutor improperly vouched for the credibility of certain witnesses (*see* CPL 470.05 [2]; *People v Miller*, 204 AD3d 1438, 1438 [4th Dept 2022]; *People v Atkinson*, 185 AD3d 1447, 1448 [4th Dept 2020], *lv denied* 35 NY3d 1111 [2020]). We decline to exercise our power to review defendant's contention with respect to those instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Additionally, defendant's contention that the prosecutor improperly failed to disclose that the People had a cooperation agreement with a witness is not properly before us because that contention involves matters outside the record and therefore must be raised by a motion pursuant to CPL article 440 (*see People v Brooks*, 139 AD3d 1391, 1394 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]).

With respect to the instances of alleged prosecutorial misconduct that are preserved for our review, we conclude that they are without merit. Defendant's contention that the prosecutor improperly introduced certain irrelevant evidence at trial is without merit inasmuch as the challenged evidence—all of which pertained to defendant's suicide attempt—was relevant to establish defendant's consciousness of guilt (*see generally People v Matthews*, 142 AD3d 1354, 1356 [4th Dept 2016], *lv denied* 28 NY3d 1125 [2016]). We also conclude that it was not improper for the prosecutor to have an employee from his office assist the surviving victim in displaying her gunshot wounds to the jury inasmuch as the victim is partially paralyzed and required assistance. Defendant does not contend that it was improper for the victim to display her wounds to the jury and does not offer an alternative means by which she could do so in light of her partial paralysis. In any event, the court alleviated any potential undue prejudice through its instruction to the jury to resist rendering a verdict based on, inter alia, sympathy (*see generally People v Moore*, 32 AD3d 1354, 1354 [4th Dept 2006], *lv denied* 8 NY3d 847 [2007], *reconsideration denied* 9 NY3d 848 [2007]).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by judicial misconduct (*see People v Price*, 129 AD3d 1484, 1484 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015]; *People v Brown*, 120 AD3d 1545, 1545-1546 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-01097

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

WILLIAM BANAS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLAYTON K. WAIKIKI, DEFENDANT-RESPONDENT.

STEPHEN R. FOLEY, LLC, BUFFALO (ZACHARY S. DRAGONETTE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 3, 2022. The order granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when the vehicle he was driving was struck from behind by a vehicle operated by defendant. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury that was causally related to the accident. Supreme Court granted the motion, and plaintiff now appeals.

Preliminarily, we note that, as limited by his brief, plaintiff challenges the court's determination only with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and he has therefore abandoned his claim with respect to the 90/180-day category set forth in his bill of particulars (*see Cline v Code*, 175 AD3d 905, 907 [4th Dept 2019]; *Harris v Campbell*, 132 AD3d 1270, 1270 [4th Dept 2015]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [1994]).

"On a motion for summary judgment dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), the defendant bears the initial burden of establishing by competent medical evidence

that [the] plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Cohen v Broten*, 197 AD3d 949, 950 [4th Dept 2021]; *Lamar v Anastasi*, 188 AD3d 1637, 1637 [4th Dept 2020]). Viewing the evidence in the light most favorable to plaintiff and affording him the benefit of every reasonable inference (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendant failed to meet that burden with respect to the remaining categories of serious injury (*see Tate v Brown*, 125 AD3d 1397, 1397-1398 [4th Dept 2015]; *Clark v Aquino*, 113 AD3d 1076, 1076-1078 [4th Dept 2014]; *Summers v Spada*, 109 AD3d 1192, 1192-1193 [4th Dept 2013]).

Defendant's submissions in support of his motion included the affirmed reports of his examining physician, who concluded—after performing a physical examination of plaintiff and reviewing plaintiff's pre- and post-accident medical records that were also in the moving papers, including a sworn MRI report that showed, inter alia, multilevel disc bulging—that plaintiff had suffered a cervical spine strain in the accident, that the injury remained unresolved nearly five years after the accident, that plaintiff's subjective complaints were supported by the examination findings, and that objective testing revealed loss of range of motion in the cervical spine (*see Clark*, 113 AD3d at 1077-1078; *cf. Bleier v Mulvey*, 126 AD3d 1323, 1324 [4th Dept 2015]). Defendant's own submissions thus "included [a sworn MRI report] demonstrating that plaintiff suffered from . . . bulging disc[s], and that proof was 'accompanied by objective evidence of the extent of alleged physical limitations resulting from the disc injury,' " i.e., the reports of defendant's examining physician containing a quantitative assessment of the degree of plaintiff's loss of range of motion (*Courtney v Hebeler*, 129 AD3d 1627, 1628 [4th Dept 2015]; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Summers*, 109 AD3d at 1192). Defendant's submissions established that plaintiff sustained, at the very least, a cervical spine strain that resulted in limited range of motion, and we conclude that defendant failed to establish as a matter of law that the limitations sustained by plaintiff from the cervical strain were not significant (*see Cook v Peterson*, 137 AD3d 1594, 1598 [4th Dept 2016]). Moreover, the evidence that plaintiff continued to suffer from his accident-related injuries nearly five years after the accident and that the diagnosed injuries remained unresolved raises an issue of fact whether the injuries are permanent (*see Courtney*, 129 AD3d at 1628; *Clark*, 113 AD3d at 1077; *cf. Cook*, 137 AD3d at 1596; *see also Latini v Barwell*, 181 AD3d 1305, 1307 [4th Dept 2020]). Defendant also failed to meet his initial burden with respect to causation because, despite his examining physician's review of the medical records showing that an MRI of plaintiff's cervical spine performed several years prior to the accident following previous complaints of neck pain revealed preexisting moderate or mild disc changes and that plaintiff had an approximately 2½-year gap in treatment following initial treatment after the accident, defendant's examining physician nonetheless maintained that plaintiff's injuries were causally related to the accident (*see Nwanji v City of New York*, 190 AD3d 650, 651 [1st Dept 2021]; *Tate*, 125 AD3d at 1398).

Based on the foregoing, we conclude that defendant "failed to meet his initial burden of establishing his entitlement to judgment as a matter of law[with respect to the remaining categories of serious injury], and 'the burden never shifted to plaintiff to raise a triable issue of fact' " (*Tate*, 125 AD3d at 1398; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). We therefore modify the order accordingly.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01116

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

FUSION FUNDING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOFTTI INC., DOING BUSINESS AS LOFTTI CAFÉ,
DEFENDANT,
AND PAUL KIM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LINDEN LAW GROUP, P.C., NEW YORK CITY (JEFFREY BENJAMIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELLS LAW P.C., LANCASTER (JAMES M. SPECYAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 13, 2022. The order denied the motion of defendant Paul Kim to vacate a default judgment.

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

Memorandum: In appeal No. 1, Paul Kim (defendant) appeals from an order denying his motion to vacate a default judgment granted against him and defendant Loftti Inc., doing business as Loftti Café. In appeal No. 2, defendant appeals from an order and judgment denying his second motion to vacate the default judgment and granting plaintiff's request for sanctions against defendant.

In appeal No. 1, we reject defendant's contention that he established that he was not properly served with the summons and complaint and therefore Supreme Court abused its discretion in denying his first motion to vacate the default judgment. "The determination whether to vacate an order entered upon default is left to the sound discretion of the court" (*Matter of Oneida County Dept. of Social Servs. v Russell R.*, 175 AD3d 1793, 1793 [4th Dept 2019], *lv dismissed* 35 NY3d 949 [2020]; *see Butchello v Terhaar*, 176 AD3d 1579, 1580 [4th Dept 2019]; *Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964, 965 [4th Dept 2007]). "Pursuant to CPLR 5015 (a)(1), a court may vacate a judgment or order entered upon default if it determines that there is a reasonable excuse for the default and a meritorious defense" (*Russell R.*, 175 AD3d at 1794 [internal quotation marks omitted]). "Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and,

therefore, gives rise to a presumption of proper service" (*Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 816, 817 [2d Dept 2018] [internal quotation marks omitted]). "Bare and unsubstantiated denials [of receipt of service] are insufficient to rebut the presumption of service" (*U.S. Bank N.A. v Rauff*, 205 AD3d 963, 965 [2d Dept 2022] [internal quotation marks omitted]; *see LeChase Constr. Servs., LLC v JM Bus. Assoc. Corp.*, 181 AD3d 1294, 1296 [4th Dept 2020]).

Here, in his first motion to vacate the default judgment, defendant failed to rebut the presumption of proper service. Defendant's conclusory assertion in his affidavit in support of the motion that he was not present in Nevada, where the summons and complaint had allegedly been served, at the time service was effected was unsubstantiated (*see U.S. Bank N.A.*, 205 AD3d at 965; *HSBC Bank USA, N.A. v Rahmanan*, 194 AD3d 792, 794 [2d Dept 2021]; *Nationstar Mtge., LLC v Cohen*, 185 AD3d 1039, 1041 [2d Dept 2020]). Further, the alleged differences between defendant's physical appearance and the description in the affidavit of service of the person served "were either too minor or insufficiently substantiated to warrant a hearing" (*U.S. Bank N.A.*, 205 AD3d at 965; *see One W. Bank, FSB v Rotondaro*, 188 AD3d 710, 712 [2d Dept 2020]).

In appeal No. 2, we conclude that defendant's second motion was, in substance, a motion for leave to renew his original motion to vacate the default judgment and, contrary to defendant's contention, the court did not abuse its discretion in denying his motion for leave to renew. "[A] motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion" (*2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 206 AD3d 1607, 1607-1608 [4th Dept 2022] [internal quotation marks omitted]). As the moving party, defendant "bore the burden of proving that the new evidence [he] sought to present could not have been discovered earlier with due diligence and would have led to a different result" (*Centerline/Fleet Hous. Partnership, L.P.–Series B v Hopkins Ct. Apts., LLC*, 176 AD3d 1596, 1598 [4th Dept 2019] [internal quotation marks omitted]). Here, defendant's motion for leave to renew was not based upon new facts not offered on the prior motion, but rather on evidence corroborating the facts alleged in support of the prior motion. Further, defendant provided no reasonable justification for the failure to provide such evidence in his first motion. "[A] motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Heltz v Barratt*, 115 AD3d 1298, 1300 [4th Dept 2014], *affd* 24 NY3d 1185 [2014] [internal quotation marks omitted]; *see Welch Foods v Wilson*, 247 AD2d 830, 831 [4th Dept 1998]).

We agree with defendant in appeal No. 2, however, that the court abused its discretion in granting plaintiff's request to assess sanctions pursuant to 22 NYCRR 130-1.1. "The court, in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from

frivolous conduct" (22 NYCRR 130-1.1 [a]). "In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action . . . who engages in frivolous conduct" (*id.*). "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c]). Here, although defendant's motion for leave to renew was without merit, it is clear that defendant was attempting to provide the court with additional support for the factual assertions made in his first motion, which the court had concluded was lacking in evidentiary support. Thus, defendant's motion was not frivolous, and we therefore modify the order and judgment in appeal No. 2 by vacating that part granting plaintiff's request for sanctions.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-01117

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

FUSION FUNDING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LOFTTI INC., DOING BUSINESS AS LOFTTI CAFE,
DEFENDANT,
AND PAUL KIM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LINDEN LAW GROUP, P.C., NEW YORK CITY (JEFFREY BENJAMIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WELLS LAW P.C., LANCASTER (JAMES M. SPECYAL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 24, 2022. The order and judgment denied the motion of defendant Paul Kim to vacate a default judgment and imposed monetary sanctions upon defendant Paul Kim.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by vacating that part granting sanctions and as modified the order and judgment is affirmed without costs.

Same memorandum as in *Fusion Funding v Loftti Inc.* ([appeal No. 1] – AD3d – [May 5, 2023] [4th Dept 2023]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 19-00115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYSHON MYLES, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered December 3, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, kidnapping in the first degree, burglary in the first degree, robbery in the first degree, robbery in the second degree and tampering with physical evidence.

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 murder in the second degree (Penal Law § 125.25 [3]), kidnapping in the first degree (§ 135.25 [3]), burglary in the first degree (§ 140.30 [4]), robbery in the first degree (§ 160.15 [4]), robbery in the second degree (§ 160.10 [1]) and tampering with physical evidence (§ 215.40 [2]). Before trial, defendant sought suppression of various pieces of evidence, including his statements to law enforcement, identification testimony and evidence obtained as a result of numerous search warrants. We conclude that Supreme Court properly rejected all of defendant’s challenges.

Defendant contends that he was arrested without probable cause and, as a result, any statements he made and physical items taken from him upon his arrest should have been suppressed. He further contends that the search warrants were not supported by probable cause. Those contentions lack merit. Both the arrest and the search warrants were supported by the requisite probable cause, which was established by, inter alia, hearsay information provided by a confidential informant (CI) and evidence gathered during the police investigation, including location data obtained from defendant’s ankle monitor.

“Where hearsay information forms at least in part the basis for

probable cause, the information must satisfy the two-part *Aguilar-Spinelli* test requiring a showing that the informant is reliable and has a basis of knowledge for the information imparted" (*People v Monroe*, 82 AD3d 1674, 1675 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011] [internal quotation marks omitted]). As we determined in the appeal of a codefendant (*People v Colon*, 192 AD3d 1567 [4th Dept 2021], *lv denied* 37 NY3d 955 [2021]), the hearsay information provided by the CI "satisfied both prongs of the *Aguilar-Spinelli* test. The reliability of the CI was established by the officers' statements that the CI had given credible and accurate information in the past . . . , and the CI's basis of knowledge was established because the police investigation corroborated the information provided by the CI" (*id.* at 1568; *see People v Barnes*, 139 AD3d 1371, 1373 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]; *Monroe*, 82 AD3d at 1674-1675; *see generally People v Bigelow*, 66 NY2d 417, 423-424 [1985]). Inasmuch as defendant, another codefendant and the victim were wearing ankle monitors, officers were able to verify much of the information provided by the CI, which consisted of detailed information about the robbery of the victim's home, a plot to kidnap the victim, and the ultimate assault of the victim. After the victim was reported missing, law enforcement officers placed defendant's home under surveillance, where officers observed a man and woman working in defendant's backyard in the middle of the night. We thus conclude that, at the time of defendant's arrest and at the time the search warrants were issued, officers had " 'information sufficient to support a reasonable belief that an offense ha[d] been . . . committed' by" defendant (*People v Shulman*, 6 NY3d 1, 25 [2005], *cert denied* 547 US 1043 [2006], quoting *Bigelow*, 66 NY2d at 423; *see People v Harlow*, 195 AD3d 1505, 1506-1507 [4th Dept 2021], *lv denied* 37 NY3d 1027 [2021]; *Monroe*, 82 AD3d at 1675).

Contrary to defendant's further contention, the court did not err in refusing to suppress statements he made when first taken into custody, but before he was provided *Miranda* warnings, inasmuch as the statements were responses to pedigree questions (*see People v Wortham*, 37 NY3d 407, 413-415 [2021], *cert denied* — US —, 143 S Ct 122 [2022]; *People v Rodney*, 85 NY2d 289, 292-294 [1995]). Although defendant correctly contends that there are times when pedigree questions seek inculpatory information and must be preceded by *Miranda* warnings, such as where a person's address might be important to establishing the criminal charges (*see People v Slade*, 133 AD3d 1203, 1206 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]), this is not such a case. Here, as in *Wortham*, defendant was asked his name and address so "the police [could] know whom they ha[d] in custody" (37 NY3d at 415).

Based on our determination, defendant's remaining contention related to the admission of his statements is academic.

With respect to the search warrants, defendant further contends that the warrant for his home was invalid because it incorrectly described the residence. We reject that contention. "The Federal and State Constitutions provide that warrants shall not be issued except upon probable cause . . . and particularly describing the place to be

searched, and the persons or things to be seized" (*People v Cook*, 108 AD3d 1107, 1108 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013] [internal quotation marks omitted]).

"Although '[p]articularity is required in order that the executing officer can reasonably ascertain and identify . . . the persons or places authorized to be searched and the things authorized to be seized[,] . . . hypertechnical accuracy and completeness of description' in the warrant is not required" (*People v Madigan*, 169 AD3d 1467, 1468 [4th Dept 2019], *lv denied* 33 NY3d 1033 [2019], quoting *People v Nieves*, 36 NY2d 396, 401 [1975]). Thus, an " 'imprecise description of the premises to be searched appearing on the face of the warrant will not invalidate a search so long as the description enables the executing officers with reasonable effort [to] ascertain and identify the place intended' " (*People v Carpenter*, 51 AD3d 1149, 1150 [3d Dept 2008], *lv denied* 11 NY3d 786 [2008]).

Here, we conclude that "the description of the premises on the warrant was sufficient to enable the executing officers to ascertain the premises intended" (*People v Anderson*, 291 AD2d 856, 857 [4th Dept 2002]), and the officers "were able 'to readily ascertain and identify the target premises with reasonable and minimal effort' " (*People v Thomas*, 155 AD3d 1120, 1121-1122 [3d Dept 2017], *lv denied* 31 NY3d 1018 [2018]; *see People v Mitchell*, 57 AD3d 1232, 1233 [3d Dept 2008], *lv denied* 12 NY3d 760 [2009]; *cf. People v Rainey*, 14 NY2d 35, 37 [1964]).

As a last contention related to the search warrants, defendant contends that the warrant for cell site location data related to his cellular phone was overbroad, but he correctly concedes that he failed to preserve that contention for our review by not raising it before the motion court (*see People v DeJesus*, 192 AD3d 561, 562 [1st Dept 2021], *lv denied* 37 NY3d 964 [2021]; *People v Chambers*, 185 AD3d 1141, 1146 [3d Dept 2020], *lv denied* 36 NY3d 1055 [2020]; *see also People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Before trial, defendant sought to suppress evidence of identification of him by a codefendant who was involved in a pretrial identification procedure. Defendant now contends that the court erred in refusing to suppress that evidence because the single photograph identification procedure used with that codefendant was unduly suggestive and that the court erred in concluding, following a *Rodriguez* hearing, that the identification was merely confirmatory (*see generally People v Rodriguez*, 79 NY2d 445, 450 [1992]). During the investigation into the victim's death, officers interviewed the codefendant who identified defendant as one of the participants in the victim's murder. Instead of showing the codefendant a photo array with multiple people, they showed him a single photograph of defendant, with his name on the bottom. Although the officers had folded the photograph in an attempt to avoid the codefendant seeing

defendant's name, the codefendant immediately unfolded the photograph and identified defendant as one of the participants in the murder.

The evidence at the *Rodriguez* hearing established that, in addition to being with defendant throughout the day of the crimes (*cf. People v Coleman*, 73 AD3d 1200, 1202 [2d Dept 2010]), the codefendant was familiar with defendant from the neighborhood, seeing him numerous times at a particular corner. He was also familiar with defendant due to defendant's friendship with the codefendant's uncle, who was also involved in the crimes. The identifying codefendant's observations of defendant on the day of the crimes "could not have been more intense or focused" (*People v Breland*, 83 NY2d 286, 295 [1994]) and that, combined with his familiarity with defendant, supports the court's determination that the identification of defendant by that codefendant was confirmatory (*see People v Carter*, 107 AD3d 1570, 1572 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014]*; People v Espinal*, 262 AD2d 245, 245 [1st Dept 1999], *lv denied* 93 NY2d 1017 [1999]). As a result, there was " 'little or no risk' that police suggestion could lead to a misidentification" (*Rodriguez*, 79 NY2d at 450; *see People v Colon*, 196 AD3d 1043, 1045 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). Given our determination, we do not address defendant's remaining contentions regarding the identification.

Defendant further contends that certain Facebook messages were improperly entered into evidence because they were not properly authenticated and they violated his constitutional right of confrontation. We reject those contentions. Addressing first the constitutional issue, we conclude that defendant failed to preserve his contention related to the confrontation clause by failing to address that ground in objecting to the admission of the messages, and the court did not expressly decide that issue in denying defendant's objection (*see People v Dennis*, 91 AD3d 1277, 1278 [4th Dept 2012], *lv denied* 19 NY3d 995 [2012]; *see generally* CPL 470.05 [2]). Although defense counsel indicated, before trial, that he *would* be raising a confrontation issue, he did not actually do so. In any event, "[f]or the statement to be admitted, the declarant must be unavailable and the statement must bear some indicia of reliability sufficient to justify its admission, even in the absence of cross-examination" (*People v Glenn*, 185 AD2d 84, 88 [4th Dept 1992]). Here, the declarant was unavailable and there were sufficient indicia of reliability. "The indicia of reliability requirement can be met in either of two circumstances: where the hearsay statement falls within a firmly rooted hearsay exception, or where it is supported by a showing of particularized guarantees of trustworthiness" (*People v James*, 93 NY2d 620, 641 [1999]). One firmly rooted exception to the hearsay rule is a "declaration by a coconspirator during the course and in furtherance of the conspiracy, [which] is admissible against another coconspirator [under the] exception" (*People v Bac Tran*, 80 NY2d 170, 179 [1992], *rearg denied* 81 NY2d 784 [1993]; *see People v Caban*, 5 NY3d 143, 148 [2005]; *James*, 93 NY2d at 641). Contrary to defendant's contention, the People established that the statements were made while defendant and the codefendant, who was sending and receiving the messages, were "engaged in a joint criminal enterprise"

(*Glenn*, 185 AD2d at 88).

With respect to the authentication issue, we conclude that, even assuming, arguendo, that the messages were not sufficiently authenticated and that the court erred in admitting those messages in evidence (*see People v Upson*, 186 AD3d 1270, 1271 [2d Dept 2020], *lv denied* 36 NY3d 1054 [2021]; *cf. People v Serrano*, 173 AD3d 1484, 1487-1488 [3d Dept 2019], *lv denied* 34 NY3d 937 [2019]; *see generally People v Price*, 29 NY3d 472, 476 [2017]), "the admission of such evidence was harmless as the evidence of . . . defendant's guilt was overwhelming, and there was no significant probability that the error contributed to . . . defendant's conviction[]" (*Upson*, 186 AD3d at 1271; *see Colon*, 192 AD3d at 1569; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Contrary to defendant's final contentions, we conclude that the conviction is supported by legally sufficient evidence on each count (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and that the verdict, viewed in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

156

KA 18-02332

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNELLE C. BARNES, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (FABIENNE SANTACROCE 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 (Charles A. Schiano, Jr., J.), rendered April 16, 2018. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that his plea was not voluntary, intelligent and knowing because Supreme Court misinformed defendant that he retained the right to appeal the court's determination relating to the sufficiency of the evidence before the grand jury. Defendant failed to preserve that contention for our review (*see generally People v Williams*, 27 NY3d 212, 224 [2016]; *People v Barrett*, 153 AD3d 1600, 1600-1601 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

160

CAF 21-01751

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

IN THE MATTER OF JULIET W.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

AMY W., RESPONDENT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-APPELLANT.

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered March 4, 2021 in a proceeding pursuant to Family Court Act article 10. The amended order, inter alia, determined that respondent had derivatively neglected the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an amended order that, inter alia, determined that she derivatively neglected the subject child. The mother contends that Family Court erred at the fact-finding hearing in admitting in evidence a report from a licensed psychologist who did not testify at trial. Even assuming, arguendo, that the report constituted hearsay and did not qualify for admission under Family Court Act § 1046 (a) (iv) (*see Matter of Chloe W. [Amy W.]*, 137 AD3d 1684, 1685 [4th Dept 2016]), we conclude that any error was harmless inasmuch as " 'the result reached herein would have been the same' " even if the report had been excluded (*Matter of Carl B. [Crystale L.]*, 178 AD3d 1456, 1456 [4th Dept 2019], *lv denied* 35 NY3d 903 [2020]; *see Matter of Jaydalee P. [Codilee R .]*, 156 AD3d 1477, 1478 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

We reject the mother's further contention that the court's finding of derivative neglect is not supported by a preponderance of the evidence. Prior orders of the court in January 2016 and June 2018 terminated the mother's parental rights over one of her children on the ground of permanent neglect and terminated her parental rights over three of her other children on the grounds of mental illness and

intellectual disability. We affirmed both orders in prior appeals (*Matter of Destiny S. [Amy W.]*, 177 AD3d 1314, 1314 [4th Dept 2019], *lv denied* 35 NY3d 947 [2020]; *Matter of Chloe W. [Amy W.]*, 148 AD3d 1672, 1673 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]). There is ample evidence in the record to support the court's finding that the prior determination of permanent neglect against the mother was "so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition[s] still existed" (*Matter of Lamairik S. [Jonas S.]*, 192 AD3d 1483, 1484 [4th Dept 2021], *lv denied* 37 NY3d 905 [2021] [internal quotation marks omitted]; *see Matter of Carmela H. [Danielle F.]*, 164 AD3d 1607, 1607 [4th Dept 2018], *lv dismissed in part & denied in part* 32 NY3d 1190 [2019]; *Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568 [4th Dept 2014]), "and that the mother failed to address the problems that led to the neglect finding[] with respect to [one of] her other children" (*Carmela H.*, 164 AD3d at 1608 [internal quotation marks omitted]).

To the extent the mother contends that the court erred in refusing to credit her testimony that the problems that led to the neglect finding "have been effectively remediated," we reject that contention. We see "no reason to disturb the court's credibility determinations inasmuch as they are supported by the record" (*Matter of Aaren F. [Amber S.]*, 181 AD3d 1167, 1168 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]).

We further conclude that the court's determination of derivative neglect was also properly "support[ed] by a finding that the mother's [largely] untreated and ongoing mental illness [and her intellectual disability] resulted in an inability to care for [the subject] child for the foreseeable future" (*Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1649 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]; *see Matter of Henry W.*, 30 AD3d 695, 696 [3d Dept 2006]; *Matter of Hannah UU.*, 300 AD2d 942, 944-945 [3d Dept 2002], *lv denied* 99 NY2d 509 [2003]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

175

KA 21-00987

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY T. SWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Sam L. Valleriani, J.), entered August 24, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from orders determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.* [SORA]) based upon state and federal convictions, respectively. The SORA determination in appeal No. 1 stems from defendant's 2009 state conviction, upon his plea of guilty, of rape in the third degree, and the determination in appeal No. 2 stems from defendant's 2010 federal conviction, upon his plea of guilty, of attempted production of child pornography. Based on the risk assessment instruments prepared by the Board of Examiners of Sex Offenders, defendant was a presumptive level two risk for the state offense and a presumptive level one risk for the federal offense, but in both appeals County Court determined that an upward departure to a level three risk was warranted. Defendant effectively contends on appeal that the court erred in granting the People's request for an upward departure in each appeal and that the court should have, instead, granted his request for a downward departure to a level one risk in appeal No. 1 and adjudicated him in accordance with his presumptive level one risk in appeal No. 2. We reject that contention.

Contrary to defendant's assertion, his acceptance of responsibility, lack of criminal history, and completion of sex offender treatment while incarcerated and continued engagement in

therapy do not constitute proper mitigating factors inasmuch as those circumstances were adequately taken into account by the risk assessment guidelines (*see People v Mann*, 177 AD3d 1319, 1320 [4th Dept 2019], *lv denied* 35 NY3d 902 [2020]; *People v Rivera*, 144 AD3d 1595, 1596 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]; *see also* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 13-17 [2006] [Guidelines]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Although an offender's response to sex offender treatment, if exceptional, may provide a basis for a downward departure (*see* Guidelines at 17; *Rivera*, 144 AD3d at 1596), we conclude that defendant failed to meet his burden of proving by a preponderance of the evidence that his response to treatment was exceptional (*see Mann*, 177 AD3d at 1320; *People v Davis*, 170 AD3d 1519, 1520 [4th Dept 2019], *lv denied* 33 NY3d 907 [2019]).

With respect to defendant's assertion that his past employment history is a mitigating circumstance, we conclude that defendant "failed to demonstrate by a preponderance of the evidence how this alleged mitigating circumstance would reduce his risk of sexual recidivism or danger to the community" (*Davis*, 170 AD3d at 1520; *see People v Alfred M.*, 172 AD3d 493, 494 [1st Dept 2019], *lv denied* 33 NY3d 914 [2019]).

Defendant also asserts as a mitigating circumstance the fact that his state conviction stemmed from consensual sexual relationships with two 15-year-old victims when he was between 20 and 21 years old. "[A] court may choose to depart downward [from the presumptive risk assessment level] in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [under risk factor 2 for sexual contact with the victim] results in an over-assessment of the offender's risk to public safety" (Guidelines at 9; *see People v Catalano*, 178 AD3d 1460, 1461 [4th Dept 2019], *lv denied* 35 NY3d 906 [2020]; *People v George*, 141 AD3d 1177, 1178 [4th Dept 2016]). Here, however, despite the lack of forcible compulsion, it cannot be said that the 25 points assessed for sexual contact with the victims "result[ed] in an over-assessment" of defendant's risk to public safety (Guidelines at 9) given defendant's repeated sexual intercourse with two victims whom he met through friendships with their siblings and knew to be less than the age of consent, the reliable hearsay evidence that one of the victims contracted a sexually transmitted infection from defendant, and defendant's subsequent federal conviction arising from his possession and sharing of child pornography (*see People v Askins*, 148 AD3d 1598, 1599 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v Cathy*, 134 AD3d 1579, 1580 [4th Dept 2015]; *cf. People v Stevens*, 201 AD3d 1344, 1345 [4th Dept 2022]; *George*, 141 AD3d at 1178; *People v Goossens*, 75 AD3d 1171, 1172 [4th Dept 2010]).

Finally, even assuming, arguendo, that defendant adequately identified mitigating circumstances not adequately taken into account by the Guidelines and proved the existence thereof by a preponderance of the evidence (*see generally Gillotti*, 23 NY3d at 861), we conclude

that the aggravating circumstances that the People established by clear and convincing evidence, which defendant does not dispute on appeal, outweighed the mitigating circumstances, and the totality of the circumstances thus warranted an upward departure to avoid an under-assessment of defendant's dangerousness and risk of sexual recidivism (*see People v Cottom*, 207 AD3d 1243, 1245 [4th Dept 2022]; *People v Mangan*, 174 AD3d 1337, 1339 [4th Dept 2019], *lv denied* 34 NY3d 905 [2019]; *see generally Gillotti*, 23 NY3d at 861). Consequently, the court did not abuse its discretion in denying defendant's request for a downward departure in appeal No. 1 and granting the People's request for an upward departure to a level three risk in appeal Nos. 1 and 2.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

176

KA 21-00988

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY T. SWARTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Sam L. Valleriani, J.), dated August 4, 2020. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Same memorandum as in *People v Swartz* ([appeal No. 1] — AD3d — [May 5, 2023] [4th Dept 2023]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

185

CA 22-00493

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

CAROL MECCA, AS EXECUTOR OF THE ESTATE OF
ROSEMARY MECCA, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ALTERNATIVE LIVING SERVICES-NEW YORK, INC., AND
BROOKDALE WILLIAMSVILLE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI, LLP, BUFFALO (JESSE A. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 28, 2022. The order, among other things, denied in part the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 24, 2023,

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

186

CA 22-01272

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

CAROL MECCA, AS EXECUTOR OF THE ESTATE OF
ROSEMARY MECCA, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ALTERNATIVE LIVING SERVICES-NEW YORK, INC., AND
BROOKDALE WILLIAMSVILLE, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MEGHANN N. ROEHL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BROWN CHIARI, LLP, BUFFALO (JESSE A. DRUMM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered August 8, 2022. The order denied the motion of defendants seeking leave to renew and reargue.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 24, 2023,

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

218

CA 18-00974

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

JEYZELL WALKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, CITY OF ROCHESTER, MUHAMMAD MUHAMMAD, ALSO KNOWN AS MOHAMED MOHAMED, DEFENDANTS-RESPONDENTS.

JEYZELL WALKER, PLAINTIFF-APPELLANT PRO SE.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF MONROE.

LINDA S. KINGSLEY, CORPORATION COUNSEL, ROCHESTER (JOHN M. CAMPOLIETO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF ROCHESTER AND MUHAMMAD MUHAMMAD, ALSO KNOWN AS MOHAMED MOHAMED.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 16, 2018. The order granted the motions of defendants County of Monroe and City of Rochester to dismiss the complaint and dismissed the complaint against said defendants.

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

Memorandum: Plaintiff appeals from an order that granted the motions of defendants City or Rochester and County of Monroe (collectively, defendants) seeking to dismiss the complaint against them for failure to state a cause of action. The appeal must be dismissed based on plaintiff's failure to provide an adequate record to permit meaningful appellate review (*see Woodman v Woodman*, 162 AD3d 1650, 1650-1651 [4th Dept 2018]). " 'It is the obligation of the appellant to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the Supreme Court' " (*Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Among other things, the record on appeal did not contain the complaint, which, as noted, defendants moved to dismiss, and those motions are the subject of the order on appeal; nor did it contain all of the relevant motion papers and exhibits upon which the order was founded (*see* CPLR 5526; *see also Fink v Al-Sar Realty Corp.*, 175 AD3d 1820, 1820-1821 [4th Dept 2019]). We note that, although plaintiff has included some additional documents in her appellant's brief, they are not properly

part of the record on appeal and, in any event, those documents do not cure the defects in the record even if considered (*see Woodman*, 162 AD3d at 1651).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

222

KA 19-00331

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MORRISON, DEFENDANT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 17, 2018. The judgment convicted defendant upon a plea of guilty of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [1]). After a previous trial on the indictment, defendant was convicted of, inter alia, rape in the first degree, and this Court affirmed his conviction (*People v Morrison*, 90 AD3d 1554 [4th Dept 2011], *lv denied* 19 NY3d 1028 [2012], *reconsideration denied* 20 NY3d 934 [2012]). Thereafter, we granted defendant's motion for a writ of error coram nobis (*People v Morrison*, 128 AD3d 1424 [4th Dept 2015]). In March 2017, we reversed the judgment and granted a new trial based on an *O'Rama* error, and on June 28, 2018, the Court of Appeals affirmed our decision (*People v Morrison*, 148 AD3d 1707 [4th Dept 2017], *affd* 32 NY3d 951 [2018]). Defendant then entered an *Alford* plea to rape in the first degree in satisfaction of all charges in the indictment, with a promised sentence of a determinate term of incarceration of 14 years with 5 years' postrelease supervision. County Court indicated that the parties and the court understood that defendant would have served that sentence by the time of sentencing the following month, but the court stated that it had to verify that with the Department of Corrections and Community Supervision (DOCCS).

On appeal, defendant contends that the plea was not knowingly, intelligently, and voluntarily entered and that his constitutional right to a speedy trial was violated. Inasmuch as both claims would survive even a valid waiver of the right to appeal, we need not address the validity of defendant's waiver of the right to appeal (*see People v Davis*, 206 AD3d 1603, 1604 [4th Dept 2022]; *People v Gumpton*,

199 AD3d 1485, 1485 [4th Dept 2021]; *People v Gessner*, 155 AD3d 1668, 1669 [4th Dept 2017]; *People v Williams*, 120 AD3d 1526, 1526-1527 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]). Defendant contends that he did not receive the benefit of the plea bargain inasmuch as the court allowed him to remain incarcerated beyond the sentencing date, and thus the plea was involuntarily entered. As defendant correctly concedes, he failed to preserve that contention for our review because he never moved to withdraw the plea or to vacate the judgment of conviction (*see People v Diggs*, 129 AD3d 1675, 1675-1676 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). In any event, we conclude that defendant's contention is without merit. Defendant received the benefit of the plea bargain inasmuch as he was sentenced to the promised sentence (*see id.* at 1676). The expectation that defendant would be released on the date of sentencing was not a promise to do so inasmuch as the court indicated that DOCCS had the final decision on that matter.

Defendant further contends that his constitutional right to a speedy trial was violated when the court repeatedly adjourned the matter during the pendency of the People's appeal to the Court of Appeals from the decision of this Court remitting the matter for a new trial. Defendant's contention is not preserved for our review because he never moved to dismiss the indictment on that ground or even objected to the adjournments (*see People v Minwalkulet*, 198 AD3d 1290, 1292-1293 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]; *People v Burke*, 197 AD3d 967, 969 [4th Dept 2021], *lv denied* 37 NY3d 1159 [2022]; *Williams*, 120 AD3d at 1526). In any event, upon our review of the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that defendant was not denied his constitutional right to a speedy trial (*see Minwalkulet*, 198 AD3d at 1293; *People v Kennedy*, 78 AD3d 1477, 1479 [4th Dept 2010], *lv denied* 16 NY3d 798 [2011]). Inasmuch as any motion to dismiss the indictment on the ground that defendant was denied his constitutional right to a speedy trial would not have succeeded, we reject defendant's further contention that defense counsel was ineffective in failing to make such a motion (*see Minwalkulet*, 198 AD3d at 1293; *Burke*, 197 AD3d at 969).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

227

CAF 22-00278

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

IN THE MATTER OF JAHKAI S. AND JAZMINE S.

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

MEMORANDUM AND ORDER

SHIRLEY S., RESPONDENT-APPELLANT.

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

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

CATHERINE M. SULLIVAN, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered January 14, 2022 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that, inter alia, adjudged that she neglected the children who are the subject of this proceeding. We affirm. Petitioner established by a preponderance of the evidence that the mental or emotional condition of each child was in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care (*see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]). The evidence at the hearing established that the mother called for an ambulance to transport her to a hospital's Comprehensive Psychiatric Emergency Program because she did not feel safe at home; upon admission she was found to be psychotic and unable to care for herself. The mother admitted to regular PCP use, including its use earlier that week, and admitted that she had not taken her psychiatric medication in a month. Moreover, the mother was unable to plan for the children's care on her own. We conclude that petitioner established imminent danger—i.e., "near or impending" injury or impairment—to the children as a result of the combination of the mother's mental illness, her failure to take her prescribed medication, and her use of illicit drugs (*Matter of Zackery S. [Stephanie S.]*, 170 AD3d 1594, 1595 [4th Dept 2019] [internal quotation marks omitted]; *see Matter of Trinity B.-S.*

[William R.N.], 198 AD3d 1331, 1332 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; *Matter of Faith K. [Cindy R.]*, 194 AD3d 1402, 1403 [4th Dept 2021]; *Matter of Lyndon S. [Hillary S.]*, 163 AD3d 1432, 1433 [4th Dept 2018]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). Contrary to the mother's contention, the evidence was sufficient to establish a causal connection between the mother's failure to treat her mental illness and the potential harm to the children (*see Lyndon S.*, 163 AD3d at 1433-1434; *see generally Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]).

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

249

CA 21-01393

PRESENT: PERADOTTO, J.P., CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF GLORIA BORRELLI, AS EXECUTOR OF THE ESTATE OF DANIEL J. THOMAS, DECEASED, AND DERIVATIVELY AS A SHAREHOLDER OF NEW YORK STATE FENCE CO., INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOM THOMAS, INDIVIDUALLY AND AS DIRECTOR AND OFFICER OF NEW YORK STATE FENCE CO., INC. AND NEW YORK STATE FENCE CO., INC., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (TARA M. WARD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered August 30, 2021. The judgment granted the motion of plaintiff to dismiss defendants' second affirmative defense.

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

Memorandum: Plaintiff, as the executor of the estate of Daniel J. Thomas (decedent) and derivatively as a shareholder of New York State Fence Co., Inc. (NYSFC), brought this action seeking damages for, inter alia, breach of fiduciary duty against defendants. Defendants answered and moved, inter alia, to dismiss the amended complaint.

In appeal No. 1, defendants appeal from a judgment granting plaintiff's CPLR 4401 motion for judgment during trial and dismissing defendants' second affirmative defense. Because a final judgment in this action was entered subsequently, defendants' appeal from the intermediate judgment must be dismissed (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *City of Syracuse v COR Dev. Co., LLC*, 147 AD3d 1510, 1510 [4th Dept 2017]; *see generally* CPLR 5501 [a] [1]).

In appeal No. 2, plaintiff appeals from a judgment dismissing the amended complaint after a trial at which Supreme Court found that plaintiff did not own any stock in NYSFC and, therefore, lacked

standing to bring a derivative cause of action on behalf of NYSFC. We affirm.

Plaintiff contends that she met her initial burden of establishing standing and that the burden therefore shifted to defendants to prove as an affirmative defense that she lacks standing. We reject that contention. It is well settled that a plaintiff does not have standing to bring a derivative action on behalf of a corporation unless they own stock in that corporation at the time the action is commenced (*see* Business Corporation Law § 626 [a], [b]). "Standing requirements are not mere pleading requirements but rather an indispensable part of the plaintiff's case and therefore each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306 [2009] [internal quotation marks omitted]; *see also Matter of Niagara Preserv. Coalition, Inc. v New York Power Auth.*, 121 AD3d 1507, 1509 [4th Dept 2014], *lv denied* 25 NY3d 902 [2015]). Plaintiff therefore bore the burden of establishing standing to commence the derivative action. That defendants disputed plaintiff's standing at the trial did not render defendants' standing argument an affirmative defense that they were required to prove (*see Palmier v United States Fid. & Guar. Co.*, 135 AD2d 1057, 1059 [3d Dept 1987]).

Plaintiff further contends that the court's determination that she lacked standing is not supported by a fair interpretation of the evidence. We disagree. When reviewing the findings of fact after a nonjury trial on the issue of standing, "this Court's authority is as broad as that of the trial court and includes the power to render the judgment it finds warranted by the facts, taking into account in a close case the fact that the trial judge had the advantage of seeing the witnesses" (*Matter of Pappas v Corfian Enters., Ltd.*, 76 AD3d 679, 679 [2d Dept 2010] [internal quotation marks omitted]; *see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). However, the trial court's decision should not be disturbed "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Spivak-Bobko v Gregory Arms, LLC*, 208 AD3d 1603, 1604 [4th Dept 2022] [internal quotation marks omitted]). Here, a fair interpretation of the evidence supports the court's determination that the decedent had transferred his shares of NYSFC to defendant Tom Thomas as of 1998 and did not own any shares in NYSFC at the time of his death.

We have reviewed plaintiff's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

250

CA 22-00550

PRESENT: PERADOTTO, J.P., CURRAN, BANNISTER, AND MONTOUR, JJ.

IN THE MATTER OF GLORIA BORRELLI, AS EXECUTOR OF THE ESTATE OF DANIEL J. THOMAS, DECEASED, AND DERIVATIVELY AS A SHAREHOLDER OF NEW YORK STATE FENCE CO., INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOM THOMAS, INDIVIDUALLY AND AS DIRECTOR AND OFFICER OF NEW YORK STATE FENCE CO., INC., AND NEW YORK STATE FENCE CO., INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PHILLIPS LYTLE LLP, ROCHESTER (TARA M. WARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ADAMS LECLAIR LLP, ROCHESTER (ANTHONY J. ADAMS, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered March 28, 2022. The judgment dismissed the amended complaint.

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

Same memorandum as in *Matter of Borrelli v Thomas* ([appeal No. 1] – AD3d – [May 5, 2023] [4th Dept 2023]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

260

KA 22-00413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON ROOT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (LEAH N. FARWELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), entered February 8, 2022. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We affirm.

We reject defendant's contention that County Court erred in assessing 15 points for inflicting physical injury on the two victims. The SORA: Risk Assessment Guidelines and Commentary (2006) (Guidelines) incorporates the definition of physical injury in Penal Law § 10.00 (9), i.e., "impairment of physical condition or substantial pain" (*see* Guidelines at 8). "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and [their] pain, whether the victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Here, the People submitted, inter alia, the first victim's grand jury testimony, and her medical records from after the incident, which established that defendant forcibly penetrated her vagina twice, grabbed her by the hair and head, and shook her head in an attempt to force her to perform oral sex on him. The second victim testified before the grand jury that defendant forcibly penetrated her twice vaginally and once anally. The victims' testimony, coupled with their

statements to medical personnel at the hospital, provided clear and convincing evidence that the victims each suffered substantial pain (*see People v Whiten*, 187 AD3d 1661, 1661-1662 [4th Dept 2020]; *People v Leach*, 158 AD3d 1240, 1241 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]).

Defendant's contention that his counsel was ineffective based on a conflict of interest is unpreserved inasmuch as it is raised for the first time on appeal (*see generally Matter of Mary R.F. [Angela I.]*, 144 AD3d 1493, 1494 [4th Dept 2016], *lv denied* 28 NY3d 915 [2017]). Furthermore, we reject defendant's contention that he was denied effective assistance of counsel based on his counsel's performance at the SORA hearing. " '[A] sex offender facing risk level classification under SORA has a right to . . . effective assistance of counsel' " (*People v Stack*, 195 AD3d 1559, 1560 [4th Dept 2021], *lv denied* 37 NY3d 915 [2021]; *see People v Morancis*, 201 AD3d 751, 751 [2d Dept 2022]). "To prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation" (*People v Flores*, 84 NY2d 184, 187 [1994]). Here, we conclude that, "viewing the evidence, the law and the circumstances of this case in totality and as of the time of [the] representation, defendant received effective assistance of counsel" (*People v Russell*, 115 AD3d 1236, 1236 [4th Dept 2014]; *see People v Hackett*, 198 AD3d 1323, 1324 [4th Dept 2021], *lv denied* 37 NY3d 919 [2022]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

269

CA 20-01427

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

STEVEN PATTERSON AND ADRIENNE PATTERSON, AS GUARDIANS OF THE PERSON OF TERRANCE PATTERSON, PLAINTIFFS-APPELLANTS,

V ORDER

COUNTY OF ERIE, ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES CHILD PROTECTION SERVICES, CHILD AND FAMILY SERVICES OF BUFFALO AND ERIE COUNTY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

PAUL WILLIAM BELTZ, LLC, BUFFALO (ELIZABETH K. BACHER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WALSH ROBERTS & GRACE, BUFFALO (KEITH BOND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered September 9, 2020. The order granted in part the motion of defendants-respondents for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 27, 2023,

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

274

CA 22-00813

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

JAMES V. PAIGE, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEERVIEW, LLC, MARK SHANNON, JAMIE SHANNON, JONATHAN WISE, SENNECA TREY STONE AND ARIANN ABRA POLASKY, DEFENDANTS-RESPONDENTS.

WRIGHT CALIMERI, PLLC, JAMESTOWN (MATTHEW B. SCHUTTE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Chautauqua County (Grace Marie Hanlon, J.), entered May 11, 2022. The order denied plaintiff's motion for summary judgment.

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

Memorandum: In this action between neighbors on Chautauqua Lake, plaintiff appeals from an order that, inter alia, denied his motion for summary judgment with respect to his first cause of action insofar as it alleges that defendants violated a riparian easement by storing their dock and boat lifts on the parties' right-of-way during the offseason. We affirm.

Viewing the evidence in the light most favorable to defendants as the nonmoving parties (*see Masheh v JHF Mgt., LLC*, 200 AD3d 1621, 1622 [4th Dept 2021]; *Jackson v Rumpf*, 177 AD3d 1354, 1355 [4th Dept 2019]), we conclude that plaintiff failed to meet his initial burden on the motion of establishing as a matter of law that defendants' offseason storage of the dock and boat lifts violated the parties' riparian easement or was otherwise unlawful (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, Supreme Court properly denied the motion "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, even assuming, arguendo, that plaintiff met his initial burden, we conclude that defendants raised a material issue of fact in opposition sufficient to defeat the motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

323

KA 21-00660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL WEAVER, JR., DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered March 11, 2021. The judgment convicted defendant upon his plea of guilty of burglary in the third degree and grand larceny in the fourth 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) and grand larceny in the fourth degree (§ 155.30 [5]), 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 the waiver of the right to appeal is invalid, we perceive no basis in the record for us to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

338

KA 17-00561

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND OGDEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY D. SESSION, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered January 27, 2017. The appeal was held by this Court by order entered June 10, 2022, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (206 AD3d 1678 [4th Dept 2022]). The proceedings were held and completed (Douglas A. Randall, J.).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]). We previously held the case, reserved decision, and remitted the matter to County Court to determine defendant's pro se motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30) by ruling on the outstanding issues whether the 83-day period from May 13, 2015, to August 4, 2015, should have been excluded because it resulted from an adjournment "requested or consented to by [defendant's] second counsel (CPL 30.30 [4] [b]) or was the result of an exceptional circumstance (CPL 30.30 [4] [g])" (*People v Session*, 206 AD3d 1678, 1682 [4th Dept 2022]). Upon remittal, the court conducted a hearing and thereafter denied the motion, determining, inter alia, that the subject period was not chargeable to the People because it was occasioned by an exceptional circumstance, namely, that a material witness was unavailable because he had left the United States to attend the funeral of a family member (*see generally People v Zirpola*, 57 NY2d 706, 708 [1982]). We affirm.

Because the adjournment in question constituted a postreadiness delay, the People had the burden "to ensure, in the first instance, that the record of the proceedings at which the adjournment was actually granted is sufficiently clear to enable the court considering

the subsequent CPL 30.30 motion to make an informed decision as to whether the People should be charged," and defendant had the burden of showing that the delay "occurred under circumstances that should be charged to the People" (*People v Cortes*, 80 NY2d 201, 215 [1992]; *see People v Anderson*, 66 NY2d 529, 541 [1985]). At the hearing on the motion, defendant had "the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 210.45 [7]; *see People v Allard*, 28 NY3d 41, 45-46 [2016]).

The People met their burden of ensuring that the record sufficiently explains the basis for the adjournment in question inasmuch as the record establishes that the court granted the adjournment after the People informed the court that the witness had to leave the United States to attend the funeral of a family member. A postreadiness motion to dismiss on speedy trial grounds "may be denied where the people are not ready for trial if the people were ready for trial prior to the expiration of the specified period and their present unreadiness is due to some exceptional fact or circumstance, including, but not limited to, the sudden unavailability of evidence material to the people's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available in a reasonable period" (CPL 30.30 [3] [b]). Defendant therefore had the burden to show that that statutory provision does not apply and therefore the adjournment period should be charged to the People. Defendant failed to meet that burden inasmuch as he presented no evidence to support his motion (*see generally People v Harden*, 6 AD3d 181, 182 [1st Dept 2004], *lv denied* 3 NY3d 641 [2004]). The court therefore properly determined that the period in question was not chargeable to the People. Inasmuch as we previously determined that whether the 83-day delay was chargeable to the People was dispositive of the propriety of the court's denial of defendant's motion (*Session*, 206 AD3d at 1682), we conclude that the court properly denied the motion after the hearing.

In light of our conclusions, defendant's remaining contention is academic.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

341

KA 22-00421

PRESENT: WHALEN, P.J., PERADOTTO, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GAGE B. ASHLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered December 16, 2021. The judgment convicted defendant upon a plea of guilty of murder in the second degree, attempted robbery in the first degree, conspiracy in the fourth degree, murder in the first degree, criminal possession of a weapon in the second degree, and tampering with physical evidence.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to dismiss the indictment is granted, and the indictment is dismissed without prejudice to the People to re-present any appropriate charges to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]). Defendant contends that County Court erred in refusing to dismiss the indictment pursuant to CPL 210.20 (1) (c) and 210.35 (1) on the ground that the grand jury was illegally constituted. Specifically, he contends that the grand jury was illegally constituted because one of the grand jurors was not qualified to serve due to a prior felony conviction (*see* Judiciary Law § 510; *see generally People v Davis*, 68 AD3d 1653, 1654-1655 [4th Dept 2009], *lv denied* 14 NY3d 839 [2010]). We agree.

CPL 210.20 (1) (c) authorizes a court to dismiss an indictment on the ground that "[t]he grand jury proceeding was defective, within the meaning of [CPL] 210.35." As relevant here, CPL 210.35 provides that "[a] grand jury proceeding is defective . . . when . . . [t]he grand jury was illegally constituted" (CPL 210.35 [1]). A grand jury is illegally constituted when, inter alia, one of its members is not qualified to serve as a juror pursuant to the Judiciary Law (*see generally Davis*, 68 AD3d at 1654-1655). Here, it is undisputed that the grand jury was illegally constituted because one of the grand

jurors had been convicted of a felony, rendering him unqualified to serve as a grand juror (*see* Judiciary Law §§ 501, 510 [3]).

Despite the illegally constituted grand jury, the court nonetheless determined that dismissal of the indictment was unwarranted inasmuch as the alleged defect did not result in any prejudice to defendant. We conclude that it was error for the court to require a showing of prejudice before dismissing the indictment for a violation of CPL 210.35 (1). The Court of Appeals has held that "[t]he clear intention of [the drafters of CPL 210.35] was to establish a rule of *automatic dismissal* [of an indictment] for a limited number of improprieties that were deemed most serious"—including, inter alia, "the specific defect[] delineated in" CPL 210.35 (1) (*People v Williams*, 73 NY2d 84, 90-91 [1989] [emphasis added]; *see also People v Perry*, 199 AD2d 889, 891 [3d Dept 1993], *lv denied* 83 NY2d 856 [1994]). With respect to those most serious improprieties, "judicial inquiries into prejudice to the accused or other forms of actual harm are wholly out of place" (*Williams*, 73 NY2d at 91). Any consideration of prejudice is limited to defects alleged in connection with the catchall provision of CPL 210.35 (5) (*see generally People v Thompson*, 169 AD3d 1473, 1474 [4th Dept 2019], *lv denied* 33 NY3d 1074 [2019]; *Davis*, 68 AD3d at 1654-1655). Here, as noted above, there is no dispute that the grand jury proceedings were defective under CPL 210.35 (1) due to the presence of the unqualified grand juror, and therefore the court should have automatically dismissed the indictment without requiring any showing of prejudice by defendant (*see Williams*, 73 NY2d at 91).

In light of our determination, defendant's remaining contentions are academic.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

344

KA 22-01032

PRESENT: WHALEN, P.J., PERADOTTO, CURRAN, OGDEN, AND GREENWOOD, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN E. SWANTON, DEFENDANT-APPELLANT.

LAW OFFICE OF FRANK POLICELLI, UTICA (FRANK POLICELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered December 2, 2021. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree, and criminal use of a firearm in the first 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 on counts 1 and 3 through 5 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [4]), and two counts of criminal use of a firearm in the first degree (§ 265.09 [1] [a], [b]). Defendant was acquitted of the remaining count of the indictment. We agree with defendant that County Court erred in refusing to charge the jury on the defense of justification pursuant to Penal Law § 35.15 (2) (a).

The evidence at trial established that defendant, who had been a friend and neighbor to the two victims, attended a party at the first victim's residence on the day of the shooting, at which the second victim was also in attendance. After defendant insulted one of the guests, the first victim asked defendant to leave the party and, though he initially resisted, defendant ultimately returned to his residence. Several minutes later, both victims arrived at defendant's residence, and a physical altercation ensued between defendant and the first victim. The altercation ended when defendant shot and killed the first victim in the driveway of defendant's home. The second victim was also shot, but survived.

Defendant testified at trial that, almost immediately upon arrival at defendant's home, the first victim began punching him in the head, causing defendant to fall backward onto the ground. While defendant was lying on his back, the first victim stomped on

defendant's leg and then straddled defendant's waist, pinning him to the ground while continuing to rain down blows. Defendant testified that he feared the first victim would inflict serious physical injury because the first victim was intoxicated and "I was on the ground. He was on top of me." Defendant, who testified that it was his regular practice to carry a legally licensed firearm, and who further testified that he had been carrying a handgun since earlier in the evening while attending the party at the first victim's home, drew his weapon and fired nine shots. Five of those shots struck the first victim, and at least one struck the second victim. Defendant testified that he did not intend to shoot the second victim, but that he had emptied the gun's magazine to ensure that the weapon could not be used against him.

It is reversible error for a trial court to fail to charge the jury with respect to the defense of justification when, "on any reasonable view of the evidence, the fact finder might have decided that defendant's actions were justified" (*People v Padgett*, 60 NY2d 142, 145 [1983]; *see People v Maher*, 79 NY2d 978, 982 [1992]). With respect to the defense of justification under Penal Law § 35.15 (2) (a), "a defendant is justified in using 'deadly physical force' upon another only if that defendant 'reasonably believes that such other person is using or about to use deadly physical force' " (*People v Brown*, 33 NY3d 316, 320 [2019]). "Deadly physical force means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [11] [internal quotation marks omitted]). In this context, deadly physical force "encompasses not merely the striking of the first blow or infliction of the first wound," but also "acts by a person that cause the defendant reasonably to believe that the defendant is facing the 'imminent threat' of deadly force" (*Brown*, 33 NY3d at 322). However, the Penal Law further provides that, for purposes of the defense of justification under Penal Law § 35.15 (2) (a), "a defendant is never justified in using deadly physical force if that defendant is the 'initial aggressor,' " i.e., "the first person in an altercation who uses or threatens the imminent use of deadly physical force" (*Brown*, 33 NY3d at 320, quoting Penal Law § 35.15 [1] [b]; *see People v Petty*, 7 NY3d 277, 285 [2006]). "If mere physical force is employed against a defendant, and the defendant responds by employing deadly physical force, the term initial aggressor is properly defined as the first person in the encounter to use deadly physical force," and the justification defense under Penal Law § 35.15 (2) (a) is inapplicable (*Brown*, 33 NY3d at 321; *see People v McWilliams*, 48 AD3d 1266, 1267 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008]).

Here, viewing the evidence in the light most favorable to defendant (*see Padgett*, 60 NY2d at 144), we conclude that a reasonable view of the evidence supports defendant's request for a justification charge pursuant to Penal Law § 35.15 (2) (a). "Even if [the first victim] had not already employed deadly physical force against . . . defendant at the time . . . defendant allegedly used deadly physical force against [the first victim], the question remains whether . . . defendant could reasonably have believed that the use of such force

against him was imminent" (*People v Singh*, 197 AD3d 1332, 1336 [2d Dept 2021]). The first victim was not armed, but defendant testified that he knew that the first victim owned at least one gun and that, at the time of the shooting, he did not know whether the first victim was armed. Further, defendant's testimony that the first victim pinned him down and was repeatedly punching his face and head could support a finding that defendant reasonably believed that such conduct presented an imminent threat of deadly force inasmuch as "[t]he natural and probable consequences of repeatedly striking a man while he is on the ground defenseless is that he will sustain a serious physical injury within the meaning of Penal Law § 10.00 (10)" (*People v Meacham*, 84 AD3d 1713, 1714 [4th Dept 2011], *lv denied* 17 NY3d 808 [2011]; *see Singh*, 197 AD3d at 1335-1336). Although defendant's version of the incident may be "dubious, a trial court is required to give the justification charge even where the defendant's version of events is 'extraordinarily unlikely' " (*People v Freeman*, 159 AD3d 1334, 1335 [4th Dept 2018]; *see People v Smith*, 62 AD3d 411, 411-412 [1st Dept 2009], *lv denied* 12 NY3d 929 [2009]).

We thus conclude that the judgment must be reversed, and that defendant is entitled to a new trial on counts 1 and 3 through 5 of the indictment. In light of our determination, we do not address defendant's remaining contentions.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

358.1

KA 19-00934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PRISCILLA GUMPTON, DEFENDANT-APPELLANT.

DAVID R. MORABITO, EAST ROCHESTER, FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION, FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (Charles N. Zambito, A.J.), rendered December 13, 2018. The appeal was held by this Court by order entered November 19, 2021, decision was reserved and the matter was remitted to Orleans County Court for further proceedings (199 AD3d 1485 [4th Dept 2021]).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on June 9, 2022, and by the attorneys for the parties on June 9, 2022,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

361

KA 17-00367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GRAYSON, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered January 25, 2017. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree, criminal sale of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree (three counts) and criminal sale of a controlled substance in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, following a joint jury trial with three codefendants, of one count each of conspiracy in the second degree (Penal Law § 105.15), criminal sale of a controlled substance in the first degree (§ 220.43 [1]), and criminal sale of a controlled substance in the second degree (§ 220.41 [1]), and three counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]), arising out of defendant's participation in a multi-level drug operation. To the extent that defendant preserved his contention that the conviction is not supported by legally sufficient evidence (*see generally People v Gray*, 86 NY2d 10, 19 [1995]), that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Further, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally id.*; *Bleakley*, 69 NY2d at 495).

Defendant failed to object to the allegedly improper remarks made by the prosecutor during opening and closing statements, and thus failed to preserve for our review his contention that he was denied a fair trial by those instances of alleged prosecutorial misconduct (*see* CPL 470.05 [2]; *People v Williams*, 163 AD3d 1422, 1423 [4th Dept 2018]). Contrary to defendant's further contention, defense counsel's failure to object to the prosecutor's allegedly improper comments did not deprive defendant of effective assistance of counsel inasmuch as

those comments did not constitute prosecutorial misconduct (*see People v Townsend*, 171 AD3d 1479, 1481 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]). We also reject defendant's contention that defense counsel was ineffective in failing to object to the testimony of a prosecution witness interpreting the meaning of language used in recorded telephone calls. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of representation, we conclude that defendant received meaningful representation (*see People v Graham*, 174 AD3d 1486, 1489 [4th Dept 2019], *lv denied* 34 NY3d 1016 [2019]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's contention, Supreme Court properly denied his request to provide the jury with a multiple conspiracies charge. "Although a multiple conspiracies charge must be given 'when the facts are such that a jury might reasonably find either a single conspiracy or multiple conspiracies' . . . , it is well established that '[p]roof of a defendant's knowledge of the identities and specific acts of all his coconspirators is not necessary where[, as here,] the circumstantial evidence establishes the defendant's knowledge that he is part of a criminal venture which extends beyond his individual participation' " (*People v King*, 166 AD3d 1562, 1564 [4th Dept 2018], *lv denied* 34 NY3d 1017 [2019]). We conclude that " '[t]here was no reasonable view of the evidence that there was any conspiracy [other] than the single conspiracy charged in the indictment' " and, thus, the court did not err in denying defendant's request to provide the jury with a multiple conspiracies charge (*People v Woodard*, 199 AD3d 1377, 1379 [4th Dept 2021]; *see King*, 166 AD3d at 1564-1565).

We agree with defendant, however, that the court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2). Defendant's contention is identical to that raised by his codefendant on his appeal (*see Woodard*, 199 AD3d at 1379-1380). While his codefendant was afforded a hearing upon remittal by this Court, defendant was not afforded the opportunity to participate in that hearing. In light of those new events, we hold the case, reserve decision, and remit the matter to Supreme Court for a determination on defendant's request for a hearing on defendant's CPL 330.30 motion.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

362

KA 21-01239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM PATRICK FRICKE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM PATRICK FRICKE, DEFENDANT-APPELLANT PRO SE.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Kristina Karle, J.), rendered June 16, 2021. The judgment convicted defendant upon a jury verdict of murder in the first degree (two counts), kidnapping in the first degree, burglary in the first degree (four counts), attempted murder in the first degree (two counts), assault in the first degree (two counts) and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]), attempted murder in the first degree (§§ 110.00, 125.27), assault in the first degree (§ 120.10 [1], [4]), and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]), one count of kidnapping in the first degree (§ 135.25 [3]), and four counts of burglary in the first degree (§ 140.30 [2], [3]).

Defendant contends in his main brief that the verdict with respect to counts 2, 4, 5, 7, 10 and 11 is against the weight of the evidence inasmuch as the People failed to establish that he committed burglary, specifically that defendant knew that he did not have permission to re-enter the residence. "The crime of burglary requires only a knowing unlawful entry with intent to commit a crime therein" (*People v Mainella*, 2 AD3d 1330, 1330 [4th Dept 2003], *lv denied* 2 NY3d 742 [2004], *reconsideration denied* 3 NY3d 660 [2004]). We conclude that, viewing the evidence in light of the elements of the

aforementioned counts as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Dowdall*, 236 AD2d 836, 836-837 [4th Dept 1997]; *People v Jordan*, 193 AD2d 890, 891, 893-894 [3d Dept 1993], *lv denied* 82 NY2d 756 [1993]). Indeed, the weight of the evidence supports the jury's determination that defendant knew he did not have permission to re-enter the residence after he had threatened the male victim (victim) with a gun, stabbed him in the chest, and repeatedly beat the female victim (decedent) about the head before dragging her outside.

Defendant also contends in his main and pro se supplemental briefs that the verdict with respect to counts 1, 3 and 6 is against the weight of the evidence because the People failed to prove that he committed kidnapping in the first degree. We reject that contention. The victim's testimony that defendant dragged the decedent outside by the hood of her sweatshirt was not incredible as a matter of law (*see People v Savery*, 209 AD3d 1268, 1270 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]) and any inconsistencies in that testimony merely presented a credibility issue for the jury to resolve (*see People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020], *lv denied* 35 NY3d 995 [2020]; *People v Cross*, 174 AD3d 1311, 1314-1315 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]).

Defendant failed to preserve his contention in his main brief that his conviction of criminal possession of a weapon in the second degree is unconstitutional in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]). Defendant's constitutional challenge is not preserved for our review inasmuch as he failed to raise any such challenge during the proceedings in Supreme Court (*see People v Beltran*, 213 AD3d 1293, 1293 [4th Dept 2023]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]). Contrary to defendant's contention, we conclude that his constitutional challenge is not exempt from the preservation rule (*see People v Thomas*, 50 NY2d 467, 472-473 [1980]; *Jacque-Crews*, 213 AD3d at 1336; *cf. People v Patterson*, 39 NY2d 288, 296 [1976], *affd* 432 US 197 [1977]).

Defendant's contention in the main brief and pro se supplemental brief that prosecutorial misconduct deprived him of a fair trial is unpreserved inasmuch as defendant failed to object to the allegedly improper behavior (*see People v Freeman*, 206 AD3d 1694, 1695 [4th Dept 2022]; *People v Santiago*, 185 AD3d 1151, 1154 [3d Dept 2020], *lv denied* 35 NY3d 1097 [2020]; *People v Smith*, 150 AD3d 1664, 1666 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]). In any event, even assuming, arguendo, that the challenged conduct was inappropriate, we conclude that it was not so pervasive or egregious as to have deprived defendant of a fair trial (*see People v Horton*, 79 AD3d 1614, 1616 [4th Dept 2010], *lv denied* 16 NY3d 859 [2011]; *People v Williams*, 77 AD3d 508, 508 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]; *see also Santiago*, 185 AD3d at 1155).

Contrary to defendant's contention in the main brief, the court did not abuse its discretion in excluding the testimony of one of defendant's proffered witnesses. Although a character witness may give testimony regarding a defendant's general reputation in the community, a witness may "not testify to specific acts of a defendant and may not give his or her personal opinion of defendant's character based on personal knowledge" (*People v Mancini*, 213 AD2d 1038, 1039 [4th Dept 1995], *lv denied* 85 NY2d 976 [1995]; *see People v McGuinness*, 245 AD2d 701, 702 [3d Dept 1997]; *People v Berge*, 103 AD2d 1041, 1041-1042 [4th Dept 1984]). Inasmuch as the proffered witness would have testified to a specific interaction that he had with defendant, which tended to show that defendant would not have responded in this instance with violence, the court properly precluded the evidence (*see People v Van Gaasbeck*, 189 NY 408, 413-416, 418, 421 [1907]; *People v Kennard*, 160 AD3d 1378, 1380 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]; *see also People v Schafer*, 81 AD3d 1361, 1363 [4th Dept 2011], *lv denied* 17 NY3d 861 [2011]).

Defendant's contention in his pro se supplemental brief that the court and defense counsel erred in failing to ensure his presence in the courtroom when the parties discussed the jury instructions and the written requests of the jury during deliberations is belied by the record, which establishes that he was present at all relevant times. To the extent that factual assertions in support of that contention may exist dehors the record on appeal, they must be raised by way of a CPL article 440 motion (*see generally People v Mahoney*, 175 AD3d 1034, 1036 [4th Dept 2019], *lv denied* 35 NY3d 943 [2020]; *People v McDermott*, 76 AD3d 790, 791 [4th Dept 2010]). Defendant's related contention that the court erred in its response to the jury's request to have certain testimony read back in its entirety has been waived inasmuch as defense counsel indicated that he was satisfied with the court's approach in response to that inquiry (*see People v Banks*, 74 AD3d 1783, 1783 [4th Dept 2010], *lv denied* 17 NY3d 857 [2011]).

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

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

364

KA 21-01053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER S. DURIE, DEFENDANT-APPELLANT.

NICHOLAS B. ROBINSON, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN D. SEAMAN, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered May 14, 2021. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We agree with defendant that his "purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant 'understood the nature of the appellate rights being waived' " (*People v Youngs*, 183 AD3d 1228, 1228 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020], quoting *People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Johnson*, 195 AD3d 1422, 1423 [4th Dept 2021], *lv denied* 37 NY3d 1146 [2021]; *People v Mazaika*, 191 AD3d 1419, 1419 [4th Dept 2021]). First, contrary to the People's assertion and defendant's incorrect concession (*see generally People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Morrison*, 179 AD3d 1454, 1455 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]), Supreme Court employed " 'misleading' language[that] confus[ed] the discrete concepts of the forfeiture of a right by operation of law and . . . intentional relinquishment of a right by a voluntary waiver" (*Thomas*, 34 NY3d at 562; *see People v Lopez*, 6 NY3d 248, 256-257 [2006]). Inasmuch as the court "conflated the right to appeal with those rights automatically forfeited by the guilty plea" (*People v Garcia*, 203 AD3d 1585, 1585 [4th Dept 2022], *lv denied* 38 NY3d 1133 [2022] [internal quotation marks omitted]), the record does not establish that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of

guilty" (*Lopez*, 6 NY3d at 256; *see Garcia*, 203 AD3d at 1586). In addition, although the court employed a "few correctly spoken terms" (*Thomas*, 34 NY3d at 566), it nevertheless incorrectly "suggest[ed] that the waiver may be an absolute bar to the taking of an appeal" (*id.* at 564; *see Youngs*, 183 AD3d at 1228-1229). "Although ambiguities in a court's explanation may be cured by adequate clarifying language, which may be provided either in a written waiver or in the oral colloquy[,]" we conclude that "such language is absent from the record in the appeal[] before us" (*People v Parker*, 189 AD3d 2065, 2066 [4th Dept 2020], *lv denied* 36 NY3d 1122 [2021]). In this case, " '[g]reater precision in the court['s] oral colloqu[y]'—such as that found in the Model Colloquy for the waiver of the right to appeal, which 'neatly synthesizes . . . the governing principles and provides a solid reference for a better practice'—was required to ensure that defendant's waiver[was] knowing, voluntary, and intelligent" (*id.*, quoting *Thomas*, 34 NY3d at 567).

Defendant further contends that his sentence is unduly harsh and severe. Preliminarily, we are "compelled to emphasize once again that, '[c]ontrary to the People's contention, and as we have previously noted, it is well settled that this Court's sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court . . . , and that we may substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Cutaia*, 167 AD3d 1534, 1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]; *see People v Spencer*, 197 AD3d 1004, 1004 [4th Dept 2021], *lv denied* 37 NY3d 1099 [2021]). Nevertheless, we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-01379

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

IN THE MATTER OF LESLIE BRILL MESEROLE
AND THE ESTATE OF AMANDA LYNN
WIENCKOWSKI, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND CHIEF MEDICAL EXAMINER
TARA J. MAHAR, M.D., RESPONDENTS-RESPONDENTS.

JOHN RAY & ASSOCIATES, MILLER PLACE (JOHN RAY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

JEREMY C. TOTH, COUNTY ATTORNEY, BUFFALO, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 10, 2022 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss and dismissed the petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioners appeal from a judgment granting respondents' motion to dismiss the petition as barred by the statute of limitations. We affirm.

"Mandamus to compel under CPLR 7803 (1)—the . . . relief sought by petitioner[s]—is 'an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought' " (*Matter of Cameron Transp. Corp. v New York State Dept. of Health*, 197 AD3d 884, 885 [4th Dept 2021]). Even assuming, arguendo, that "[m]andamus to compel lies" here (*id.*), we conclude that Supreme Court properly granted respondents' motion to dismiss the petition on statute of limitations grounds inasmuch as this proceeding was not commenced until years after the relevant determination became final and binding in February 2009, i.e., well beyond the applicable four-month statute of limitations (*see* CPLR 217 [1]; *Matter of Jorbel v Thanning*, 36 AD3d 913, 914 [2d Dept 2007]; *Matter of Clemens v Matera*, 40 AD2d 914, 915 [3d Dept 1972]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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CA 22-00908

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

NANCY O'NEILL AND JAMES O'NEILL,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BUFFALO SOUTHWESTERN, LLC, BENDERSON
DEVELOPMENT COMPANY, LLC, AND T.C. NOTARO
CONTRACTING, INC., DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANTHONY V. IACONO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered June 3, 2022. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Nancy O'Neill (plaintiff) when she slipped and fell on snow and ice in a parking lot owned and managed by defendants Buffalo Southwestern, LLC and Benderson Development Company, LLC (Benderson), respectively. Benderson contracted with defendant T.C. Notaro Contracting, Inc. (Notaro) for snow removal services for the property. Defendants moved for summary judgment dismissing the complaint on the ground that there was a storm in progress at the time of the accident. Supreme Court granted the motion, and we affirm.

Defendants met their initial burden on the motion of establishing as a matter of law that "plaintiff's injuries [were] sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter" (*Solazzo v New York City Tr. Auth.*, 6 NY3d 734, 735 [2005]; *see Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016]; *Gilbert v Tonawanda City School Dist.*, 124 AD3d 1326, 1327 [4th Dept 2015]). We reject plaintiffs' contention that defendants failed to submit proof in admissible form in support of their motion. Although defendants submitted an unsworn report of an expert meteorologist in support of their motion, they submitted an affidavit of that same meteorologist in reply, to which he attached the same report submitted in the initial moving papers. Under the

circumstances, we conclude that the court did not abuse its discretion in allowing defendants to correct the unsworn report by submitting the same evidence in proper form in their reply papers (*see* CPLR 2001; *County of Erie v Gateway-Longview, Inc.*, 193 AD3d 1336, 1337 [4th Dept 2021]; *Bacon & Seiler Constructors, Inc. v Solvay Iron Works, Inc.*, 185 AD3d 1390, 1391-1392 [4th Dept 2020]; *see also Cook v Franz*, 309 AD2d 1234, 1234 [4th Dept 2003]). Defendants did not submit any new facts in their reply papers (*cf. Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408 [4th Dept 2009]; *Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1187-1188 [4th Dept 2008]). We decline to follow the First Department precedent advanced by plaintiff that a defect of this nature cannot be cured on reply (*see e.g. Accardo v Metro-North R.R.*, 103 AD3d 589, 589 [1st Dept 2013]).

Contrary to plaintiffs' further contention, in opposition to the motion they failed to "raise a triable issue of fact whether the accident was caused by a slippery condition at the location where . . . plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that . . . defendant[s] had actual or constructive notice of the preexisting condition" (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [4th Dept 2014] [internal quotation marks omitted]; *see Hanifan v COR Dev. Co., LLC*, 144 AD3d 1569, 1569 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624 [4th Dept 2009]). Finally, we reject plaintiffs' contention that, by plowing the snow from the parking lot, Notaro left it in a more dangerous condition because now any ice underneath the snow was exposed. "[B]y merely plowing the snow, as required by the contract, [Notaro's] actions could not be said 'to have created or exacerbated a dangerous condition' " (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 22-00824

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

IN THE MATTER OF EMILY ROBINSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF MANCHESTER-SHORTSVILLE CENTRAL SCHOOL DISTRICT, MANCHESTER-SHORTSVILLE CENTRAL SCHOOL DISTRICT AND HALEY CARRIGAN,
RESPONDENTS-RESPONDENTS.

ROBERT T. REILLY, LATHAM (CLAYTON E. EICHELBERGER OF COUNSEL), FOR PETITIONER-APPELLANT.

FERRARA FIORENZA, P.C., EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Brian D. Dennis, A.J.), entered April 19, 2022 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, granted respondents' motion to dismiss and dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, reinstatement of her employment with respondent Manchester-Shortsville Central School District (District). During the 2019-2020 school year, petitioner was employed by the District as a full-time English Language Arts (ELA) teacher. However, in June 2020, respondent Board of Education of Manchester-Shortsville Central School District (Board) reduced petitioner's position from full to part time. Pursuant to Education Law § 3013 (3) (a), petitioner was placed on a "preferred eligible list of candidates for appointment to a vacancy . . . that may thereafter occur in an office or position similar to the one which [petitioner] filled." Petitioner was offered, and accepted, the position of a part-time ELA teacher. In September 2020, petitioner resigned from the part-time ELA teacher position for financial reasons, i.e., the need for a full-time position and, on September 17, 2020, the Board accepted petitioner's resignation. On April 19, 2021, the District posted an opening for a full-time ELA teacher. Although petitioner applied for the opening and went through the formal application process, when she was offered the position, petitioner rejected the offer. The District hired respondent Haley Carrigan. On August 31, 2021, petitioner submitted a demand that she

be recalled to her prior position pursuant to Education Law § 3013 (3) (a). By letter dated September 15, 2021, the District refused petitioner's demand.

Petitioner commenced the instant proceeding by filing a petition on November 10, 2021. Thereafter, respondents filed a pre-answer motion to dismiss the petition. Supreme Court effectively granted respondents' motion on, inter alia, the ground that the proceeding was untimely inasmuch as petitioner's cause of action accrued on September 17, 2020, when the District accepted her resignation, or alternatively on April 15, 2021, when she received notice that she would be expected to reapply for the opening. Petitioner appeals.

Contrary to petitioner's contention, the court properly granted the motion. Where, as here, a proceeding is in "the nature of mandamus to compel, it [is] required to have been commenced within four months after the refusal by [the] respondent, upon the demand of [the] petitioner, to perform its duty" (*Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182 [4th Dept 2014] [internal quotation marks omitted]). "[A] petitioner[, however,] may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make [the] demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of facts which give [them] a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches" (*id.* [internal quotation marks omitted]; *see Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017]). "The term laches, as used in connection with the requirement of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time and does not refer to the equitable doctrine of laches" (*Granto*, 148 AD3d at 1695 [internal quotation marks omitted]). "[T]he four-month limitations period of CPLR article 78 proceedings has been treat[ed] . . . as a measure of permissible delay in the making of the demand" (*id.* at 1696 [internal quotation marks omitted]; *see Matter of Norton v City of Hornell*, 115 AD3d 1232, 1233 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]).

Under the circumstances of this case, petitioner knew or should have known of facts that gave her a clear right to relief as of April 19, 2021, when the District posted the opening for the full-time ELA teacher position. However, petitioner did not demand that she be recalled to her prior position until August 31, 2021, beyond the four-month limitations period. Thus, the proceeding is barred by the doctrine of laches (*cf. Speis*, 114 AD3d at 1182; *see generally Granto*, 148 AD3d at 1695-1696).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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TP 22-01262

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

IN THE MATTER OF MICHAEL S. VOSBURGH, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, RESPONDENT.

LEONARD CRIMINAL DEFENSE GROUP, PLLC, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALEXANDRIA TWINEM 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 [Scott J. DelConte, J.], entered August 3, 2022) to review a determination of respondent. The determination revoked the driver's license of petitioner.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated (DWI). We confirm the determination. Contrary to petitioner's contention, the determination that petitioner refused to submit to a chemical test after receiving the requisite warnings is supported by substantial evidence (*see Matter of Malvestuto v Schroeder*, 207 AD3d 1245, 1245-1246 [4th Dept 2022]). The arresting officer's testimony at the hearing, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to a chemical test after he was arrested for DWI and provided with three clear and unequivocal warnings of the consequences of such refusal (*see id.* at 1246; *see generally* Vehicle and Traffic Law § 1194 [2] [b]). We reject petitioner's contention that it was error to consider the refusal report in addition to the arresting officer's testimony (*see Matter of Chartrand v New York State Dept. of Motor Vehs. Appeals Bd.*, 214 AD3d 1402, 1404 [4th Dept 2023]; *see generally Malvestuto*, 207 AD3d at 1246; *Matter of Bersani v New York State Dept. of Motor Vehs.*, 162

AD3d 1553, 1553 [4th Dept 2018]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CAF 21-01796

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

IN THE MATTER OF ALEXANDER P. AND CHRISTIAN P.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JILLIAN P., RESPONDENT-APPELLANT.

STEPHANIE R. DIGIORGIO, UTICA, FOR RESPONDENT-APPELLANT.

LAURA ESTELA CARDONA, EAST SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oswego County (Spencer J. Ludington, A.J.), entered November 17, 2021 in a proceeding pursuant to Family Court Act article 10. The order entered a suspended judgment.

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

Memorandum: Petitioner commenced this neglect proceeding pursuant to Family Court Act article 10 alleging, inter alia, that respondent mother neglected her two children on two occasions after she became impaired from use of an inhalant to the point that she was unable to care for them. During the first incident, the mother used an inhalant while the children were in her custody and the children were unable to wake her. The children, both under the age of 10 at the time, were thus left in the house without any supervision. The older child called the nonparty father, who sent the paternal grandmother to the house to get the children. On the second occasion, the mother again used an inhalant and, when the children arrived home from school on the bus, they observed her lying on the couch with a can of dust remover nearby. Again the children were unable to wake her. The older child called the father and barricaded the door in order to protect his younger brother from strangers. The mother now appeals from an order of disposition that, inter alia, ordered a suspended judgment upon a finding that the mother neglected the children.

Contrary to the mother's contention, we conclude that Family Court properly determined that the children were neglected, i.e., that their physical, mental or emotional condition was "in imminent danger of becoming impaired as a result of" the mother's failure to exercise a minimum degree of care "in providing the child[ren] with proper supervision" (Family Ct Act § 1012 [f] [i] [B]; *see generally*

Nicholson v Scoppetta, 3 NY3d 357, 369-370 [2004]). Although no actual harm befell the children, petitioner established by a preponderance of the evidence that, on two occasions, the mother's behavior while under the influence of an inhalant "created an imminent danger of emotional or mental impairment to the children" (*Matter of Nevaeh L. [Katherine L.]*, 177 AD3d 1400, 1402 [4th Dept 2019]). As in *Nevaeh L.*, this is not a situation where the children were unaware of the mother's use of inhalants (*see id.*). The mother was " 'pass[ing] out' when her children were awake and in need of her care" (*id.*). The children were unable to wake her and were scared (*see Matter of Grace F. [Nicole F.]*, 144 AD3d 680, 680 [2d Dept 2016]). The children's reports that the mother had used her "medicine," i.e., inhalants, were corroborated by the testimony of the father and law enforcement that they observed the can of inhalants when they arrived at the mother's house, as well as by the father's testimony that he was unable to wake her upon his arrival after the second incident. The children's statements were also corroborated by the deputy's observations of the mother's behavior, which included slurred speech and lethargy (*see Matter of Kaylee D. [Kimberly D.]*, 154 AD3d 1343, 1344-1345 [4th Dept 2017]). We thus conclude that there is a sound and substantial basis to support the court's determination that the mother neglected the children (*see generally Nevaeh L.*, 177 AD3d at 1402; *Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

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

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KA 22-00378

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMONIE S. BENJAMIN, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (FARES A. RUMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 19, 2021. The judgment convicted defendant upon a plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). Although the record establishes that defendant validly waived his right to appeal (*see generally People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), defendant's challenge to the constitutionality of Penal Law § 265.03 in light of the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (— US —, 142 S Ct 2111 [2022]) is not barred by the waiver inasmuch as that challenge relates to "a right of constitutional dimension going to 'the very heart of the process' " (*People v Lopez*, 6 NY3d 248, 255 [2006]). Because defendant failed to raise any such challenge in County Court, however, it is not preserved for our review (*see* CPL 470.05 [2]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]; *see generally People v Reese*, 206 AD3d 1461, 1462-1463 [3d Dept 2022]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

405

KA 18-02150

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAAC M. VILLANUEVA-MEDINA, DEFENDANT-APPELLANT.

ERIK TEIFKE, ACTING PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Francis A. Affronti, J.), rendered November 14, 2017. The judgment convicted defendant upon a plea of guilty of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the second degree and conspiracy 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 his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), criminal possession of a controlled substance in the second degree (§ 220.18 [1]) and conspiracy in the fourth degree (§ 105.10 [1]), arising from the execution of a search warrant for a vehicle in which defendant was a passenger and wherein drugs were discovered. We affirm.

Defendant contends that the search warrant for the vehicle was not supported by probable cause and that Supreme Court therefore erred in refusing to suppress the evidence seized as a result of that search. Contrary to defendant's contention, the search warrant was supported by probable cause. "A search warrant must be based on probable cause and describe with particularity the areas to be searched" (*People v Gordon*, 36 NY3d 420, 426 [2021]). "Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place" (*People v Bigelow*, 66 NY2d 417, 423 [1985]). Moreover, " '[s]earch warrant applications should not be read in a hypertechnical manner as if they were entries in an essay contest' . . . , rather, such applications

'must be considered in the clear light of everyday experience and accorded all reasonable inferences' " (*People v Hightower*, 207 AD3d 1199, 1201 [4th Dept 2022], *lv denied* 38 NY3d 1188 [2022]). Here, the search warrant application was supported by the affidavit of a deputy, which included details of the deputy's personal knowledge of an ongoing investigation of a drug trafficking operation. The affidavit also included descriptions of telephone conversations obtained by eavesdropping warrants, during which defendant was a participant in conversations with his coconspirators about drug exchanges. In the affidavit the deputy further stated that defendant was observed driving the subject vehicle when he met with one of the coconspirators. We conclude that such information is sufficient to support a reasonable belief that evidence of the drug trafficking operation could be found in the vehicle (*see id.*; *People v Harper*, 236 AD2d 822, 823 [4th Dept 1997], *lv denied* 89 NY2d 1094 [1997]).

In light of our determination, we do not consider defendant's remaining contention.

Entered: May 5, 2023

Ann Dillon Flynn
Clerk of the Court