SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MAY 10, 2024

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. STEPHEN K. LINDLEY

HON. JOHN M. CURRAN

HON. TRACEY A. BANNISTER

HON. MARK A. MONTOUR

HON. JEANNETTE E. OGDEN

HON. DONALD A. GREENWOOD

HON. HENRY J. NOWAK

HON. SCOTT J. DELCONTE

HON. LYNN W. KEANE

HON. CRAIG D. HANNAH, ASSOCIATE JUSTICES

ANN DILLON FLYNN, CLERK

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

DECISIONS FILED MAY 10, 2024

_____	958	KA 22 01388	PEOPLE V GARY W. HENSLEY
_____	966	CA 22 01514	LG 70 DOE V TOWN OF AMHERST
_____	970	CA 22 01908	AL 557 DOE V CENTRAL VALLEY CENTRAL SCHOOL DISTR
_____	1022	CA 23 00204	CHAD KRAUSE V INDUSTRY MATRIX, LLC
_____	35	KA 21 01534	PEOPLE V DEWAYNE MCGUIRE
_____	39	KA 22 00394	PEOPLE V LYDELL C. DILLARD
_____	79	KA 23 00857	PEOPLE V JONATHAN C. ROSSBOROUGH
_____	95	KA 18 01371	PEOPLE V DONTEY L. LATHROP
_____	157	KA 21 00537	PEOPLE V LISA DUMAS
_____	167	KA 21 00682	PEOPLE V HILLARD SMITH
_____	172	CA 23 01003	JAMES A. MONROE V EMILY A. MONROE
_____	184	KA 17 00394	PEOPLE V ANTWON M. SMITH
_____	202	CA 22 00647	BENEDICT VIGLIETTA V ASBESTOS CORPORATION LIMITED
_____	207	CA 23 00749	BENEDICT VIGLIETTA V HEDMAN RESOURCES LIMITED
_____	215	KA 22 01400	PEOPLE V DEREK YEARA
_____	222	CA 23 00039	ECHO FORD V FAYEZ CHAHFE, M.D.
_____	234	KA 21 01595	PEOPLE V DANIEL C. CAIN
_____	246	CA 23 00172	JEBEDIA S. WORDEN V CITY OF UTICA
_____	253	KA 22 01986	PEOPLE V SHAWN LYON
_____	257	CAF 22 01988	CHRISTIAN JONES V LATOYA BROWN
_____	259	CA 23 00665	BARBARA PAGAN V GPK, LLC
_____	263	CA 22 01732	JAMES KEEM V FORD MOTOR COMPANY
_____	272	KA 21 00629	PEOPLE V NATHANIEL BAKER
_____	304	CA 23 01291	GABRIELLE J. DIDOMENICO V JACOB D. MCWHORTER
_____	316	CAF 22 01699	Mtr of ANTONIO S.

_____	317	CAF 22 01708	Mtr of ISAIAH K.
_____	318	CAF 22 01709	Mtr of JAVIER S.
_____	323	CAF 22 01710	Mtr of SKYLAR K.
_____	324	CAF 22 01711	Mtr of TREVON K.
_____	329	CA 23 00723	OLIVIA LESTER V FD CAPITAL, LLC
_____	331	CA 23 00368	MYA VAN HOOK V JEREMY P. DOAK, M.D.
_____	334	KA 22 00237	PEOPLE V DEVONTE D. BOUIE
_____	340	CAF 23 00156	KATTIE M. OSBORNE V CHRISTOPHER S. TULWITS
_____	341	CAF 22 01956	Mtr of CLARISSA F.
_____	343	CA 23 01132	UTICA MUTUAL INSURANCE COMPANY V ABEILLE GENERAL INSURANCE CO.
_____	354	KA 22 01836	PEOPLE V CAMILLE RACONA
_____	374	CAF 23 00442	REBECCA H. MILLER V DANIEL J. BOYDEN
_____	375	CAF 23 01240	REBECCA H. MILLER V DANIEL BOYDEN
_____	388	KA 19 00660	PEOPLE V ISAAC O. HUBBERT

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

35

KA 21-01534

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEWAYNE A. MCGUIRE, DEFENDANT-APPELLANT.

FELDMAN AND FELDMAN, MANHASSET (STEVEN A. FELDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered August 31, 2021. The appeal was held by this Court by order entered July 28, 2023, the decision was reserved and the matter was remitted to Steuben County Court for further proceedings (218 AD3d 1357 [4th Dept 2023]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]), assault in the second degree (§ 120.05 [2]), criminal mischief in the third degree (§ 145.05 [2]), and tampering with physical evidence (§ 215.40 [2]). We previously held this case, reserved decision, and remitted the matter to County Court for a ruling on defendant's motion for a trial order of dismissal (*People v McGuire*, 218 AD3d 1357 [4th Dept 2023]). On remittal, the court denied the motion. We now affirm.

Defendant contends that his conviction of each offense is based on legally insufficient evidence of intent. We reject that contention. Here, there is "a valid line of reasoning and permissible inferences which could lead a rational person to the same conclusion as the [factfinder]" (*People v Ferguson*, 177 AD3d 1247, 1248 [4th Dept 2019] [internal quotation marks omitted]). "It is well settled that [a] defendant may be presumed to intend the natural and probable consequences of [their] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused" (*People v Meacham*, 151 AD3d 1666, 1668 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017] [internal quotation marks omitted]; *see People v Mahoney*, 6 AD3d 1104, 1104 [4th Dept 2004], *lv denied* 3 NY3d 660 [2004]). Here, "viewing

the facts in a light most favorable to the People" (*People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the evidence is legally sufficient to establish that defendant intended to cause "serious physical injury" (Penal Law § 120.10 [1]) and "physical injury" (§ 120.05 [2]) to another person by aiming a shotgun at a moving vehicle and pulling the trigger from only 20 yards away (*see People v Appuzie*, 9 AD3d 273, 273 [1st Dept 2004], *lv denied* 3 NY3d 670 [2004]). In addition, the People presented evidence that defendant said, "I got 'em" after the shooting (*see People v Laufer*, 187 AD3d 1052, 1052-1053 [2d Dept 2020], *lv denied* 36 NY3d 1098 [2021], *reconsideration denied* 37 NY3d 958 [2021]). Even defendant's other purported statements that were less incriminating allow for an inference that defendant intended to fire and injure those inside the vehicle. Similarly, the facts establish that defendant intended "to damage property of another person" (§ 145.05; *see People v Bodine*, 231 AD2d 840, 840 [4th Dept 1996], *lv denied* 89 NY2d 862 [1996]). Additionally, the testimony that defendant asked a friend to "hold" the shotgun after the incident supports an intent "to prevent" the production or use of physical evidence in an official proceeding (§ 215.40 [2]; *see People v Thompson*, 75 AD3d 760, 764 [3d Dept 2010], *lv denied* 15 NY3d 896 [2010]).

Although defendant failed to preserve for our review his additional contention that his conviction for assault in the first degree is based on legally insufficient evidence of serious physical injury because his motion for a trial order of dismissal was not specifically directed at the alleged error raised on appeal (*see generally People v Winston*, 220 AD3d 1161, 1161 [4th Dept 2023], *lv denied* 41 NY3d 967 [2024]; *People v Cooley*, 220 AD3d 1189, 1189 [4th Dept 2023], *lv denied* 41 NY3d 964 [2024]), we "necessarily review the evidence adduced as to each of the elements of the crime[ ] in the context of our review of defendant's challenge to the weight of the evidence" (*People v Cartagena*, 149 AD3d 1518, 1518 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017], *reconsideration denied* 30 NY3d 1018 [2017] [internal quotation marks omitted]). Here, the evidence established that the passenger of the vehicle suffered a hole in her eardrum and a loss of hearing that had not resolved at the time of the trial. Thus, we conclude that the verdict on the assault in the first degree charge is not against the weight of the evidence with respect to the element of serious physical injury (*see* Penal Law § 10.00 [10]; *People v Hildenbrandt*, 125 AD2d 819, 820 [3d Dept 1986], *lv denied* 69 NY2d 881 [1987]; *see also People v Garland*, 155 AD3d 527, 528 [1st Dept 2017], *affd* 32 NY3d 1094 [2018], *rearg denied* 33 NY3d 970 [2019], *cert denied* — US —, 140 S Ct 2525 [2020]).

We also reject defendant's remaining grounds for contending that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

The record does not support the contention of defendant that the court penalized him for exercising his right to a trial by imposing a more severe sentence than offered as part of a plea bargain (*see People v Pena*, 50 NY2d 400, 411-412 [1980], *rearg denied* 51 NY2d 770 [1980], *cert denied* 449 US 1087 [1981]; *People v Jackson*, 94 AD3d 1559, 1561 [4th Dept 2012], *lv denied* 19 NY3d 1026 [2012]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

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

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

39

KA 22-00394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYDELL C. DILLARD, DEFENDANT-APPELLANT.

SARAH S. HOLT, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Melchor E. Castro, A.J.), rendered December 9, 2016. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal sexual act in the third degree (Penal Law § 130.40 [2]), arising from allegations that he engaged in sexual conduct with a 16-year-old girl. We affirm.

We reject defendant's contention that County Court erred in permitting the testimony of multiple witnesses under the prompt outcry exception to the hearsay rule (*see People v Felix*, 32 AD3d 1177, 1178 [4th Dept 2006], *lv denied* 7 NY3d 925 [2006]; *see also People v Shepherd*, 83 AD3d 1298, 1299-1300 [3d Dept 2011], *lv denied* 17 NY3d 809 [2011]; *People v Stuckey*, 50 AD3d 447, 448 [1st Dept 2008], *lv denied* 11 NY3d 742 [2008]). Even assuming, arguendo, that the court erred in permitting the testimony to exceed its proper scope, we conclude that any such error is harmless (*see People v Rice*, 75 NY2d 929, 932 [1990]).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal (*see People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is

against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that "the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]; *see People v Wilcox*, 192 AD3d 1540, 1541 [4th Dept 2021], *lv denied* 37 NY3d 961 [2021]; *People v Elmore*, 175 AD3d 1003, 1005 [4th Dept 2019], *lv denied* 34 NY3d 1158 [2020]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

79

KA 23-00857

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN C. ROSSBOROUGH, DEFENDANT-APPELLANT.

HAYDEN M. DADD, CONFLICT DEFENDER, GENESEO (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered February 16, 2023. The judgment convicted defendant upon a plea of guilty of forgery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of forgery in the second degree (Penal Law § 170.10 [1]). Although defendant "could not have brought a CPL 220.60 (3) plea withdrawal motion . . . because the plea and sentence occurred during the same proceeding" (*People v Tyrell*, 22 NY3d 359, 364 [2013]; *see generally* CPL 220.60 [3]), defendant did not move to vacate the judgment of conviction and thus failed to preserve for our review his contention that, based on his alleged mental illness and the alleged insufficiency of the plea colloquy, his guilty plea was not voluntarily, knowingly and intelligently entered (*see People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]; *see generally People v Peque*, 22 NY3d 168, 182 [2013], *cert denied* 574 US 840 [2014]; *People v Lopez*, 71 NY2d 662, 665-666 [1988]; *People v Thompson*, 206 AD3d 1628, 1629 [4th Dept 2022], *lv denied* 38 NY3d 1153 [2022]). Furthermore, this case does not fall within the rare exception to the preservation requirement set forth in *Lopez* (71 NY2d at 666).

In any event, defendant's contention is without merit. The Court of Appeals has "said repeatedly that there is no requirement for a uniform mandatory catechism of pleading defendants" (*People v Seeber*, 4 NY3d 780, 781 [2005] [internal quotation marks omitted]). Thus, contrary to defendant's contention, his " 'yes' and 'no' answers during the plea colloqu[y] do not invalidate [his] guilty plea[ ]" (*People v Stutzman*, 158 AD3d 1294, 1295 [4th Dept 2018], *lv denied* 31

NY3d 1122 [2018] [internal quotation marks omitted]; *see People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]). Further, "[t]here is no indication in the record that defendant was unable to understand the proceedings or that he was mentally incompetent at the time he entered his guilty plea" (*Williams*, 124 AD3d at 1286 [internal quotation marks omitted]; *see generally People v Robinson*, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007]). We note that "[d]efendant was asked a number of questions during the plea proceedings to which he responded coherently and rationally, and there is no indication that defendant was unable to understand the implications of his decision to accept the plea offer" (*People v Shackelford*, 100 AD3d 1527, 1528 [4th Dept 2012], *lv denied* 21 NY3d 1009 [2013]). We conclude that "the plea allocution as a whole establishes that defendant understood the charges and made an intelligent decision to enter a plea" (*People v Oswold*, 151 AD3d 1756, 1756 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017] [internal quotation marks omitted]).

Defendant's sentence is not unduly harsh or severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

95

KA 18-01371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONTEY L. LATHROP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 6, 2017. The judgment convicted defendant upon a jury verdict of attempted murder in the second degree, attempted assault in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is modified on the facts by reversing those parts convicting defendant of attempted murder in the second degree under count 1 of the indictment, attempted assault in the first degree under count 2 of the indictment, and criminal possession of a weapon in the second degree under count 3 of the indictment and dismissing those counts of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant was convicted following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We agree with defendant that the verdict is against the weight of the evidence with respect to counts 1, 2 and 3 of the indictment, charging attempted murder in the second degree, attempted assault in the first degree, and criminal possession of a weapon in the second degree under subdivision (1) (b) of section 265.03, but reject defendant’s remaining contentions.

Defendant’s conviction stems from an incident during which he was driving a vehicle on a one-way street in the City of Rochester when the front seat passenger in his vehicle fired a gun numerous times out of the window in the direction of a parked car. The victim — a man sitting in the parked car — exited the car and ran away unharmed after hearing gunshots. While driving away from the scene, defendant collided with another vehicle at a nearby intersection. The other

driver exited her vehicle and asked defendant to exchange "paperwork," but defendant swore at her and drove away. Several witnesses provided the police with the license plate number of the vehicle defendant was driving, and he was determined to be its registered owner. Defendant was soon arrested, but the passenger who fired the shots was never identified. Each count of the indictment alleged, inter alia, that defendant acted in concert with the shooter and was an accomplice under Penal Law § 20.00.

At trial, the evidence against defendant was based on the fact that he was driving the unknown shooter who fired shots in the direction of the putative victim for unknown reasons. The victim testified that he heard someone yell "yo" before the shots were fired, but the victim did not identify the shooter or anyone else in the vehicle from which the shots were fired. The People offered no evidence with respect to why the shooter may have wished to harm the victim, or if indeed the victim was the intended target, and there is no evidence in the record that the victim and defendant knew each other prior to the shooting. Although the woman whose vehicle defendant struck in the intersection testified that she thought she saw a black object resembling a gun in defendant's hand after the collision, she acknowledged on cross-examination that she testified before the grand jury that she could not tell whether it was the driver or passenger of the vehicle whom she saw holding the black object.

"Intent to kill may be inferred from [a] defendant's conduct as well as the circumstances surrounding the crime" (*People v Price*, 35 AD3d 1230, 1231 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]). A person is criminally liable for the conduct of another that constitutes an offense " 'when, acting with the mental culpability required for the commission thereof, [they] solicit[ ], request[ ], command, importune[ ], or intentionally aid[ ] such person to engage in such conduct' " (*People v Ramos*, 218 AD3d 1113, 1113-1114 [4th Dept 2023], quoting Penal Law § 20.00 [emphasis omitted]). Here, the question is whether defendant shared the shooter's intent to kill or seriously injure the victim. Even assuming, arguendo, that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]), we conclude that the verdict is against the weight of the evidence with respect to counts 1, 2 and 3 of the indictment. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]) and considering that "a defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" (*Ramos*, 218 AD3d at 1114 [internal quotation marks omitted]), here the People failed to prove beyond a reasonable doubt that defendant "shared the [shooter's] intent to kill" or cause serious physical injury to the victim, or the intent to use the gun unlawfully against the victim (*People v McDonald*, 172 AD3d 1900, 1904 [4th Dept 2019]; *see generally People v Hawkins*, 192 AD3d 1637, 1640 [4th Dept 2021]), particularly given the lack of evidence "that defendant knew that the [shooter] was armed at the time defendant transported him" (*Ramos*, 218 AD3d at 1116).

We note that the evidence at trial established that the gun from which the shots were fired was small and, despite the permissible inferences, the evidence falls short of establishing beyond a reasonable doubt that defendant knew that the shooter was armed or that defendant purposely "position[ed] the vehicle to enable the [shooter] to get a clear shot at the victim" (*People v McGee*, 87 AD3d 1400, 1401 [4th Dept 2011], *affd* 20 NY3d 513 [2013]). Although defendant engaged in an argument with the driver of the vehicle he hit and then fled from the scene, such evidence does not establish beyond a reasonable doubt that defendant shared a "common purpose and a collective objective" with the passenger of his vehicle with respect to the shooting (*People v Cabey*, 85 NY2d 417, 422 [1995]; *see People v Payne*, 298 AD2d 937, 937 [4th Dept 2002]; *cf. People v Pietrocarlo*, 37 NY3d 1142, 1143 [2021]; *see generally People v Allah*, 71 NY2d 830, 832 [1988]). We therefore modify the judgment by reversing those parts convicting defendant of attempted murder in the second degree, attempted assault in the first degree, and criminal possession of a weapon in the second degree under of counts 1, 2 and 3 of the indictment and dismissing those counts of the indictment.

The remaining count of the indictment charges defendant with possessing a firearm outside of his home or place of business (Penal Law § 265.03 [3]). With respect to that count, we conclude that the conviction is supported by legally sufficient evidence (*see generally Bleakley*, 69 NY2d at 495) and that, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict on that count is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We further conclude, with respect to the remaining count of the indictment, that defendant failed to preserve for our review his contention that his conviction of that offense should be dismissed because Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) (*see People v Cabrera*, 41 NY3d 35, 42 [2023]; *People v Maddox*, 218 AD3d 1154, 1154-1155 [4th Dept 2023], *lv denied* 40 NY3d 1081 [2023]; *People v Jacque-Crews*, 213 AD3d 1335, 1335-1336 [4th Dept 2023], *lv denied* 39 NY3d 1111 [2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see generally People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006], *rearg denied* 7 NY3d 742 [2006]).

We reject defendant's contention that Supreme Court erred in denying his request for a circumstantial evidence charge. Where, as here, "there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" (*People v Hardy*, 26 NY3d 245, 249 [2015]; *see People v Slover*, 178 AD3d 1138, 1145 [3d Dept 2019], *lv denied* 34 NY3d 1163 [2020]). Finally, the sentence imposed on defendant's conviction, as modified by our determination, is not unduly harsh or severe.

All concur except BANNISTER and GREENWOOD, JJ., who dissent and vote to affirm in the following memorandum: Because we conclude that the

verdict is not against the weight of the evidence with respect to counts 1, 2 and 3 of the indictment, we respectfully dissent and would affirm the judgment. Defendant's conviction stems from an incident where he was driving down a one-way street in Rochester when his passenger (shooter) fired a gun several times at a parked vehicle on that street. There was a man (victim) sitting in the front passenger seat of the parked vehicle at the time, and he ran away upon hearing the gunshots. Defendant then drove off and collided with a vehicle at the end of the street. After a brief verbal encounter with the driver of that vehicle, defendant drove off again.

The majority agrees with defendant that the verdict is against the weight of the evidence with respect to counts 1, 2 and 3, charging, respectively, attempted murder in the second degree, attempted assault in the first degree, and criminal possession of a weapon in the second degree under Penal Law § 265.03 (1) (b), on whether defendant shared the shooter's intent. We cannot agree.

In determining whether a verdict is against the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). If so, "then [we] must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id.*, quoting *People ex rel. MacCracken v Miller*, 291 NY 55, 62 [1943]). Weight of the evidence review requires us to "affirmatively review the record; independently assess all of the proof; substitute [our] own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if [we] are not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 116-117 [2011]). In reviewing the evidence, we must "give due deference to the factfinder's resolution of witness credibility and conflicting evidence" (*People v Romero*, 7 NY3d 633, 643 [2006]).

Viewing the evidence in light of the elements of counts 1, 2 and 3 of the indictment 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 because defendant was a knowing accomplice to the attempted murder, attempted assault, and gun possession offenses charged under those counts of the indictment (*see People v Lewis-Bush*, 204 AD3d 1424, 1425 [4th Dept 2022], *lv denied* 38 NY3d 1072 [2022]). Defendant drove the vehicle while the shooter fired several times at the parked vehicle in which the victim was sitting in the front passenger seat, and the victim heard someone say "yo" as soon as the gunshots started. The police found the parked vehicle's driver's side windows shattered and shell casings on the ground next to the vehicle. A permissible and eminently reasonable inference from the facts was that defendant stopped or slowed down the vehicle in order to allow the shooter to fire several shots at the parked vehicle (*see People v McGee*, 87 AD3d 1400, 1401 [4th Dept 2011], *affd* 20 NY3d 513 [2013]). In other words, defendant shared the shooter's intent to use a gun to

kill or cause serious physical injury to the victim and "intentionally aid[ed]" the shooter to engage in such conduct (Penal Law § 20.00). In addition, defendant fled from the scene after the gunshots were fired and collided with another vehicle. The driver of that vehicle testified that, when she asked defendant to exchange paperwork and information, he told her to "move the f*** out of the way," before he pushed her vehicle with his vehicle and drove off again.

Although we agree with the majority that "a defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" (*People v Ramos*, 218 AD3d 1113, 1114 [4th Dept 2023] [internal quotation marks omitted]; *see generally People v Cabey*, 85 NY2d 417, 421 [1995]), defendant was not merely present at the crime scene but an active participant. Unlike in *Ramos* (218 AD3d at 1114-1115), *People v Hawkins* (192 AD3d 1637, 1638-1639 [4th Dept 2021]), and *People v McDonald* (172 AD3d 1900, 1902-1903 [4th Dept 2019]), all relied upon by the majority, the shooting in this case occurred while the shooter was *in the vehicle* driven by defendant, and the evidence showed that defendant and the shooter shared a " 'community of purpose' " (*People v Pietrocarlo*, 37 NY3d 1142, 1143 [2021]; *see People v Cabassa*, 79 NY2d 722, 728 [1992]). Although the majority notes that the People did not present evidence of the shooter's motive in firing at the victim, motive is not an element of the crimes at issue here (*see People v Caban*, 5 NY3d 143, 154 [2005]). Thus, even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Inasmuch as we conclude that the remaining contentions raised by defendant do not require reversal or modification of the judgment, we would affirm.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

157

KA 21-00537

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LISA DUMAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (PAUL J. WILLIAMS, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered March 17, 2021. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking a term of probation imposed after her plea of guilty of attempted robbery in the third degree (Penal Law §§ 110.00, 160.05). County Court sentenced defendant to an indeterminate term of imprisonment that is concurrent to a longer sentence imposed on defendant for an unrelated conviction. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid, as the People concede, and therefore does not preclude our review of her challenge to the severity of the sentence (*see People v Littles*, 221 AD3d 1592, 1592 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *People v Albanese*, 218 AD3d 1366, 1366-1367 [4th Dept 2023], *lv denied* 40 NY3d 995 [2023]), we conclude that the sentence is not unduly harsh or severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

167

KA 21-00682

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HILLARD SMITH, ALSO KNOWN AS MARK SMITH,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a resentence of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 9, 2020. Defendant was resentenced upon a conviction of manslaughter in the first degree, burglary in the first degree, menacing in the second degree (two counts), criminal possession of a weapon in the third degree (two counts), and criminal contempt in the first degree (two counts).

It is hereby ORDERED that the resentence so appealed from is unanimously modified on the law by directing that the sentence imposed on count 10 of the indictment shall run concurrently with the sentence imposed on count 9 of the indictment, and as modified the resentence is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of numerous offenses arising out of conduct that occurred on four separate dates, including two counts of manslaughter in the first degree (Penal Law § 125.20 [1]) and two counts each of criminal possession of a weapon in the third degree (§ 265.02 [1]) and criminal contempt in the first degree (§ 215.51 [b] [i]). Supreme Court subsequently resentenced defendant as a second violent felony offender. On defendant's appeal from the judgment of conviction, this Court modified the judgment by reversing it in part and dismissing two counts of the indictment, including one of the counts that resulted in a manslaughter conviction (*People v Smith* [appeal No. 1], 186 AD3d 1106 [4th Dept 2020]). On defendant's appeal from the resentence, this Court reversed the resentence, concluding that his prior conviction under North Carolina law did not constitute a predicate violent felony conviction, and remitted the matter for resentencing on the remaining counts (*People v Smith* [appeal No. 2], 186 AD3d 1106 [4th Dept 2020]). Defendant now appeals from that resentence.

As defendant contends and the People correctly concede, the court erred in directing that the sentence imposed for criminal contempt in the first degree under count 10 of the indictment run consecutively to the sentence imposed for criminal possession of a weapon in the third degree under count 9 of the indictment inasmuch as "the crime of [third] degree weapon possession was completed only upon the [violation of the order of protection]" at issue in the criminal contempt charge (*People v Wright*, 19 NY3d 359, 367 [2012]; *see generally People v Laureano*, 87 NY2d 640, 643 [1996]; *People v Day*, 73 NY2d 208, 210-211 [1989]). We therefore modify the resentence accordingly.

Defendant further contends that the resentence should be reduced in the interest of justice for various reasons, including the fact that this Court dismissed two of the 10 counts for which he was convicted and concluded that the court erred in determining that he was a second violent felony offender. We reject that contention. Although defendant received largely the same aggregate sentence following remittal, the resentence changed the indeterminate terms of incarceration imposed on counts 6, 7, 9, and 10 in accordance with this Court's determination that defendant was not a second violent felony offender. Although the resentencing court did not alter the sentence imposed on the remaining manslaughter conviction, we note that the sentence on that count represents the same maximum sentence that could have been imposed on anyone committing that crime, regardless of that person's predicate status. We also reject defendant's contention that the resentence is unduly harsh and severe. Defendant unlawfully entered a dwelling and stabbed the unarmed victim 12 times with a knife. In addition, he has numerous prior convictions, and the current conviction covers four separate and distinct offenses. Further, this Court's determination to dismiss the manslaughter conviction under count 2 of the indictment was not based on a determination that defendant was any less culpable, but rather was based on the fact that count 2 of the indictment, which charged defendant with murder in the second degree (Penal Law § 125.25 [1]) is a lesser included offense of murder in the first degree (§ 125.27 [1] [a] [vii]; [b]), the offense charged in count 1 of the indictment, and thus should have been considered only in the alternative (*see Smith* [appeal No. 1], 186 AD3d at 1108-1109). Inasmuch as defendant originally received concurrent sentences for those counts, we decline to conclude that the court's determination to impose the same sentence on count 1 is unduly harsh and severe.

Finally, we reject defendant's contention that he was denied effective assistance of counsel at the resentencing. Viewing the evidence, the law, and the circumstances of this resentencing, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

172

CA 23-01003

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

JAMES A. MONROE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EMILY A. MONROE, DEFENDANT-RESPONDENT.

LAWRENCE BROWN, BRIDGEPORT, FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Oswego County (Scott J. DelConte, J.), dated November 30, 2022, in a divorce action. The judgment, inter alia, equitably distributed the marital assets of the parties and awarded defendant maintenance.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part addressing the parties' obligations related to the mortgage on the marital residence and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: In this matrimonial action, plaintiff appeals from a judgment of divorce that, among other things, distributed marital property and awarded defendant maintenance. The parties were married in 2013, and plaintiff commenced this action in 2021. In 2019, during the course of the marriage, defendant received an inheritance from her grandfather, and the following year the parties purchased their marital residence for $160,000. Defendant used $125,000 of her inheritance to fund that purchase, with the balance covered by a mortgage. In order to secure the mortgage, plaintiff needed to prove to the bank that he had sufficient funds, so defendant provided him with a "gift letter" stating that she was giving him $125,000 "as an outright gift and not a loan in any form" and that the money was being given to him "for the purchase of [the marital residence]."

To the extent that plaintiff contends that Supreme Court erred in awarding defendant a separate credit of $125,000 for inherited funds she used to purchase the marital residence, he failed to preserve that contention for our review (*see Palumbo v Palumbo*, 134 AD3d 1423, 1424 [4th Dept 2015]). Indeed, plaintiff conceded at trial and in his proposed findings of fact that defendant was entitled to the separate credit awarded by the court, and the court noted the concession in its findings of fact and conclusions of law. In any event, the court's separate property determination is supported by the record (*see Pelcher v Czebatol*, 98 AD3d 1258, 1259 [4th Dept 2012]; *Salvato v Salvato*, 89 AD3d 1509, 1510 [4th Dept 2011], *lv denied* 18 NY3d 811

[2012]).

Plaintiff further contends that the court erred in determining that he should be solely responsible for the 27-year mortgage on the marital residence, less defendant's $20,000 share of the balance due. In particular, plaintiff asserts that the determination is akin to an award of maintenance and that its duration is thus subject to the constraints of Domestic Relations Law § 236 (B) (6) (f) (1). We reject that contention.

"The term 'maintenance' shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of [section 236 (B) (5-a) and (6)], to be paid at fixed intervals for a definite or indefinite period of time" (Domestic Relations Law § 236 [B] [1] [a]). While there are cases that have deemed mortgage payments a "form" of maintenance (*Behan v Kornstein*, 164 AD3d 1113, 1114 [1st Dept 2018], *lv dismissed in part & denied in part* 32 NY3d 1078 [2018]; *see Baker v Baker*, 206 AD2d 931, 932 [4th Dept 1994], *lv dismissed* 84 NY2d 1026 [1995], *cert denied* 514 US 1128 [1995]; *Matter of Frye v Brown*, 189 AD2d 1031, 1033 [3d Dept 1993]), this is not such a case.

Here, the court ordered plaintiff to pay *both* maintenance and the mortgage balance, less defendant's $20,000 share. We note that distributive awards and maintenance awards serve distinct purposes. "A distributive award is intended to reflect the equitable division of the marital assets between the parties, while maintenance is merely a payment awarded in the discretion of the court to a needy spouse . . . In view of these distinct purposes, [courts have] previously indicated that the treatment of a distributive award as maintenance is improper" (*Lipovsky v Lipovsky*, 271 AD2d 658, 659 [2d Dept 2000], *lv dismissed* 95 NY2d 886 [2000], *lv denied* 96 NY2d 712 [2001]; *see Buzzeo v Buzzeo*, 141 AD2d 490, 491 [2d Dept 1988]).

In our view, the determination to divide the mortgage balance equitably between the parties was intended as a distribution of marital debt, not a form of maintenance (*cf. Behan*, 164 AD3d at 1114; *Baker*, 206 AD2d at 932; *Frye*, 189 AD2d at 1033). The judgment of divorce required plaintiff to pay his portion of the mortgage balance within 60 days of entry of the judgment. Thus, contrary to plaintiff's contention, the requirement that he pay a portion of a mortgage was not an award spanning 27 years.

Plaintiff's further contention that the court erred in directing that he pay his share of the mortgage balance directly to defendant instead of to the bank misrepresents the judgment on appeal. The judgment directed that he pay his share of the mortgage balance "in bank certified funds to Defendant's Counsel payable" to counsel's law firm "within 60 days of the filing of the Judgment of Divorce." The judgment does not require plaintiff to pay defendant directly, nor does it permit defendant to use those funds for any purpose other than fulfilling plaintiff's obligation with respect to the mortgage.

Nevertheless, we conclude that the court erred in failing to

direct defendant to take measures to remove plaintiff's name from the mortgage upon his payment of his share of the mortgage balance. The judgment required the parties to "execute all documents necessary to transfer title to real estate and to comply with any other distribution," but it made no provision for plaintiff's name to be removed from the mortgage, even though defendant was receiving the home and was also responsible for a portion of the mortgage payments. We conclude that, once plaintiff made his payment—assuming, arguendo, that he made the payment as the judgment directed—he should have been relieved of any further obligation to the bank holding the mortgage. We therefore modify the judgment by vacating that part addressing the parties' obligations related to the mortgage on the marital residence, and we remit the matter to Supreme Court to calculate each party's share of the balance due on the mortgage.

Finally, we reject plaintiff's contention that the court erred in awarding defendant any maintenance or distribution due to her failure to file financial documentation. In the judgment, the court took note of defendant's failure to comply with her obligation to file such documentation when it declined to award her attorney's fees and costs and imputed income to her despite her lack of employment. Aside from the challenges to the distributive award addressed above, plaintiff does not attack the maintenance or distributive award as unfair or an abuse of discretion (*see generally Anastasi v Anastasi*, 207 AD3d 1131, 1131 [4th Dept 2022]). We therefore address only the court's authority to issue such awards despite defendant's failure to file the requisite financial documents to support those awards. Assuming, arguendo, that plaintiff's contention is preserved (*cf. Juhasz v Juhasz* [appeal No. 2], 92 AD3d 1209, 1211 [4th Dept 2012]), we conclude that, notwithstanding "[t]he lack of disclosure" (*Campbell v Campbell*, 72 AD3d 556, 557 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]), the court had "the opportunity to consider the parties' relative financial circumstances at the [trial]" (*Harold v Harold*, 133 AD3d 1376, 1378 [4th Dept 2015]). Indeed, the relevant facts related to the parties' financial circumstances were not disputed. We therefore see no basis to disturb the remainder of the court's determinations regarding equitable distribution and maintenance.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

184

KA 17-00394

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWON M. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 16, 2017. The judgment convicted defendant upon a jury verdict of predatory sexual assault against a child (three counts) and sexual abuse in the first 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 three counts of predatory sexual assault against a child (Penal Law § 130.96) and two counts of sexual abuse in the first degree (§ 130.65 [3]). Although defendant contends that his conviction is not supported by legally sufficient evidence, his general motion to dismiss at the close of the People's case did not preserve for our review any of his specific challenges on appeal (*see People v Bubis*, 204 AD3d 1492, 1493-1494 [4th Dept 2022], *lv denied* 38 NY3d 1149 [2022]). In any event, we conclude that the contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, 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 Bleakley*, 69 NY2d at 495).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

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

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

202

CA 22-00647

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

TERRI VIGLIETTA, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF BENEDICT VIGLIETTA,
DECEASED, PLAINTIFF,

V MEMORANDUM AND ORDER

ASBESTOS CORPORATION LIMITED, ET AL., DEFENDANTS,
AND HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.

OCCIDENTAL CHEMICAL CORPORATION, NONPARTY-RESPONDENT.
(APPEAL NO. 1.)

CLYDE & CO US LLP, NEW YORK CITY (PETER J. DINUNZIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOSHUA GLASGOW OF COUNSEL), FOR NONPARTY-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered April 21, 2022. The order, insofar as appealed from, granted the motion of nonparty Occidental Chemical Corporation to quash a subpoena issued to it by defendant Hedman Resources Limited.

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

Memorandum: Defendant Hedman Resources Limited (Hedman) appeals from an order insofar as it granted the motion of nonparty Occidental Chemical Corporation (OCC) to quash a subpoena served on OCC by Hedman. During the pendency of this appeal, this matter proceeded to trial, the jury returned a verdict against Hedman and another party, and Hedman appealed from the judgment.

The appeal from the order must be dismissed inasmuch as the order is subsumed in the final judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Knapp v Finger Lakes NY, Inc.*, 184 AD3d 335, 337 [4th Dept 2020]; *Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see generally* CPLR 5501 [a] [1]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

207

CA 23-00749

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

TERRI VIGLIETTA, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF BENEDICT VIGLIETTA,
DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ASBESTOS CORPORATION LIMITED, ET AL., DEFENDANTS,
AND HEDMAN RESOURCES LIMITED, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CLYDE & CO LLP, NEW YORK CITY (PETER J. DINUNZIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BELLUCK & FOX, LLP, NEW YORK CITY (SETH A. DYMOND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Deborah A. Chimes, J.), entered December 21, 2022. The judgment awarded plaintiff money damages against defendant Hedman Resources Limited.

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

Memorandum: Decedent and his spouse, plaintiff Terri Viglietta, commenced this action seeking damages for injuries that decedent suffered as a result of his alleged exposure in the 1970s to asbestos while he was employed by a predecessor-in-interest of Occidental Chemical Corporation (OCC), a nonparty to this action. Defendant Hedman Resources Limited (Hedman), which supplied products containing chrysotile asbestos to decedent's employer, served a subpoena on OCC requiring it to produce a representative to testify at trial about various topics related to the alleged asbestos exposure. OCC moved to quash the subpoena, and Supreme Court granted that motion. After a trial, the jury returned a verdict against Hedman and another party. Hedman appeals from the judgment awarding damages against it.

Whether to quash a subpoena against a nonparty "rests within the sound discretion of the court to which application is made" (*Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032 [1984]; *see also Reus v ETC Hous. Corp.*, 203 AD3d 1281, 1283 [3d Dept 2022], *lv dismissed* 39 NY3d 1059 [2023]). Nevertheless, we may substitute our discretion for that of the trial court in discovery matters even in the absence of an abuse of discretion (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43,

52-53 [1999]).

"An application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] [internal quotation marks omitted]). The burden is on the party seeking to quash the subpoena to make such a showing (*see Kimmel v State of New York*, 76 AD3d 188, 197-198 [4th Dept 2010], *affd* 29 NY3d 386 [2017]; *Kapon*, 23 NY3d at 39; *Barber v BorgWarner, Inc.*, 174 AD3d 1377, 1378 [4th Dept 2019], *lv denied* 34 NY3d 986 [2019]).

We reject Hedman's contention that the court erred in granting OCC's motion to quash. Here, Hedman served a subpoena seeking testimony from a witness with knowledge of events that took place about 50 years earlier. Moreover, OCC is not a party and Hedman lacked the ability to apportion any liability to OCC (*see* CPLR 1601 [1]; Workers' Compensation Law § 11; *see generally Castro v United Container Mach. Group*, 96 NY2d 398, 401 [2001]; *Pilato v Nigel Enters., Inc.*, 48 AD3d 1133, 1135 [4th Dept 2008]). The court properly determined that, to the limited extent that any of the topics addressed in the subpoena were relevant to decedent's culpable conduct, OCC's only obligation under the subpoena was to produce a witness under its control with knowledge of the relevant material, and no such witness existed (*see generally Matter of Standard Fruit & S. S. Co. v Waterfront Commn. of N.Y. Harbor*, 43 NY2d 11, 15-16 [1977]).

Next, we reject Hedman's contention that the court erred in denying its request for a jury instruction that decedent's employer could be considered an intervening cause of decedent's injuries because of its failure to warn its employees of, and protect them from, the hazards of asbestos-containing materials. Hedman advertised its product as being "non-asbestos" and safer than "straight asbestos," and argued at trial that its warnings were adequate. Under those circumstances, we conclude as a matter of law that the alleged failure of decedent's employer was not an act that "is of such an extraordinary nature or so attenuates [Hedman's] negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to [Hedman]" (*Williams v Tennien*, 294 AD2d 841, 842 [4th Dept 2002]; *see Kush v City of Buffalo*, 59 NY2d 26, 33 [1983]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980], *rearg denied* 52 NY2d 784 [1980]).

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

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

215

KA 22-01400

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK YEARA, DEFENDANT-APPELLANT.

ANDREW D. CORREIA, PUBLIC DEFENDER, LYONS (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTINE CALLANAN, ACTING DISTRICT ATTORNEY, LYONS (CATHERINE A. MONIKOTZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered April 7, 2022. The judgment convicted defendant, upon a guilty plea, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of robbery in the first degree (Penal Law § 160.15 [3]). We affirm.

Defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and the valid waiver encompasses his challenges to County Court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Giles*, 219 AD3d 1706, 1707 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]) and to the severity of his sentence (*see People v Lollie*, 204 AD3d 1430, 1431 [4th Dept 2022], *lv denied* 38 NY3d 1134 [2022]). We note that, although the written waiver form executed by defendant incorrectly portrays the waiver as an absolute bar to the taking of an appeal (*see generally People v Thomas*, 34 NY3d 545, 564-567 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]), the oral colloquy, "which followed the appropriate model colloquy, cured that defect" (*People v Clark*, 221 AD3d 1550, 1551 [4th Dept 2023]).

Defendant also contends that the court erred in denying defense counsel's request for a competency examination of defendant pursuant to CPL 730.30. That contention "survives the plea and the valid waiver of the right to appeal to the extent that it implicates the voluntariness of the plea" (*People v Chapman*, 179 AD3d 1526, 1527 [4th Dept 2020], *lv denied* 35 NY3d 968 [2020]; *see generally Lopez*, 6 NY3d at 255). Nevertheless, we reject defendant's contention. A court

must issue an order of examination "when it is of the opinion that the defendant may be an incapacitated person" (CPL 730.30 [1]). "The determination whether to order a competency examination, either sua sponte or upon defense counsel's request, lies within the sound discretion of the court" (*People v Thorpe*, 218 AD3d 1124, 1125 [4th Dept 2023], citing *People v Morgan*, 87 NY2d 878, 879-880 [1995]). Here, we conclude that the court did not abuse its discretion in denying the request inasmuch as the court had ample opportunity to observe defendant prior to that request and the record supports its determination that defendant demonstrated an understanding of the proceedings and had the ability to assist in his own defense (*see Thorpe*, 218 AD3d at 1125; *People v Watson*, 45 AD3d 1342, 1344 [4th Dept 2007], *lv denied* 10 NY3d 818 [2008]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

222

CA 23-00039

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

ECHO FORD, ALSO KNOWN AS HONG JU WANG
AND J. MARK FORD, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FAYEZ CHAHFE, M.D., CHAHFE MEDICAL PROFESSIONAL
RECRUITMENT, LLC, TANYA PERKINS-MWANTUALI, M.D.,
EAST UTICA MEDICAL GROUP, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

PORTER LAW GROUP, SYRACUSE (MICHAEL S. PORTER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E. PATTON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS FAYEZ CHAHFE, M.D. AND CHAHFE MEDICAL PROFESSIONAL RECRUITMENT, LLC.

GALE GALE & HUNT, LLC, FAYETTEVILLE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TANYA PERKINS-MWANTUALI, M.D. AND EAST UTICA MEDICAL GROUP.

Appeal from an order of the Supreme Court, Oneida County (Gregory R. Gilbert, J.), entered November 22, 2022. The order denied the motion of plaintiffs to set aside the jury verdict.

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

Memorandum: Plaintiffs appeal from an order denying their motion to set aside the jury verdict. "The right to appeal from an intermediate order terminates with the entry of a final judgment" (*Deuser v Precision Constr. & Dev., Inc.*, 149 AD3d 1540, 1540 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Aho*, 39 NY2d 241, 248 [1976]; *see generally* CPLR 5501 [a] [1]). Here, because a final judgment in this action was entered on December 27, 2022, plaintiffs' appeal from the intermediate order must be dismissed (*see McCann v Gordon*, 204 AD3d 1449, 1449 [4th Dept 2022], *appeal dismissed* 38 NY3d 1158 [2022]; *Deuser*, 149 AD3d at 1540). Plaintiffs may raise their contentions in an appeal from the final judgment (*see McDonough v Transit Rd. Apts., LLC*, 164 AD3d 1603, 1603 [4th Dept 2018]; *see*

generally Chase Manhattan Bank, N.A. v Roberts & Roberts, 63 AD2d 566, 567 [1st Dept 1978]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

234

KA 21-01595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL C. CAIN, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 28, 2021. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). We affirm.

The evidence at trial established that defendant stabbed the victim—his brother—after accusing his girlfriend of cheating on him with the victim. On the night of the incident, the victim came over to the apartment where defendant and his girlfriend lived. Defendant had hidden knives around the apartment prior to the victim's arrival and, after the victim arrived, defendant began arguing with his girlfriend about her alleged cheating and, when the victim tried to intervene, stabbed the victim multiple times. Thereafter, defendant, inter alia, prevented the victim from calling 911 and threatened to hurt himself when his girlfriend and another person present attempted to call 911, before finally calling 911 himself.

Contrary to defendant's contention, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to disprove defendant's justification defense beyond a reasonable doubt (*see People v Walker*, 168 AD2d 983, 983 [4th Dept 1990], *lv denied* 77 NY2d 883 [1991]), and to establish that defendant had the requisite intent for each count (*see People v White*, 202 AD3d 1481,

1482 [4th Dept 2022], *lv denied* 38 NY3d 1036 [2022]; *see also People v Madore*, 145 AD3d 1440, 1440 [4th Dept 2016], *lv denied* 29 NY3d 1034 [2017]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, 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]), including the charge on the defense of justification, we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Wolf*, 16 AD3d 1167, 1168 [4th Dept 2005]).

Further, we conclude that "[d]efendant's challenge to [County Court's] suppression ruling is academic because the statements that the court refused to suppress were not introduced at trial" (*People v Nevins*, 16 AD3d 1046, 1048 [4th Dept 2005], *lv denied* 4 NY3d 889 [2005], *cert denied* 548 US 911 [2006]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

246

CA 23-00172

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

JEBADIAH S. WORDEN AND REBECCA WORDEN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF UTICA, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

HARDING MAZZOTTI, LLP, ALBANY (PETER P. BALOUSKAS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (ZACHARY C. OREN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered December 21, 2022. The order granted the motion of defendant City of Utica for summary judgment dismissing 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 denied, and the complaint is reinstated against defendant City of Utica.

Memorandum: In this personal injury action, plaintiffs appeal from an order that granted the motion of the City of Utica (defendant) for summary judgment dismissing the complaint against it. We reverse.

At the outset of the action, Supreme Court issued a stipulated scheduling order, which provided that any summary judgment motions must be made within 120 days of the filing of the note of issue (*see* CPLR 3212 [a]). Following depositions and discovery, the note of issue was filed on April 14, 2022. Thus, the 120-day deadline expired on August 12, 2022. However, defendant did not move for summary judgment until August 23, 2022, 11 days beyond the deadline.

Defendant's motion was therefore untimely (*see Brill v City of New York*, 2 NY3d 648, 651 [2004]; *Lozzi v Fuller Rd. Mgt. Corp.*, 175 AD3d 1815, 1816 [4th Dept 2019]; *Mitchell v City of Geneva*, 158 AD3d 1169, 1169 [4th Dept 2018]; *see generally* CPLR 3212 [a]) and, thus, defendant was required to demonstrate "good cause" for the untimeliness of the motion in its initial motion papers (CPLR 3212 [a]; *see Brill*, 2 NY3d at 652; *Mitchell*, 158 AD3d at 1169). Indeed, "[i]t is well settled that it is improper for a court to consider the 'good cause' proffered by a movant if it is presented for the first

time in reply papers" (*Mitchell*, 158 AD3d at 1169; *see Lozzi*, 175 AD3d at 1816; *Bissell v New York State Dept. of Transp.*, 122 AD3d 1434, 1434-1435 [4th Dept 2014]). Inasmuch as it is undisputed here that defendant did not proffer any good cause for the delay in its initial motion papers, the court erred in considering the motion and should have denied it as untimely (*see Lozzi*, 175 AD3d at 1816; *Bissell*, 122 AD3d at 1434; *see generally Brill*, 2 NY3d at 652-654).

Plaintiffs' remaining contentions are academic in light of our determination.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

253

KA 22-01986

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. LYON, DEFENDANT-APPELLANT.

NICHOLAS A. PASSALACQUA, UTICA, FOR DEFENDANT-APPELLANT.

TODD C. CARVILLE, DISTRICT ATTORNEY, UTICA (DAWN CATERA LUPI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered September 19, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the third degree (two counts) and rape in the third degree (four counts).

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

Memorandum: In this prosecution arising from multiple incidents in which defendant separately engaged in sexual activity with two teenage female victims, defendant appeals from a judgment convicting him, upon his plea of guilty, of four counts of rape in the third degree (Penal Law § 130.25 [2]) and two counts of criminal sexual act in the third degree (§ 130.40 [2]). We affirm.

Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Tennant*, 217 AD3d 1564, 1564 [4th Dept 2023]; *see generally People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]) and therefore does not preclude our review of his contention that he was denied his statutory right to a speedy trial (*cf. People v Paduano*, 84 AD3d 1730, 1730 [4th Dept 2011]), we conclude that defendant's contention lacks merit. Although counts 11-14 of the indictment were based on the same incident of sexual activity between defendant and the first victim as alleged in the earlier filed felony complaint, the remaining counts in the indictment were not "based upon several groups of acts 'so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident' " (*People v Stone*, 265 AD2d 891, 892 [4th Dept 1999], *lv denied* 94 NY2d 907 [2000]) inasmuch as counts 1-10 charged defendant for conduct arising from "separate and distinct" incidents of sexual activity with the first victim that preceded the incident that was the subject of the felony complaint and counts 15-27 charged defendant for conduct arising from "separate and

distinct" incidents of sexual activity with the second victim that were not the subject of the felony complaint (*People v Lowman*, 103 AD3d 976, 977 [3d Dept 2013]; *see People v Crowell*, 130 AD3d 1362, 1362-1365 [3d Dept 2015], *lv denied* 26 NY3d 1144 [2016], *cert denied* 580 US 1202 [2017]; *People v Sant*, 120 AD3d 517, 517-519 [2d Dept 2014]; *People v Fehr*, 45 AD3d 920, 920-922 [3d Dept 2007], *lv denied* 10 NY3d 764 [2008]). Consequently, County Court properly dismissed counts 11-14 of the indictment inasmuch as those counts related back for purposes of CPL 30.30 (1) (a) to the filing of the felony complaint and the People were not ready for trial within the requisite time period; however, contrary to defendant's contention, the court properly refused to dismiss counts 1-10 and counts 15-27 because those counts related back to the filing of the indictment and it is uncontested that the People were thereafter ready for trial within the requisite time period with respect to those counts (*see Lowman*, 103 AD3d at 977-978; *see also Crowell*, 130 AD3d at 1365).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

257

CAF 22-01988

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

IN THE MATTER OF CHRISTIAN JONES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LATOYA BROWN, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered November 30, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner primary physical custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, among other things, granted petitioner father's amended petition to modify a prior custody order by, inter alia, awarding the father primary physical custody of the two subject children.

"Where an order of custody and visitation is entered on stipulation, a petitioner seeking to modify the prior order has the burden of establishing a change in circumstances since the time of the stipulation sufficient to warrant an inquiry into whether a [modification of the prior order] is in the child[ren]'s best interests" (*Matter of Luce v Buehlman*, 218 AD3d 1243, 1243 [4th Dept 2023], *lv denied* 40 NY3d 908 [2023] [internal quotation marks omitted]). Upon determining that there has been a change in circumstances, Family Court "must consider whether the requested modification is in the best interests of the child[ren]" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011]).

Contrary to the mother's contention, the father established a change in circumstances sufficient to warrant an inquiry into the children's best interests. Among other things, the testimony at the hearing established that the relationship between the parties had deteriorated, that the mother's housing situation had changed, and that one of the children had expressed a desire to modify the existing

custody arrangement (*see generally Matter of Johnson v Johnson* [appeal No. 2], 209 AD3d 1314, 1315 [4th Dept 2022]; *Matter of Cheney v Cheney*, 118 AD3d 1358, 1359 [4th Dept 2014]; *Matter of Amy L.M. v Kevin M.M.*, 31 AD3d 1224, 1225 [4th Dept 2006]).

We likewise reject the mother's contention that the court's modification of the prior custody order is not in the best interests of the children. As an initial matter, although "the record demonstrates that the court weighed the appropriate factors in making its custody determination" (*Matter of Hochreiter v Williams*, 201 AD3d 1303, 1304 [4th Dept 2022]), the court's order does not, on its face, make a best interests determination. Nevertheless, our authority in custody determinations is as broad as that of Family Court, and " 'where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child[ren]' " (*Matter of Alwardt v Connolly*, 183 AD3d 1252, 1253 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]).

Upon our review of the relevant factors (*see generally Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]), we conclude that the modifications to the prior custody order set forth in the order appealed from are in the best interests of the children. Among other things, the record reflects that the original custodial relationship had broken down and the father could provide a more stable home environment, as demonstrated by evidence that the mother temporarily became homeless and that one of the children asked to stay with the father during the mother's parenting time. Further, although both parents appear fit and loving, the father has greater financial stability, and was the only parent willing and able to pay for and drive the children to certain extracurricular activities. Additionally, the desire of the oldest of the two children to modify the prior custody order is " 'entitled to great weight, particularly where . . . [her] age and maturity . . . make [her] input particularly meaningful' " (*Sheridan v Sheridan*, 129 AD3d 1567, 1568 [4th Dept 2015]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

259

CA 23-00665

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

BARBARA PAGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GPK, LLC, AND BUFFALO FLEECE AND OUTERWEAR, LLC,
DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANT-APPELLANT GPK, LLC.

MANSON & MCCARTHY, BUFFALO (KELLY J. PHILIPS OF COUNSEL), FOR DEFENDANT-APPELLANT BUFFALO FLEECE AND OUTERWEAR, LLC.

WEBSTER SZANYI LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 23, 2023. The order denied the motions of defendants for summary judgment and denied the joint motion of defendants to, inter alia, strike plaintiff's errata sheet.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants to the extent that it seeks to strike plaintiff's errata sheet, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she allegedly sustained when she slipped and fell on snow and ice that had accumulated on the sidewalk of 758 Elmwood Avenue, which is owned by defendant GPK, LLC and leased by defendant Buffalo Fleece and Outerwear, LLC (Buffalo Fleece). Defendants separately moved for summary judgment dismissing the complaint and all cross-claims against them based on, inter alia, plaintiff's deposition testimony that the accident occurred in front of a property that is located at 750 Elmwood Avenue that was not owned, leased or maintained by defendants. Defendants also jointly moved for, inter alia, an order striking plaintiff's errata sheet, which plaintiff submitted after her deposition testimony. Defendants now appeal from an order that denied the motions.

Contrary to defendants' contentions, in their respective motions for summary judgment dismissing the complaint they failed to meet their prima facie burdens of establishing as a matter of law that

plaintiff slipped and fell on the sidewalk at 750 Elmwood Avenue, and not on the sidewalk abutting defendants' property (*see Martinez v Contreras*, 216 AD3d 532, 532 [1st Dept 2023]). In support of their motions defendants submitted plaintiff's deposition testimony, during which Buffalo Fleece's attorney showed plaintiff a photograph depicting 750 Elmwood Avenue, and plaintiff identified the photograph as the location of her fall. Plaintiff, however, later testified upon questioning by her own attorney that she fell at 758 Elmwood Avenue and she identified photographs of the sidewalk in front of that address as the location of the incident. Thus, plaintiff's deposition testimony raises a question of fact with respect to the location where she fell. Therefore, defendants did not meet their initial burden on their motions, and the burden did not shift to plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Further, even if defendants met their initial burdens on their motions for summary judgment, plaintiff's submissions in opposition are sufficient to raise an issue of fact with respect to the location of the accident. Plaintiff averred in her affidavit that, when she was shown the photograph of 750 Elmwood Avenue, she wrongly assumed that she was being shown a photograph that had been previously circulated in the case. She further asserted that the photographs shown to her by her own attorney at the deposition refreshed her recollection regarding where she fell. Additionally, she asserted that the photograph shown to her by Buffalo Fleece's attorney depicted where the ambulance that responded to the scene was parked and where she was then loaded into the ambulance. Thus, plaintiff's affidavit provided an explanation for the inconsistencies in her deposition testimony and raised an issue of fact with respect to the location of her fall (*see Martinez*, 216 AD3d at 532-533).

We agree with defendants, however, that Supreme Court erred in denying their joint motion to the extent that it seeks to strike plaintiff's errata sheet inasmuch as the errata sheet was untimely (*see* CPLR 3116 [a]). We therefore modify the order accordingly. CPLR 3116 (a) provides, in relevant part, that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." It is undisputed that plaintiff did not submit the errata sheet within 60 days of her deposition, and submitted it over a month after the 60-day period expired, in opposition to defendants' motions for summary judgment. Plaintiff's reasons for the lateness under the circumstances did not constitute a good cause for the delay (*see* CPLR 2004; *Zamir v Hilton Hotels Corp.*, 304 AD2d 493, 493-494 [1st Dept 2003]; *see generally Horn v 197 5th Ave. Corp.*, 123 AD3d 768, 770 [2d Dept 2014]). We note that we did not consider the errata sheet when reviewing defendants' contentions regarding their motions for summary judgment.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

263

CA 22-01732

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

BARBARA KEEM, INDIVIDUALLY AND AS EXECUTOR
OF THE ESTATE OF JAMES KEEM, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FORD MOTOR COMPANY, PIONEER FORD-MERCURY, INC.
AND TOWNE FORD, INC., DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (MARC C. PANEPINTO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (RICHARD J. MONTES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 19, 2022. The order, insofar as appealed from, granted those parts of the motion of defendant Ford Motor Company seeking summary judgment dismissing the second, third and sixth causes of action against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Ford Motor Company is denied in part and the second, third and sixth causes of action against it are reinstated.

Memorandum: In this action, plaintiff, individually and as executor of the estate of her late husband James Keem (decedent), seeks damages for injuries sustained by decedent when the airbag of his Ford Explorer, manufactured by defendant Ford Motor Company (Ford Motor), unexpectedly deployed. Just prior to the airbag's deployment, decedent's vehicle had collided with a deer. After the collision, decedent parked his vehicle on the side of the road, then he looked to his right to check on his passengers in the vehicle and looked to the left to see the deer. At that point the airbag deployed. Plaintiff alleges, inter alia, that decedent's injuries were caused by Ford Motor's defective design and manufacture of the vehicle. Plaintiff appeals from an order that, inter alia, granted Ford Motor's motion for summary judgment dismissing the complaint against it. We reverse the order insofar as appealed from and conclude that Supreme Court erred in granting those parts of the motion seeking to dismiss the causes of actions sounding in strict products liability and negligence with respect to, inter alia, the design and manufacture of the vehicle.

We note at the outset that plaintiff does not address in her brief the propriety of the dismissal of the complaint against defendants Pioneer Ford-Mercury, Inc. and Towne Ford, Inc. and thus is deemed to have abandoned any issue with respect to the dismissal of the complaint against those defendants (*see Mills v Raycom Media, Inc.*, 34 AD3d 1352, 1352 [4th Dept 2006]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). We further note that plaintiff does not raise any contentions in her brief with respect to the first cause of action, for breach of implied warranty against Ford Motor, and therefore has abandoned any issues concerning the dismissal of that cause of action (*see Cassatt v Zimmer, Inc.*, 161 AD3d 1549, 1550 [4th Dept 2018]; *Ciesinski*, 202 AD2d at 984).

We agree with plaintiff that Ford Motor failed to meet its burden on the motion with respect to the strict products liability and negligence causes of action. It is well settled that a strict products liability cause of action may be established by circumstantial evidence, and thus a plaintiff " 'is not required to prove the specific defect' " in the product (*Speller v Sears, Roebuck & Co.*, 100 NY2d 38, 41 [2003]; *see Codling v Paglia*, 32 NY2d 330, 337 [1973]; *Saunders v Farm Fans, div. of ffi Corp.*, 24 AD3d 1173, 1175-1176 [4th Dept 2005]). "In order to proceed in the absence of evidence identifying a specific flaw, a plaintiff must prove that the product did not perform as intended and exclude all other causes for the product's failure that are not attributable to defendants" (*Speller*, 100 NY2d at 41). " 'Proof that will establish strict liability will almost always establish negligence' " (*Saunders*, 24 AD3d at 1174-1175).

Here, in support of its motion, Ford Motor submitted decedent's deposition testimony in which he stated that the airbag did not deploy until after the collision with the deer and after decedent parked his vehicle on the side of the road. Although the airbag system was not available for testing and inspection after the accident, and thus Ford Motor was unable to provide an expert opinion based upon an examination of the system, Ford Motor submitted the affidavit and deposition testimony of its expert, who testified that the supplemental safety systems and frontal crash deployable devices of the vehicle, including the airbag system, were not defective at the time of the sale of the vehicle, and that those systems were designed and manufactured in compliance with applicable industry standards. Ford Motor's expert further stated that he believed that the airbag operated and deployed properly during the collision with the deer and he was not aware of any design or manufacturing defect through which the unexpected deployment of the airbag would happen. However, Ford Motor's expert failed to assert that there existed a likely cause of the unexpected deployment of the airbag that was "not attributable to any defect in the design or manufacturing of the product," and therefore Ford Motor failed to meet its burden on its motion with respect to the strict products liability and negligence causes of action (*Koslow v Zenith Electronics Corp.*, 45 AD3d 810, 810-811 [2d Dept 2007]; *see Saunders*, 24 AD3d at 1175; *cf. Speller*, 100 NY2d at 42; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Inasmuch as Ford Motor failed to establish its prima facie

entitlement to judgment as a matter of law, we need not consider the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In light of our determination, we need not address plaintiff's remaining contention.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

272

KA 21-00629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHANIEL BAKER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered March 3, 2021. The judgment convicted defendant, upon a guilty plea, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [4]), defendant contends that the waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Seay*, 201 AD3d 1361, 1361-1362 [4th Dept 2022]), we conclude that the sentence is not unduly harsh or severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

304

CA 23-01291

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

GABRIELLE J. DIDOMENICO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JACOB D. MCWHORTER, DEFENDANT-RESPONDENT.

MCMAHON KUBLICK, P.C., SYRACUSE (W. ROBERT TAYLOR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), dated January 26, 2023. 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 reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when the vehicle in which she was a passenger was struck in an intersection by a vehicle operated by defendant. Supreme Court granted defendant's motion for summary judgment dismissing the complaint on the ground that a release signed by plaintiff after the motor vehicle accident barred her action against him. Plaintiff contends on appeal that the court erred in granting the motion because there is an issue of fact whether the release was the result of mutual mistake. We agree.

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release . . . If the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [internal quotation marks omitted]). "A release 'should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice' " (*id.*, quoting *Mangini v McClurg*, 24 NY2d 556, 563 [1969]). Thus, "[a] release may be invalidated . . . for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake' " (*id.*, quoting *Mangini*, 24 NY2d at 563). "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed

release 'shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release' " (*id.*, quoting *Fleming v Ponziani*, 24 NY2d 105, 111 [1969]).

"[W]here, as here, the release is challenged on the ground of mutual mistake, the party challenging it 'must sustain the [ultimate] burden of persuasion if [that party] is to establish that the general language of the release, valid on its face and properly executed, is to be limited because of a mutual mistake, or otherwise does not represent the intent of the parties' " (*Pressley v Rochester City School Dist.*, 234 AD2d 998, 998 [4th Dept 1996], quoting *Mangini*, 24 NY2d at 563; *see* 2B PJI3d 4:11 at 213-214, 220-221 [2023]). "[I]n resolving claims of mutual mistake as to injury at the time of release, there has been delineated a sharp distinction between injuries unknown to the parties and mistake as to the consequence of a known injury" (*Mangini*, 24 NY2d at 564; *see Schroeder v Connelly*, 46 AD3d 1439, 1440 [4th Dept 2007]). "A mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release" (*Mangini*, 24 NY2d at 564; *see Schroeder*, 46 AD3d at 1440). By contrast, "[i]f the injury is known, and the mistake . . . is merely as to the consequence, future course, or sequelae of [the] known injury, then the release will stand" (*Mangini*, 24 NY2d at 564). "Even where a releasor has knowledge of the causative trauma, . . . there must be actual knowledge of the injury. Knowledge of injury to an area of the body cannot cover injury of a different type and gravity" (*id.* at 565; *see Schroeder*, 46 AD3d at 1440; *O'Neal v Life Science Labs., Inc.*, 23 AD3d 1024, 1024-1025 [4th Dept 2005]).

Here, it is uncontested that defendant met his initial burden of establishing that he had been released from the claims against him by submitting the executed release in support of his motion (*see Bronson v Hansel*, 16 NY3d 850, 851 [2011]; *Himmelsbach v George*, 70 AD3d 1461, 1461-1462 [4th Dept 2010], *lv denied* 15 NY3d 705 [2010]). Nonetheless, viewing the evidentiary submissions in the light most favorable to plaintiff as the nonmoving party (*see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]), we agree with plaintiff that she raised an issue of fact whether the release was the result of mutual mistake (*see Mangini*, 24 NY2d at 560, 565-566; *Schroeder*, 46 AD3d at 1440-1441; *O'Neal*, 23 AD3d at 1024-1025; *Paige v City of Buffalo*, 300 AD2d 1001, 1002 [4th Dept 2002]).

The submissions establish that, beginning days after the accident and during an approximately two-week period prior to signing the release, plaintiff had four appointments with her chiropractor during which she complained of symptoms including problems with sleeping, fatigue, ringing in the ears, anxiety, stiffness in the neck, fullness in the head and neck, headaches, pain in the mid- and low-back, and neck pain. Following the collection of such subjective complaints and performance of a battery of objective tests, the chiropractor rendered diagnoses of whiplash, cervicalgia, and segmental and somatic dysfunction of the cervical, thoracic, and lumbar regions, and the chiropractor opined that plaintiff had a favorable prognosis.

However, "[t]he favorable prognosis of recovery was apparently made on th[e] erroneous assumption" that plaintiff's pain and other symptoms were attributable to the diagnosed neck and back injuries (*Mangini*, 24 NY2d at 565). While the chiropractor made a single passing reference in the medical record of the first visit that plaintiff presented with a concussion, the diagnosis and treatment of a concussion is outside the scope of professional practice for a chiropractor, and the chiropractor neither referenced a concussion in the medical records of the three additional visits conducted before plaintiff signed the release nor referred plaintiff to an appropriate medical provider for such a condition (*see* Education Law § 6551 [1]; NY St Educ Dept, Off of the Professions, Practice Alerts for Chiropractic—Practice of Treating Concussion).

Moreover, the medical records submitted by plaintiff indicate that, even after she signed the release, medical professionals remained unsure whether she had sustained a concussion in the accident. Specifically, after plaintiff presented at a hospital emergency department with increased head pain and nausea nine days after she signed the release and underwent evaluation and testing, the medical provider at the hospital opined that it was "possible" that plaintiff was suffering from "a postconcussive type syndrome," but that it remained "not quite clear" whether such a diagnosis was warranted. At the recommendation of the medical provider at the hospital, plaintiff subsequently followed up with a neurologist and, two weeks after plaintiff had signed the release, plaintiff was diagnosed for the first time with postconcussion syndrome (*see Schroeder*, 46 AD3d at 1440). Later treatment at a concussion clinic confirmed that plaintiff had sustained a mild traumatic brain injury at the time of the accident.

Consequently, inasmuch as the submissions indicate that plaintiff had been diagnosed with neck and back injuries only at the time she signed the release and that plaintiff's symptoms were not medically attributed to postconcussive syndrome until after the execution of the release with additional uncertainty in the interim, we conclude that plaintiff raised an issue of fact whether, at the time the release was executed, the parties were under "[a] mistaken belief as to the nonexistence of [a] presently existing injury," i.e., a traumatic brain injury (*Mangini*, 24 NY2d at 564; *see Schroeder*, 46 AD3d at 1440-1441; *O'Neal*, 23 AD3d at 1024-1025; *Paige*, 300 AD2d at 1002; *cf. Himmelsbach*, 70 AD3d at 1462). We therefore reverse the order, deny the motion, and reinstate the complaint.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

316

CAF 22-01699

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ANTONIO S.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTY K., RESPONDENT,
AND RENE G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JACQUELINE MOHRMAN, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Rene G. had neglected the subject child.

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

Memorandum: In these proceedings pursuant to Family Court Act article 10, Rene G. (respondent) appeals in appeal Nos. 1 through 5 from orders of disposition that, inter alia, adjudged that he neglected the subject children.

Respondent contends in all five appeals that Family Court erred in finding that he neglected the children because there was no evidence that the children's physical, mental, or emotional well-being was impaired or in danger of becoming impaired as a result of his conduct. We reject that contention. "[A] party seeking to establish neglect must show, by a preponderance of the evidence . . . , first, that [the] child[ren's] physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). In certain situations, "[t]he exposure of the child[ren] to domestic violence between the [parties] may form the basis for a finding of

neglect" (*Matter of Michael G.*, 300 AD2d 1144, 1144 [4th Dept 2002]; *see Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]).

Here, the evidence established that the children's mother was stabbed in the leg during an altercation with respondent. The children were present at the scene when police arrived; the children appeared scared and saw their mother bleeding and taken away in an ambulance. Although it was unclear whether the children were awake at the time of the altercation itself or whether they witnessed it, two of the children at some point went down the street to get help from their aunt. One child later told the caseworker that he knew that the mother was hurt and that she needed help that night; a second child knew that the dining room table had been broken during the incident. According to respondent's own testimony, the two youngest children were also home at the time of the incident. The children were also present during a subsequent incident in which respondent climbed into the mother's house through a window, in violation of a no-contact order of protection, and had an altercation with the mother. One of the children was injured during that altercation, and respondent was thereafter charged with criminal contempt and endangering the welfare of a child. Respondent was arrested at the house again several months later, an event witnessed by at least some of the children.

Thus, we conclude that the evidence established that the children's emotional or mental condition had been impaired, or was in imminent danger of becoming impaired, as a result of respondent's failure to exercise a minimum degree of care by providing the children with proper supervision or guardianship, "i.e., by engaging in . . . act[s] in which a reasonable and prudent parent [or caretaker] would not have engaged" (*Matter of Shania R. [Shana R.]*, 222 AD3d 1385, 1386 [4th Dept 2023]; *see Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1159-1160 [4th Dept 2013]).

We have considered respondent's remaining contention and conclude that it is without merit.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

317

CAF 22-01708

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF ISAIAH K.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTY K., RESPONDENT,
AND RENE G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JACQUELINE MOHRMAN, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Rene G. had neglected the subject child.

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

Same memorandum as in *Matter of Antonio S. (Rene G.)* ([appeal No. 1] — AD3d — [May 10, 2024] [4th Dept 2024]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

318

CAF 22-01709

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF JAVIER S.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTY K., RESPONDENT,
AND RENE G., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

JACQUELINE MOHRMAN, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Rene G. had neglected the subject child.

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

Same memorandum as in *Matter of Antonio S. (Rene G.)* ([appeal No. 1] — AD3d — [May 10, 2024] [4th Dept 2024]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

323

CAF 22-01710

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF SKYLAR K.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTY K., RESPONDENT,
AND RENE G., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

JACQUELINE MOHRMAN, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Rene G. had neglected the subject child.

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

Same memorandum as in *Matter of Antonio S. (Rene G.)* ([appeal No. 1] — AD3d — [May 10, 2024] [4th Dept 2024]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

324

CAF 22-01711

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

IN THE MATTER OF TREVON K.

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTY K., RESPONDENT,
AND RENE G., RESPONDENT-APPELLANT.
(APPEAL NO. 5.)

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

JACQUELINE MOHRMAN, BATH, FOR PETITIONER-RESPONDENT.

MARY HOPE BENEDICT, BATH, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Philip J. Roche, J.), entered October 13, 2022, in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Rene G. had neglected the subject child.

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

Same memorandum as in *Matter of Antonio S. (Rene G.)* ([appeal No. 1] — AD3d — [May 10, 2024] [4th Dept 2024]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

329

CA 23-00723

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

OLIVIA LESTER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FD CAPITAL, LLC, DEFENDANT-RESPONDENT.

CELLINO LAW, LLP, ROCHESTER (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, JAMESVILLE (DANIEL K. CARTWRIGHT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Gail Donofrio, J.), entered February 17, 2023. 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 to the extent that it alleges that defendant had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she fell while attempting to enter a side door of a house owned by defendant. In her complaint, plaintiff alleged, inter alia, that defendant had actual or constructive notice of the allegedly dangerous condition, i.e., the height differential between the sidewalk and the threshold of the side door. Defendant moved for summary judgment dismissing the complaint, and plaintiff opposed the motion, arguing that there were triable issues of fact with respect to the theories of actual and constructive notice. We conclude that Supreme Court properly granted the motion with respect to the negligence claim insofar as it is predicated on the theories of creation of a dangerous condition and actual notice thereof, but erred in granting the motion with respect to the theory of constructive notice.

Generally, landowners "have a duty to maintain their properties in reasonably safe condition" (*Andrews v JCP Groceries, Inc.*, 208 AD3d 1607, 1607-1608 [4th Dept 2022] [internal quotation marks omitted]). Thus, "[i]n seeking summary judgment, a defendant landowner has the initial burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not create or have actual or constructive notice of a dangerous condition on the premises" (*Menear*

v Kwik Fill, 174 AD3d 1354, 1357 [4th Dept 2019]).

Initially, we agree with plaintiff that the court erred in finding that she fell after her "foot became trapped as the door was closing," rather than as a result of the alleged dangerous condition. "The court's function on a motion for summary judgment is to determine whether factual issues exist, not to resolve such issues" (*First Presbyt. Church of Monroe v Vays*, 199 AD3d 986, 989 [2d Dept 2021] [internal quotation marks omitted]; *see Glennon v West Taft Rd. Assoc., LLC*, 215 AD3d 1246, 1247 [4th Dept 2023]; *Pugh v Jeffrey*, 289 AD2d 946, 947 [4th Dept 2001]). Even assuming, arguendo, that the deposition testimony of plaintiff submitted by defendant could support such a finding, we agree with plaintiff that her testimony, "when considered in a light most favorable to plaintiff" (*Monnin v Clover Group, Inc.*, 187 AD3d 1512, 1514 [4th Dept 2020] [internal quotation marks omitted]), further raised an issue of fact whether she tripped over the height differential between the sidewalk and the threshold of the doorway.

Contrary to plaintiff's contention, however, defendant met its initial burden on its motion of establishing that it did not create the dangerous condition that allegedly caused plaintiff to trip and fall (*see Andrews*, 208 AD3d at 1608). Plaintiff did not oppose the motion with respect to the issue of creation of the dangerous condition, " 'thus implicitly conceding that defendant[ ] [was] entitled to summary judgment to that extent' " (*Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1437 [4th Dept 2018]). Defendant also met its initial burden on its motion with respect to actual notice by submitting evidence "that [it] did not receive any complaints concerning the area where plaintiff fell" (*Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]; *see Danielak v State of New York*, 185 AD3d 1389, 1389-1390 [4th Dept 2020], *lv denied* 35 NY3d 918 [2020]). In opposition, plaintiff failed to raise a triable issue of fact with respect to actual notice (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, we reject plaintiff's contention that the court erred in granting the motion in those respects.

We agree with plaintiff, however, that the court erred in granting the motion with respect to the claim that defendant had constructive notice of the dangerous condition, and we therefore modify the order accordingly. Defendant failed to meet its initial burden on that issue inasmuch as its own submissions raise triable issues of fact whether the height differential between the sidewalk and the threshold of the doorway "was visible and apparent and existed for a sufficient length of time prior to plaintiff's fall to permit [defendant] to discover and remedy it" (*Navetta*, 106 AD3d at 1469

[internal quotation marks omitted]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

331

CA 23-00368

PRESENT: LINDLEY, J.P., MONTOUR, OGDEN, DELCONTE, AND HANNAH, JJ.

MYA VAN HOOK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY P. DOAK, M.D., UBMD ORTHOPAEDICS & SPORTS MEDICINE, TYLER KENT, M.D., WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, KALEIDA HEALTH, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

EAGAN & HEIMER, PLLC, BUFFALO (NEAL A. JOHNSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS JEREMY P. DOAK, M.D., AND UBMD ORTHOPAEDICS & SPORTS MEDICINE.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (JOHN P. DANIEU OF COUNSEL), FOR DEFENDANTS-APPELLANTS TYLER KENT, M.D., WOMEN & CHILDREN'S HOSPITAL OF BUFFALO, AND KALEIDA HEALTH, INC.

CELLINO LAW, LLP, BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John B. Licata, J.), entered February 22, 2023. The order, insofar as appealed from, denied in part the motions of defendants Jeremy P. Doak, M.D., UBMD Orthopaedics & Sports Medicine, Tyler Kent, M.D., Women & Children's Hospital of Buffalo and Kaleida Health, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting in its entirety the motion of defendants Tyler Kent, M.D., Women & Children's Hospital of Buffalo, and Kaleida Health, Inc. and dismissing the complaint against them, and granting those parts of the motion of defendants Jeremy P. Doak, M.D., UBMD Orthopaedics & Sports Medicine, and UBMD, Inc. for summary judgment dismissing the complaint, as amplified by the bill of particulars, against defendant Jeremy P. Doak, M.D., insofar as it asserts claims for negligent training of nursing staff, inadequate nursing staffing and equipment, negligent neuromonitoring, failure to obtain a consultation, and failure to review orders, and against defendant UBMD Orthopaedics & Sports Medicine insofar as it asserts direct claims against it, and dismissing the complaint against those defendants to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages resulting from a spinal cord injury that occurred during a facetectomy as part of pediatric scoliosis surgery. The facetectomy was performed by defendant Tyler Kent, M.D., a fourth-year resident employed by defendant Women & Children's Hospital of Buffalo (Hospital), an affiliate of defendant Kaleida Health, Inc. (Kaleida Health), under the direct supervision of defendant Jeremy P. Doak, M.D., an attending physician employed by defendant UBMD Orthopaedics & Sports Medicine (UBMD) with privileges at Kaleida Health. Defendants Kaleida Health, the Hospital (collectively, Kaleida Health defendants), Kent, Doak and UBMD appeal from an order that, insofar as appealed from, denied in part their motions for summary judgment dismissing the complaint and any cross-claims against them.

With respect to the appeal by Kent and the Kaleida Health defendants, we conclude that Supreme Court erred in denying that part of their motion (Kaleida motion) seeking summary judgment dismissing the complaint and any cross-claims against Kent because Kent did not exercise independent medical judgment during the surgery. It is well settled that a " 'resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene' " (*Blendowski v Wiese* [appeal No. 2], 158 AD3d 1284, 1285 [4th Dept 2018]; *see Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012]), even where the resident " 'played an active role in [the plaintiff's] procedure' " (*Green v Hall*, 119 AD3d 1366, 1367 [4th Dept 2014]). Kent and the Kaleida Health defendants met their burden on the Kaleida motion with respect to Kent by submitting evidence that plaintiff was Doak's patient, Doak determined the surgery that was to be performed, and Doak directly supervised Kent during the facetectomy, and plaintiff failed to raise a triable issue of fact in opposition (*see id.*; *see generally Soto v Andaz*, 8 AD3d 470, 471 [2d Dept 2004]).

Based on that determination, we further conclude that the court erred in denying that part of the Kaleida motion seeking summary judgment dismissing the complaint and any cross-claims against the Kaleida Health defendants "insofar as the complaint asserts a claim of vicarious liability based on the alleged conduct of [Kent]" (*Bieger v Kaleida Health Sys., Inc.*, 195 AD3d 1473, 1475 [4th Dept 2021]; *see Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1274 [4th Dept 2015]).

We also agree with Kent and the Kaleida Health defendants that the court erred in denying that part of their motion seeking summary judgment dismissing the complaint and any cross-claims against the Kaleida Health defendants insofar as the complaint asserts a claim of vicarious liability based on the alleged conduct of Doak. Generally, " 'a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee' " (*Wulbrecht*, 92 AD3d at 1214; *see Lorenzo v Kahn*, 74 AD3d 1711, 1712-1713 [4th Dept 2010]), but rather is "part of a group of independent contractor physicians" (*Thurman v United Health Servs. Hosps., Inc.*, 39 AD3d 934, 935 [3d Dept 2007], *lv denied* 9 NY3d 807 [2007]). However,

" '[v]icarious liability for the medical malpractice of an independent, private attending physician may . . . be imposed under a theory of apparent or ostensible agency by estoppel' " (*Carroll v Niagara Falls Mem. Med. Ctr.*, 218 AD3d 1373, 1377 [4th Dept 2023]; *see Dragotta v Southampton Hosp.*, 39 AD3d 697, 698 [2d Dept 2007]). An apparent or ostensible agency is created by "words or conduct of the principal, communicated to a third party, which give rise to the appearance and belief that the agent possesses the authority to act on behalf of the principal" (*Dragotta*, 39 AD3d at 698; *see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). Kent and the Kaleida Health defendants met the initial burden on their motion with respect to the vicarious liability claim based on Doak's conduct (*see Bieger*, 195 AD3d at 1475; *King v Mitchell*, 31 AD3d 958, 960-961 [3d Dept 2006]; *Nagengast v Samaritan Hosp.*, 211 AD2d 878, 878-880 [3d Dept 1995]), and plaintiff failed to raise a triable issue of fact in opposition. Contrary to plaintiff's contention, neither Doak's affiliation with the Kaleida Health defendants nor the presence of a UBMD office within a Kaleida Health defendants' facility raise a triable issue of fact as to apparent or ostensible agency (*see Thurman*, 39 AD3d at 936; *King*, 31 AD3d at 960).

We agree with Kent and the Kaleida Health defendants that the court erred in denying that part of their motion seeking summary judgment dismissing, as abandoned, the remaining direct and indirect claims against the Kaleida Health defendants. Contrary to the parties' contentions and as explained in *Carroll* (218 AD3d at 1375), medical malpractice defendants are not entitled to "partial summary judgment dismissing each of the particularized factual allegations contained in the bill of particulars that [are] not expressly addressed by the plaintiff's expert in opposition" (*id.*). Instead, summary judgment is properly granted only as to the "distinct theor[ies] or claim[s] of malpractice" that were unaddressed by the plaintiff's expert in opposition (*id.* at 1376). Here, Kent and the Kaleida Health defendants met their burden on the motion with respect to plaintiff's remaining malpractice claims against the Kaleida Health defendants, which were based upon distinct legal theories of negligent neuromonitoring, failure to enact policies and procedures, negligent supervision and training, and vicarious liability for the conduct of individuals other than Doak and Kent, and plaintiff's expert failed to address those legal theories in opposition to the motion (*see Carroll*, 218 AD3d at 1376). Based on the above, we modify the order by granting the Kaleida motion in its entirety and dismissing the complaint against the Kaleida Health defendants and Kent.

With respect to the appeal by Doak and UBMD, we conclude that the court erred in denying that part of the motion of those defendants and UBMD, Inc. (UBMD motion) seeking summary judgment dismissing, as abandoned, the complaint and any cross-claims against UBMD insofar as the complaint asserts a claim of direct liability against UBMD. Doak and UBMD met their initial burden with respect to the malpractice claim against UBMD insofar as it is based upon a legal theory of direct liability, and plaintiff's expert failed to address that legal theory in opposition to the motion thereby "abandon[ing] that distinct

theory of medical malpractice" (*Carroll*, 218 AD3d at 1376). Further, plaintiff conceded that the malpractice claim against UBMD is limited to a claim based upon a legal theory of vicarious liability.

Finally, we agree with Doak and UBMD that the court erred in denying that part of the UBMD motion seeking summary judgment dismissing, as abandoned, the complaint and any cross-claims against Doak insofar as the complaint asserts claims under the legal theories of negligent training of nursing staff, inadequate nursing staffing and equipment, negligent neuromonitoring, failure to obtain a consultation, and failure to review orders. We therefore further modify the order accordingly. Doak and UBMD met their initial burden to that extent, and plaintiff's expert failed to address them in opposition to the motion (*see id.*).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

334

KA 22-00237

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVONTE BOUIE, DEFENDANT-APPELLANT.

JULIE CIANCA, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (Alex R. Renzi, J.), rendered May 19, 2021. The judgment convicted defendant, upon a guilty plea, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that his waiver of the right to appeal is invalid. The written waiver used overbroad language that " 'mischaracterized the nature of the right[s] that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal' " (*People v Johnson*, 192 AD3d 1494, 1495 [4th Dept 2021], *lv denied* 37 NY3d 965 [2021]; *see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v St. Denis*, 207 AD3d 1084, 1084 [4th Dept 2022]), and the oral colloquy did not cure that defect (*see Thomas*, 34 NY3d at 566; *People v Fernandez*, 218 AD3d 1257, 1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]; *People v Rumph*, 207 AD3d 1209, 1210 [4th Dept 2022], *lv denied* 39 NY3d 1075 [2023]). Nevertheless, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

340

CAF 23-00156

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

IN THE MATTER OF KATTIE M. OSBORNE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER S. TULWITS, RESPONDENT-RESPONDENT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (DALTON C. VIEIRA OF COUNSEL), FOR PETITIONER-APPELLANT.

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

BRIAN P. DEGNAN, BATAVIA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Cattaraugus County (Moses M. Howden, J.), entered December 13, 2022, in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

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 amended petition, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: In this Family Court Act article 6 proceeding, petitioner mother filed a petition in March 2020 (first petition) to modify a prior stipulated order of custody that granted the parties joint custody of the child who is the subject of this proceeding, with respondent father having primary placement. In her petition, the mother sought primary placement of the child, but no proceedings occurred on that petition. In September 2021, the mother filed another petition (second petition) again seeking primary placement of the child. In August 2022, the mother filed an amended petition seeking sole custody of the child. A trial commenced and, at the conclusion of the mother's proof, the father moved to dismiss the "petition" on the ground that the mother failed to establish a change in circumstances. Family Court granted the motion and dismissed the first and second petitions, thereby implicitly dismissing the amended petition, and the mother now appeals.

" 'A party seeking to modify an existing custody arrangement must demonstrate a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the

child[ ]' " (*Matter of Myers v Myers*, 192 AD3d 1681, 1682 [4th Dept 2021]; *see Matter of Heinsler v Sero*, 177 AD3d 1316, 1316 [4th Dept 2019]; *Matter of Cole v Nofri*, 107 AD3d 1510, 1511 [4th Dept 2013], *appeal dismissed* 22 NY3d 1083 [2014]). "Although, as a general rule, the custody determination of the trial court is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]), '[s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record' " (*Cole*, 107 AD3d at 1511). In addition, " '[o]ur authority in determinations of custody is as broad as that of Family Court' " (*id.*).

We conclude that the mother established the requisite change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child and that the court therefore erred in dismissing her amended petition at the close of her proof. The evidence established that the mother was the child's primary caretaker from the child's birth until she was eight years old. The father obtained custody of the child after an incident of domestic violence involving the mother's then-boyfriend. The mother testified that, in the four years since the prior order of custody, she had moved out of the residence that she shared with the ex-boyfriend and no longer had contact with him, she had attended domestic violence support groups and counseling, and she had secured a new residence (*see Heinsler*, 177 AD3d at 1316-1317; *see also Matter of Austin ZZ. v Aimee A.*, 191 AD3d 1134, 1135-1136 [3d Dept 2021]). The evidence further established that the father engaged in corporal punishment of the child, which was prohibited by the prior order. Even accepting the father's explanation to the mother that the incident was the result of the child's emotional outburst, we conclude that his reaction supports the mother's position that he was unable to handle the child's outbursts (*see Matter of Morales v Vaillant*, 187 AD3d 1591, 1591 [4th Dept 2020]; *see also Matter of DeJesus v Gonzalez*, 136 AD3d 1358, 1359-1360 [4th Dept 2016], *lv denied* 27 NY3d 906 [2016]). The evidence also established that the father did not ensure that the child continued counseling, despite that direction in the prior order (*see Matter of DiPaolo v Avery*, 93 AD3d 1240, 1241 [4th Dept 2012]).

We therefore modify the order by denying the motion in part and reinstating the amended petition, and we remit the matter to Family Court for a hearing on the best interests of the child (*see Myers*, 192 AD3d at 1682-1683; *Heinsler*, 177 AD3d at 1317).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

341

CAF 22-01956

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

IN THE MATTER OF CLARISSA F., WILLIAM F.,
ELAINA F., AND AYLA O.
---------- MEMORANDUM AND ORDER
ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

CARRIE W., RESPONDENT-APPELLANT.

MARY WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR RESPONDENT-APPELLANT.

ALLISON B. CARROW, COUNTY ATTORNEY, BELMONT, FOR PETITIONER-RESPONDENT.

WILLIAM D. BRODERICK, JR., ELMA, ATTORNEY FOR THE CHILD.

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

MINDY L. MARRANCA, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered November 2, 2022, in a proceeding pursuant to Family Court Act article 10. The order placed the subject children with respondent and placed respondent under the supervision of petitioner for a period of one year.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by deleting the expiration date of the order of protection and substituting therefor the expiration date of October 31, 2023, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that, although now expired, brings up for review the underlying fact-finding order in which Family Court found that the mother neglected the subject children (*see Matter of Justice H.M. [Julia S.]*, 225 AD3d 1298, 1298 [4th Dept 2024]).

We reject the mother's contention that petitioner failed to establish by a preponderance of the evidence that she neglected the children. Petitioner adduced ample evidence that the mother was aware that the children were in imminent danger from her boyfriend and that she failed to exercise a minimum degree of care in providing them with supervision (*see Matter of Derrick C.*, 52 AD3d 1325, 1326 [4th Dept 2008], *lv denied* 11 NY3d 705 [2008]). Even amidst the proceedings,

the mother permitted the boyfriend to return to her home in violation of a temporary order of protection and continued to dismiss the children's allegations and side with the boyfriend.

However, as the mother contends and as petitioner correctly concedes, the duration of the October 31, 2022 order of protection is unlawful. "Family Court Act § 1056 (1) prohibits the issuance of an order of protection that exceeds the duration of any other dispositional order in the case" (*Matter of Sheena D.*, 8 NY3d 136, 140 [2007]) except as provided in Family Court Act § 1056 (4). "Subdivision (4) allows a court to issue an order of protection until a child's 18th birthday, but only against a person 'who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household' " (*Matter of Nevaeh T. [Abreanna T.–Wilbert J.]*, 151 AD3d 1766, 1768 [4th Dept 2017]). Inasmuch as the mother's boyfriend is the biological father of one of the children and inasmuch as the children resided in the same household with the mother at the time of the disposition, subdivision (4) is inapplicable, and the duration of the order of protection, which exceeded the duration of the dispositional order in this case, is thus unlawful. We therefore modify the order of protection to expire on the same date as the dispositional order (*see id.*).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

343

CA 23-01132

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

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-RESPONDENT,

V ORDER

ABEILLE GENERAL INSURANCE COMPANY, NOW KNOWN AS
21ST CENTURY NATIONAL INSURANCE COMPANY, ET AL.,
DEFENDANTS-APPELLANTS.

NORTON ROSE FULBRIGHT US LLP, NEW YORK CITY (VICTORIA V. CORDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HUNTON ANDREWS KURTH LLP, WASHINGTON, D.C. (SYED S. AHMAD, ADMITTED PRO HAC VICE, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered May 23, 2023. The order, inter alia, granted the cross-motion of plaintiff for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 1, 2024,

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

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

354

KA 22-01836

PRESENT: LINDLEY, J.P., CURRAN, OGDEN, KEANE, AND HANNAH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMILLE RACONA, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, 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 May 23, 2022. The judgment convicted defendant upon her plea of guilty of criminal possession of stolen property in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of stolen property in the third degree (Penal Law § 165.50). We affirm.

Defendant contends that her plea was involuntary because her factual allocution cast doubt on her guilt and because her plea was induced by an unfulfilled promise that she be permitted to participate in a drug treatment court program. However, "[b]y failing to move to withdraw the . . . plea[ ] or to vacate the . . . judgment[ ] of conviction" on the grounds asserted, defendant "failed to preserve [her] contention for our review" (*People v Ablack*, 126 AD3d 1410, 1411 [4th Dept 2015], *lv denied* 25 NY3d 1197 [2015]; *see People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). We conclude that this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Contrary to defendant's contention, nothing in the plea colloquy "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," and County Court therefore had no duty to conduct further inquiry with respect to the plea (*id.*).

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

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

374

CAF 23-00442

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

IN THE MATTER OF REBECCA H. MILLER,
PETITIONER-RESPONDENT,

V ORDER

DANIEL J. BOYDEN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

KELLY M. FORST, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered February 6, 2023, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, suspended the visitation of respondent with respect to the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

375

CAF 23-01240

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

IN THE MATTER OF REBECCA H. MILLER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL BOYDEN, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR RESPONDENT-APPELLANT.

KELLY M. FORST, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Ontario County (Brian D. Dennis, J.), entered June 30, 2023, in a proceeding pursuant to Family Court Act article 6. The amended order, inter alia, suspended the visitation of respondent with the subject child.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: Petitioner mother had sole legal custody and primary physical placement of the subject child and, pursuant to a prior order entered on the consent of the parties, respondent father had visitation at least once every three months. At all times relevant to this case, the father has been incarcerated, and therefore all in-person visitation with the child was to occur in prison. After entry of the prior order, the mother filed a modification petition seeking, inter alia, to suspend the father's in-person visitation with the child. Family Court held a hearing and subsequently granted the mother's petition in part and, inter alia, suspended the father's visitation with the child for the remainder of his time in prison. The father appeals.

Initially, the father contends that the amended order was not entered upon his default, and he is therefore not precluded from appealing from the amended order (*see generally* CPLR 5511; *Matter of Hopkins v Gelia*, 56 AD3d 1286, 1286 [4th Dept 2008]). We agree. Although the amended order includes the statement that it was entered on the father's default, the court's bench decision clearly specified that it was granting the mother's modification petition based on the evidence adduced during the hearing, during which the father was represented by counsel (*see Hopkins*, 56 AD3d at 1286; *see generally Matter of Bailey v Bailey*, 213 AD3d 1329, 1329 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]). Where, as here, "there is a discrepancy

between the order and the decision, the decision controls," and we therefore conclude that the amended order was not entered on the father's default to the extent that it granted in part the mother's petition (*Matter of Bonilla-Wright v Wright*, 213 AD3d 1289, 1291 [4th Dept 2023] [internal quotation marks omitted]; *see Matter of Sturnick v Hobbs*, 191 AD3d 1375, 1376 [4th Dept 2021]).

The father further contends that the court failed to make any factual findings whatsoever to support the determination to suspend the father's visitation with the child, and that the matter should be remitted to allow the court to make such findings. We agree. It is "well established that the court is obligated 'to set forth those facts essential to its decision' " (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]; *see* CPLR 4213 [b]; Family Ct Act § 165 [a]; *Matter of Brown v Orr*, 166 AD3d 1583, 1583 [4th Dept 2018]). Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its determination (*see Brown*, 166 AD3d at 1583-1584), either with respect to whether there had been a change in circumstances (*see Matter of Berg v Stoufer-Quinn*, 179 AD3d 1544, 1544-1545 [4th Dept 2020]), or the relevant factors that it considered in making a best interests of the child determination (*see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536 [4th Dept 2015]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]; *Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]). "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" (*Matter of Jose L. I.*, 46 NY2d 1024, 1026 [1979]). We therefore reverse the amended order and remit the matter to Family Court to make a determination on the petition including specific findings as to a change in circumstances and the best interests of the child, following an additional hearing if necessary (*see Brown*, 166 AD3d at 1584; *Avdic*, 125 AD3d at 1536). Pending the court's determination on remittal, the custody and visitation provisions in the temporary order dated October 12, 2021 shall remain in effect.

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

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

388

KA 19-00660

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAAC O. HUBBERT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered March 6, 2019. The judgment convicted defendant, upon a guilty plea, of sexual abuse in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by amending the order of protection to specify that it is subject to modification by a subsequent visitation order of Family Court, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [1]). Preliminarily, as defendant contends and the People correctly concede, the record does not establish that defendant validly waived his right to appeal. County Court's "oral waiver colloquy and the written waiver signed by defendant together mischaracterized the nature of the right that defendant was being asked to cede, portraying the waiver as an absolute bar to defendant taking an appeal and the attendant rights to counsel and poor person relief, as well as a bar to all postconviction relief, and there is no clarifying language in either the oral or written waiver indicating that appellate review remained available for certain issues" (*People v Porchea*, 204 AD3d 1444, 1444 [4th Dept 2022], *lv denied* 38 NY3d 1073 [2022] [internal quotation marks omitted]; *see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Edge*, 213 AD3d 1204, 1204 [4th Dept 2023]).

Defendant contends that, although he mentioned during the sentencing proceeding that he wanted a new attorney, the court failed to provide him with an opportunity to explain his complaints about defense counsel. We reject that contention. The record of the sentencing proceeding establishes that defendant was " 'given an

opportunity to state the basis for [the] application' " (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]; *see People v Konovalchuk*, 148 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]) and that, additionally, the court heard from defense counsel with respect to defendant's primary complaint (*see generally People v Porto*, 16 NY3d 93, 101-102 [2010]). We conclude that defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*id.* at 100; *cf. People v Dodson*, 30 NY3d 1041, 1042 [2017]).

Although defendant failed to preserve for our review his further contention that the order of protection in favor of the victim issued at the time of sentencing should be amended to reflect the conditions agreed to during the plea proceeding, we exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Davis*, 193 AD3d 1352, 1353 [4th Dept 2021], *lv denied* 37 NY3d 964 [2021]). Given that defendant and the victim share a child in common, that the victim wanted defendant to have a relationship with the child, that the court agreed to make the order of protection subject to modification by a subsequent visitation order of Family Court, and that the People did not object to that condition at the time of the plea, we modify the judgment by amending the order of protection to specify that it is subject to modification by a subsequent visitation order of Family Court (*see Davis*, 193 AD3d at 1353; *People v Smart*, 169 AD3d 1525, 1526 [4th Dept 2019]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

958

KA 22-01388

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY W. HENSLEY, DEFENDANT-APPELLANT.

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

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 15, 2021. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (four counts), criminal possession of stolen property in the third degree, criminal possession of stolen property in the fourth degree (two counts) and criminal possession of stolen property in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reversing that part convicting defendant of criminal possession of stolen property in the fifth degree, dismissing count 7 of the indictment, reducing the conviction of criminal possession of stolen property in the third degree (Penal Law § 165.50) to criminal possession of stolen property in the fifth degree (§ 165.40), vacating the sentence imposed on count 1 of the indictment and imposing a definite sentence of 364 days on that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3] [counts 2, 3, 8 and 9 of the indictment]), one count of criminal possession of stolen property in the third degree (§ 165.50 [count 1 of the indictment]), two counts of criminal possession of stolen property in the fourth degree (§ 165.45 [4] [counts 4 and 5 of the indictment]), and one count of criminal possession of stolen property in the fifth degree (§ 165.40 [count 7 of the indictment]). The conviction arises from the seizure of various handguns and other stolen property from a storage unit used by defendant and from a residence where he used to live.

Defendant contends that his conviction is not supported by legally sufficient evidence for a number of reasons. Initially, with

respect to counts 1 through 5, 8 and 9 of the indictment, which relate to the items seized from the storage unit, he contends that the People failed to establish his constructive possession of those items because he was incarcerated at the time they were seized. We reject that contention. In order to establish that a defendant has constructive possession of tangible property, "the People must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see* Penal Law § 10.00 [8]; *People v Jones*, 149 AD3d 1580, 1580 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). Here, there was ample evidence from which the jury could conclude that defendant constructively possessed the items seized from the storage unit (*see Jones*, 149 AD3d at 1580).

With respect to defendant's conviction of criminal possession of stolen property in the fifth degree under count 7 of the indictment, however, we agree with defendant, as he asserts in his reply brief, that there is legally insufficient evidence establishing that he constructively possessed the items seized from his previous residence. Although defendant failed to develop that contention adequately in his main brief (*see People v Jones*, 2 AD3d 1397, 1399 [4th Dept 2003], *lv denied* 2 NY3d 742 [2004]), we nevertheless reach the issue (*see* CPL 470.15 [1], [4] [b]; *see also People v Bunnell*, 59 AD3d 942, 943 [4th Dept 2009], *amended on rearg* 63 AD3d 1671 [4th Dept 2009], *amended* 63 AD3d 1727 [4th Dept 2009]; *People v Workman*, 56 AD3d 1155, 1156 [4th Dept 2008], *lv denied* 12 NY3d 789 [2009]), and we conclude that the evidence at trial failed to establish that "defendant exercised dominion or control over the property [seized from the former residence] by a sufficient level of control over the area in which [it was] found" (*Jones*, 149 AD3d at 1580 [internal quotation marks omitted]; *see People v Gautreaux-Perez*, 31 AD3d 1209, 1210 [4th Dept 2006]). We therefore modify the judgment by reversing that part convicting defendant of criminal possession of stolen property in the fifth degree and dismissing count 7 of the indictment.

We reject defendant's remaining contentions concerning the alleged legal insufficiency of the evidence supporting the conviction under counts 2 through 5, 8 and 9 of the indictment, which relate to the handguns found in the storage unit (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of criminal possession of a weapon in the second degree and criminal possession of stolen property in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant that, with respect to his conviction of criminal possession of stolen property in the third degree under count 1 of the indictment, there is legally insufficient evidence establishing the value of the items seized from the storage unit. Although defendant did not preserve that issue for our review, we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). "A person is guilty of

criminal possession of stolen property in the third degree when [that person] knowingly possesses stolen property, with intent to benefit [that person] or a person other than an owner thereof or to impede the recovery by an owner thereof, and when the value of the property exceeds three thousand dollars" (Penal Law § 165.50; *see People v Pierce*, 14 NY3d 564, 574 [2010]). It is well settled that "a victim must provide a basis of knowledge for [their] statement of value before it can be accepted as legally sufficient evidence of such value" (*People v Lopez*, 79 NY2d 402, 404 [1992]). "Conclusory statements and rough estimates of value are not sufficient" to establish the value of the property (*People v Loomis*, 56 AD3d 1046, 1047 [3d Dept 2008]; *see People v Walker*, 119 AD3d 1402, 1402-1403 [4th Dept 2014]; *People v Pallagi*, 91 AD3d 1266, 1269 [4th Dept 2012]). Although the People elicited some valuation testimony from the victims at trial, such testimony did not include the basis for the victims' knowledge of the value of most of the items in the storage unit (*see People v Slack*, 137 AD3d 1568, 1569 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]; *cf. People v Grant*, 189 AD3d 2112, 2114 [4th Dept 2020], *lv denied* 37 NY3d 956 [2021]; *People v Pepson*, 61 AD3d 1399, 1400 [4th Dept 2009], *lv denied* 12 NY3d 919 [2009]). We conclude on this record that the evidence is legally insufficient to establish that the value of the property taken exceeded $3,000 (*see Slack*, 137 AD3d at 1570). The evidence is legally sufficient, however, to establish that defendant committed the lesser included offense of criminal possession of stolen property in the fifth degree (*see* § 165.40). We therefore further modify the judgment by reducing the conviction under count 1 of the indictment to that crime, for which proof of value of the stolen items is not required (*see Slack*, 137 AD3d at 1570; *People v Miller*, 174 AD2d 989, 990 [4th Dept 1991], *lv denied* 78 NY2d 1078 [1991]). We note that, because defendant has already served the maximum term of incarceration allowed for that offense, there is no need to remit the matter to County Court for resentencing on count 1 of the indictment (*see People v McKinney*, 91 AD3d 1300, 1300 [4th Dept 2012]). Rather, in the interest of judicial economy, we further modify the judgment by vacating the sentence imposed on count 1 of the indictment and imposing the maximum sentence allowed for a class A misdemeanor, i.e., a definite sentence of 364 days.

Finally, defendant was properly determined to be a persistent violent felony offender (*see People v Barnes*, 156 AD3d 1417, 1420 [4th Dept 2017], *lv denied* 31 NY3d 1078 [2018]), and we conclude that the sentence imposed with respect to counts 2 through 5, 8 and 9 of the indictment is not unduly harsh or severe.

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

966

CA 22-01514

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

LG 70 DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF AMHERST, DEFENDANT-APPELLANT,
TOWN OF AMHERST POLICE DEPARTMENT,
ET AL., DEFENDANTS.

WEBSTER SZANYI LLP, BUFFALO (SHANNON B. O'NEILL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered July 22, 2022. The order, insofar as appealed from, denied those parts of the motion of defendants Town of Amherst and Town of Amherst Police Department seeking to dismiss the 7th and 10th causes of action against defendant Town of Amherst.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted in its entirety, and the 7th and 10th causes of action are dismissed against defendant Town of Amherst.

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that he was repeatedly sexually assaulted between 1977 and 1981 by his former youth baseball coach (coach), who was employed at that time as a police officer by defendant Town of Amherst (Town). The Town and defendant Town of Amherst Police Department (Police Department) moved to, inter alia, dismiss all causes of action against the Police Department and dismiss several causes of action against the Town. The Town now appeals from an order that, inter alia, denied the motion insofar as it sought to dismiss plaintiff's 7th and 10th causes of action against the Town.

We agree with the Town that Supreme Court erred in denying that part of the motion seeking dismissal against it of plaintiff's seventh cause of action, alleging that the Town negligently supervised plaintiff, thereby resulting in his injuries. 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). Where, however, "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). Here, plaintiff's seventh cause of action is premised on the Town's exercise of a governmental function—specifically, its general duty to provide police protection—and, as such, plaintiff was required to plead that the Town owed him a special duty of care (*see Howell v City of New York*, 39 NY3d 1006, 1008 [2022]; *Ruiz v City of Buffalo*, 100 AD3d 1388, 1388-1389 [4th Dept 2012]). Plaintiff failed to do so here.

A special duty can arise in three ways, namely: " '(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when [the municipality] 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' " (*Weisbrod-Moore v Cayuga County*, 216 AD3d 1459, 1460 [4th Dept 2023]). Although plaintiff asserts that the Town voluntarily assumed a duty to supervise him under the second category, to establish voluntary assumption a plaintiff must plead: " '(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' " (*Ferreira*, 38 NY3d at 312-313). Here, the complaint does not allege a promise or other affirmative action by the Town assuming a duty to act on behalf of plaintiff specifically, nor does it allege that plaintiff relied upon such an assumption. The court therefore erred in denying that part of the motion seeking dismissal of plaintiff's seventh cause of action against the Town (*see Ruiz*, 100 AD3d at 1389; *Wood v Nigro*, 81 AD3d 1453, 1454 [4th Dept 2011]).

We also agree with the Town that the court erred in denying that part of the motion seeking dismissal against it of plaintiff's 10th cause of action, alleging a failure to report under Social Services Law former § 413 and Social Services Law § 420. Social Services Law § 420 imposes, as relevant here, civil penalties on "[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment[, such as a police officer or other law enforcement official,] who knowingly and willfully fails to do so" (Social Services Law § 420 [2]; *see* former § 413).

In a decision released while this appeal was pending, we concluded, as other Departments of the Appellate Division had previously, that there is no statutory duty to report child abuse where the alleged abuser is neither a parent nor another person

legally responsible for the abused child's care (*Solly v Pioneer Cent. Sch. Dist.*, 221 AD3d 1447, 1449 [4th Dept 2023]; *see Dolgas v Wales*, 215 AD3d 51, 59 [3d Dept 2023], *lv denied* 41 NY3d 904 [2024]; *Hanson v Hicksville Union Free Sch. Dist.*, 209 AD3d 629, 631 [2d Dept 2022]; *see generally Matter of Catherine G. v County of Essex*, 3 NY3d 175, 180 [2004]). In reaching that conclusion, we explained that the Social Services Law incorporated the definition of "abused child" found in the Family Court Act (*see* Social Services Law former § 412 [1]), which in turn defined that term, as relevant there, as "a child harmed by a 'parent or other person legally responsible for [the child's] care' " (*Solly*, 221 AD3d at 1449, quoting Family Ct Act former § 1012 [e]). The Family Court Act definition of an "abused child" does not encompass abuse by "persons who assume fleeting or temporary care of a child such as . . . those persons who provide extended daily care of children in institutional settings, such as teachers" (*Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *see Solly*, 221 AD3d at 1449), on the premise that the State need not intervene in such situations inasmuch as "[p]arents would usually be the ones to take action" (*Catherine G.*, 3 NY3d at 180).

Plaintiff does not dispute that, as the Town contends, the coach who is alleged to have sexually assaulted him was not a person legally responsible for his care. Plaintiff responds, however, that the 10th cause of action should nonetheless not be dismissed against the Town inasmuch as the allegations in the complaint may be construed as alleging that the coach had intentionally inflicted "serious physical injury" on him and, thus, plaintiff fell under the definition of a "maltreated child" under Social Services Law former § 412 (2) (b), as opposed to an "abused child" under former section 412 (1), thus triggering the duty to report under former section 413. A maltreated child is defined in former section 412 (2) (b), as well as the current version, as a child "who has had serious physical injury inflicted upon [them] by other than accidental means," without any reference to the relationship that the child has to the person suspected of inflicting the injury. Plaintiff argues that the child protective services provisions under Social Services Law article 6, title 6, should therefore be interpreted to mandate reporting every time an individual intentionally inflicts serious physical injury upon a child, regardless of the individual's relationship to the child. The Town, in contrast, argues that the protective provisions for maltreated children who have been seriously injured should be interpreted, as we concluded with respect to the provisions for abused children in *Solly* (221 AD3d at 1449), to mandate reporting only where the individual who is suspected to have intentionally inflicted the serious physical injury on the child is a parent or other legally responsible person. We agree with plaintiff's interpretation.

It is fundamental that "[e]ffect and meaning must, if possible, be given to the entire statute and every part and word thereof" (*People v Talluto*, 39 NY3d 306, 311 [2022] [internal quotation marks omitted]). The Town's proffered interpretation of the applicable child protective provisions imposes a relationship requirement on the definition of, and duty to report suspected, maltreatment caused by the intentional infliction of serious physical injury that would, if

adopted, nullify the plain and unambiguous textual distinction between that category of maltreatment and abuse (*see* Social Services Law §§ 412, 413; *see generally Talluto*, 39 NY3d at 310) and, further, subsume the definition of "maltreated child" under Social Services Law § 412 (2) (b) into the definition of "abused child" under section 412 (1), rendering the former and current versions of section 412 (2) (b) superfluous (*see generally Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]). While the " '[s]ubject of [a] report' " of suspected child abuse or maltreatment under former section 412 (4) was defined as the subject child and the "parent, guardian or other person legally responsible" for the subject child, unlike with an abused child there was, and is, no statutory requirement that the serious physical injury suffered by a maltreated child had to have been intentionally inflicted by the child's parent, guardian or other legally responsible person in order for the conduct to fall within the ambit of child protective services (*cf. Solly*, 221 AD3d at 1449; *see generally* Social Services Law former § 412 [4]; *Matter of Adalisa R. v New York State Off. of Children & Family Servs.*, 190 AD3d 436, 437 [1st Dept 2021]). Thus, we conclude that Social Services Law former § 413 mandated, as the current version mandates, the reporting of every instance of suspected intentionally inflicted serious physical injury upon a child, regardless of who is suspected to have inflicted it, thereby triggering an investigation of the child's parent or other legally responsible person—as a "subject of the report"—to determine whether, inter alia, that person inflicted or allowed the harm to be inflicted upon the child. "[T]he purpose of [the child protective services provisions under Social Services Law article 6, title 6, is] to encourage more complete reporting of suspected child abuse and maltreatment," not less (Social Services Law § 411), and the former and current versions of sections 412 (2) (b) and 413 apply equally to children who have had a serious physical injury intentionally inflicted by, inter alia, a coach, a classroom teacher, a neighbor, another child or a distant relative who is not legally responsible for the child's care.

Nonetheless, we ultimately agree with the Town that the court erred in failing to dismiss the 10th cause of action against it. Although this Court "must accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable theory" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1420 [4th Dept 2021] [internal quotation marks omitted]), "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Easterbrooks v Schenectady County*, 218 AD3d 969, 970 [3d Dept 2023] [internal quotation marks omitted]; *cf. BL Doe 3*, 199 AD3d at 1423). Inasmuch as the complaint here does not contain a specific allegation that the Town received information that its employee—plaintiff's youth baseball coach—was sexually assaulting plaintiff, the 10th cause of action against the Town necessarily "consist[s] of 'bare legal conclusions without factual support [that] are insufficient to withstand a motion to dismiss' " (*BL Doe 5 v Fleming*, 199 AD3d 1426, 1428 [4th Dept 2021]; *see Hanson*, 209 AD3d at

631; *cf. J.K. v City of New York*, 223 AD3d 565, 566 [1st Dept 2024]).

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

All concur except WHALEN, P.J., and LINDLEY, J., who concur in the result in the following memorandum: We concur with the majority that Supreme Court erred in denying that part of the motion of defendant Town of Amherst (Town) and defendant Town of Amherst Police Department that sought dismissal of plaintiff's 7th cause of action against the Town, alleging that the Town negligently supervised plaintiff, and erred in denying that part of the motion seeking dismissal of plaintiff's 10th cause of action against the Town, alleging a failure to report under Social Services Law former § 413 and Social Services Law § 420. We write separately only to express our disagreement with the conclusion of the majority that, with respect to the 10th cause of action, a mandated reporter is statutorily required to report any person who inflicted serious physical injury upon a child regardless of whether there is a parental or guardianship relationship, even where that same mandated reporter would not be required to report conduct constituting abuse.

Social Services Law § 420 imposes, as relevant here, civil penalties on "[a]ny person, official or institution required by this title to report a case of suspected child abuse or maltreatment[, such as a police officer or other law enforcement official,] who knowingly and willfully fails to do so" (Social Services Law § 420 [2]; *see* former § 413). As the majority acknowledges, we released a decision while this appeal was pending in which we concluded, as other Departments of the Appellate Division had previously, that there is no statutory duty to report child abuse where the alleged abuser is neither a parent nor a person legally responsible for the child's care (*Solly v Pioneer Cent. Sch. Dist.*, 221 AD3d 1447, 1449 [4th Dept 2023]; *see Dolgas v Wales*, 215 AD3d 51, 59 [3d Dept 2023], *lv denied* 41 NY3d 904 [2024]; *Hanson v Hicksville Union Free Sch. Dist.*, 209 AD3d 629, 631 [2d Dept 2022]). In response to the Town's appeal, plaintiff does not dispute that his alleged abuser—a youth baseball coach otherwise employed by the Town as a police officer—was not a person legally responsible for his care at the time the coach allegedly "sexual[ly] assault[ed] and/or abuse[d]" him. Plaintiff nonetheless seeks to avoid our conclusion in *Solly*, and the Town's reliance thereon, by reframing his statutory failure to report cause of action as one premised on maltreatment rather than abuse. We respectfully disagree with the conclusion of the majority that, but for plaintiff's failure to specifically allege that the Town received information that its employee was sexually assaulting plaintiff, plaintiff would have sufficiently stated a viable statutory failure to report cause of action.

Initially, Social Services Law article 6, title 6, viewed as a whole, "[p]lainly . . . contemplates intervention in relationships between children and their parents (or guardians or custodians)" (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 180 [2004]; *see generally Matter of Town of Southampton v New York State Dept. of*

Envtl. Conservation, 39 NY3d 201, 209 [2023]). Social Services Law former § 412 (4) expressly limited the appropriate subject of *any* mandated report, including a maltreated child under Social Services Law former § 412 (2) (b), to the child and the child's "parent, guardian or other person legally responsible." Thus, even assuming, arguendo, that the sexual abuse and assault allegations in plaintiff's complaint may be appropriately construed as maltreatment and further assuming, arguendo, that a statutory failure to report cause of action premised separately and distinctly on allegations of maltreatment rather than abuse is revived by CPLR 214-g, we conclude that the coach still "could not be the subject of a report for purposes of Social Services Law former § 413, [and therefore the Town] was not required to report any suspected [maltreatment] by him" (*Solly*, 221 AD3d at 1449).

We respectfully disagree with the majority's conclusion that applying the plain language of Social Services Law former § 412 (4) to both abuse and maltreatment caused by the intentional infliction of serious physical injury would "nullify the plain and unambiguous textual distinction between that category of maltreatment and abuse" or "subsume the definition of 'maltreated child' under section 412 (2) (b) into the definition of 'abused child' under section 412 (1), rendering the former and current versions of section 412 (2) (b) superfluous." The distinction between an abused child and a maltreated one is not premised on the alleged perpetrator of the abuse or maltreatment. Instead, for the purpose of mandated reporting, an "abused child" is defined under the former and current versions of Social Services Law § 412 (1) by reference to the Family Court Act, which in turn limits reportable incidents of abuse involving physical injury to those acts or omissions which "cause[ ] or create[ ] a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ" (Family Ct Act § 1012 [e] [i]; *see also* § 1012 [e] [ii]). In contrast, Social Services Law § 412 (2) (b) defines a maltreated child, as relevant, as one "who has had serious physical injury inflicted upon [them] by other than accidental means" without reference to the Family Court Act or the heightened requirements found therein. So construed, that definition of maltreatment requires the reporting of a broader range of non-trivial, intentionally inflicted injuries that nonetheless fall short of the substantial risk of death, disfigurement, or impairment requirements of the Family Court Act's definition of abuse. Contrary to the majority's conclusion, it is that interpretation that gives "[e]ffect and meaning . . . to the entire statute and every part and word thereof" (*People v Talluto*, 39 NY3d 306, 311 [2022] [internal quotation marks omitted]), including the former and current versions of Social Services Law § 412 (4), and avoids requiring mandatory reporters "to furnish information to the state hotline [even when] the

reporters know the [perpetrator] cannot be the subject of a report" (*Catherine G.*, 3 NY3d at 180).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

970

CA 22-01908

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

AL 557 DOE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CENTRAL VALLEY CENTRAL SCHOOL DISTRICT, FORMERLY KNOWN AS ILION CENTRAL SCHOOL DISTRICT, CENTRAL VALLEY CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, FORMERLY KNOWN AS ILION CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, DEFENDANTS-APPELLANTS, AND EAST FRANKFORT SCHOOL, DEFENDANT.

GIRVIN & FERLAZZO, P.C., ALBANY (PATRICK J. FITZGERALD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LAFAVE, WEIN AND FRAMENT, PLLC, ALBANY (JASON A. FRAMENT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Jeffrey A. Tait, J.), entered November 2, 2022. The order, insofar as appealed from, denied in part the motion of defendants to dismiss the amended complaint.

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

Memorandum: Plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) against defendants Central Valley Central School District, formerly known as Ilion Central School District (Central Valley); Central Valley Central School District Board of Education, formerly known as Ilion Central School District Board of Education (Board); and East Frankfort School.

The parties on this appeal do not dispute that, in 2013, Ilion Central School District (Ilion) merged with Mohawk Central School District as a part of a centralization to become Central Valley Central School District. After defendants answered, they moved to dismiss the amended complaint pursuant to CPLR 3211 (a) (7), contending, among other things, that they are not proper parties to the action because Central Valley did not exist until 2013, and the centralization that occurred in 2013 pursuant to Education Law §§ 1801 and 1802 (1) resulted in the dissolution of Ilion. They also contended that East Frankfort School ceased to exist in 1977 and, at all relevant times, was merely a part of Ilion and lacked a separate and distinct legal existence. Supreme Court denied the motion to

dismiss except insofar as it sought to dismiss the amended complaint against East Frankfort School. Central Valley and the Board (collectively, appellants) now appeal, and we affirm.

We conclude, initially, that the action may be maintained against Central Valley and the Board, notwithstanding that Central Valley and the Board came into existence in 2013 as a result of the centralization. Education Law § 1804 provides for a centralized school district's responsibility to a component district's property and indebtedness. Pursuant to section 1804, a "central school district's board of education becomes the successor in interest of the trustees of school districts which merge into the centralized district" regardless of when the centralization occurred (*Board of Educ. of Ramapo Cent. School Dist. v Greene*, 112 AD2d 182, 184 [2d Dept 1985]). Moreover, the component district "shall continue to exist in law . . . for the purpose of providing for and paying all its just debts" (Education Law § 1518; *see* § 1804 [5] [a], [b]). We therefore conclude that Central Valley and the Board are proper parties to this action, but we note that any responsibilities resulting from this action will be left to the Board to address by taxing only the property owners of the component district from which those responsibilities arose (*see generally Matter of Locust Val. Lib. v Board of Educ. of Cent. School Dist. No. 3 of Town of Oyster Bay*, 54 Misc 2d 315, 323-324 [Sup Ct, Nassau County 1967]).

Contrary to appellants' contention, nothing in the plain language of the relevant statutes suggests that only fixed debts known to the component district at the time of centralization are "just debts." Plaintiff's causes of action accrued during Ilion Central's pre-centralization existence (*cf. Barringer v Powell*, 230 NY 37, 42 [1920]) and, pursuant to CPLR 214-g, the causes of action have been timely raised. Under the circumstances of this case, "just debts" are those debts, if any, "which shall turn out to be just" after all legal defenses have been exhausted (*Martin v Gage*, 9 NY 398, 401 [1853] [internal quotation marks omitted]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court

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

1022

CA 23-00204

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

CHAD KRAUSE, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

INDUSTRY MATRIX, LLC,
DEFENDANT-RESPONDENT-APPELLANT.

INDUSTRY MATRIX, LLC, THIRD-PARTY PLAINTIFF,

V

CHRISTOPHER CROTTY, THIRD-PARTY
DEFENDANT.

MICHAEL STEINBERG, ROCHESTER, FOR PLAINTIFF-APPELLANT-RESPONDENT.

PEIRCE & SALVATO PLLC, WHITE PLAINS (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross-appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered January 18, 2023. The order denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that said cross-appeal is dismissed and the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained when he fell from a ladder while performing chimney pointing work on a residential rental building owned by defendant. Plaintiff appeals from an order that denied his motion for partial summary judgment on his Labor Law § 240 (1) cause of action, and defendant cross-appeals from that part of the order that denied defendant's request to deny the motion as premature under CPLR 3212 (f).

As an initial matter, we conclude that defendant is not aggrieved by the order from which it purports to cross-appeal because, in rejecting defendant's argument that plaintiff's motion was premature, the order neither granted relief against it nor denied any motion for affirmative relief on its own behalf (*see* CPLR 5511; *Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 664 n 4 [2014]; *Kavanaugh v Kavanaugh*, 200 AD3d 1568, 1571 [4th Dept 2021]). Consequently, defendant's cross-appeal must be dismissed (*see Fabrizi*, 22 NY3d at 664; *Kavanaugh*, 200 AD3d at 1571).

We reject plaintiff's contention on his appeal that Supreme Court erred in denying the motion. We conclude that plaintiff met his initial burden on the motion of establishing that the ladder was "not so placed . . . as to give proper protection to [him]" through evidence that plaintiff fell when the ladder suddenly and unexpectedly shifted (*Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578 [4th Dept 2016] [internal quotation marks omitted]; *see Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403 [4th Dept 2015]; *Woods v Design Ctr., LLC*, 42 AD3d 876, 877 [4th Dept 2007]). The burden then shifted to defendant to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident" (*Kin v State of New York*, 101 AD3d 1606, 1607 [4th Dept 2012] [internal quotation marks omitted]; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We conclude that defendant met that burden through evidence suggesting that plaintiff fell from the ladder because he missed a step while descending, not because the ladder shifted or otherwise failed (*see Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011]; *see also DiCembrino v Verizon N.Y. Inc.*, 149 AD3d 541, 541-542 [1st Dept 2017]; *Hamill v Mutual of Am. Inv. Corp.*, 79 AD3d 478, 479 [1st Dept 2010]).

Even assuming, arguendo, that some of the evidence relied on by defendant was inadmissible hearsay (*see generally Williams v Alexander*, 309 NY 283, 287 [1955]; *Mosqueda v Ariston Dev. Group*, 155 AD3d 504, 504 [1st Dept 2017])—i.e., the uncertified hospital records containing a statement by plaintiff blaming the fall on, inter alia, missing a step—we conclude that the court properly considered such evidence in opposition to the motion because it was "not the only proof relied upon by" defendant (*Biggs v Hess*, 85 AD3d 1675, 1676 [4th Dept 2011] [internal quotation marks omitted]; *see X-Med, Inc. v Western N.Y. Spine, Inc.*, 74 AD3d 1708, 1710 [4th Dept 2010]).

The principal conclusion of our dissenting colleagues that, in opposition to the motion, defendant failed to meet "a necessary element" with respect to whether plaintiff was the sole proximate cause because it did not affirmatively establish that it had provided any "safety equipment at all to plaintiff," and therefore did not show that the ladder was an adequate safety device, is not predicated on any argument advanced by plaintiff in his brief to this Court. Thus, because we do not believe that the issue addressed by the dissent is properly before us, we do not address its merits (*see Misicki v Caradonna*, 12 NY3d 511, 519 [2009]).

All concur except BANNISTER and DELCONTE, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent and vote to reverse the order and grant plaintiff's motion for partial summary judgment on the issue of liability with respect to the Labor Law § 240 (1) cause of action.

Preliminarily, we agree with the majority that plaintiff met his initial burden on the motion of establishing that the ladder was "not

so placed . . . as to give proper protection to [him]" through evidence that plaintiff fell when the ladder suddenly and unexpectedly shifted (*Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1578 [4th Dept 2016] [internal quotation marks omitted]). We respectfully disagree, however, with the majority's conclusion that defendant raised a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of [his] accident" (*Kin v State of New York*, 101 AD3d 1606, 1607 [4th Dept 2012] [internal quotation marks omitted]).

As this Court recently explained, where, as here, a plaintiff establishes a prima facie case that Labor Law § 240 had been violated, the burden then shifts to defendant, who may "establish a sole proximate cause defense, [by] demonstrat[ing] that the plaintiff '(1) had adequate safety devices available, (2) knew both that the safety devices were available and that [the plaintiff was] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had [the plaintiff] not made that choice' " (*Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1180 [4th Dept 2023], quoting *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]).

With respect to the first element, " '[t]he sole proximate cause defense does not apply where [a] plaintiff was not provided with an adequate safety device as required by the Labor Law' " (*DeRose v Bloomingdale's Inc.*, 120 AD3d 41, 45 [1st Dept 2014]) and, thus, "[i]n order to raise an issue of fact whether [a plaintiff's] own conduct was the sole proximate cause of the accident, [a] defendant [is first] required to establish that 'the safety devices that [the plaintiff] alleges were absent were readily available at the work site' " (*Kin*, 101 AD3d at 1607-1608). Here, there is no evidence–such as an expert affidavit or an admission by plaintiff–that there was equipment on site that was "adequate to allow plaintiff to safely complete his assigned task at the time of the accident" (*Green v Evergreen Family Ltd. Partnership*, 210 AD3d 1496, 1497 [4th Dept 2022]). Indeed, defendant concedes that it had provided no safety equipment at all to plaintiff, despite the nondelegable statutory duty to do so under Labor Law § 240 (1) (*see Panek v County of Albany*, 99 NY2d 452, 457 [2003]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]), and that the ladder used by plaintiff, who was working outdoors at night at the time of the accident, may have been broken. Without evidence establishing that adequate safety devices were present at the night-time work site, defendant failed to raise a triable question of fact with respect to a necessary element of the sole proximate cause defense (*see Miles v Great Lakes Cheese of N.Y., Inc.*, 103 AD3d 1165, 1167 [4th Dept 2013]).

The cases relied upon by the majority in support of its conclusion that defendant met its burden through hearsay evidence in the medical record suggesting that plaintiff fell from the ladder because he missed a step while descending in the dark, i.e., *DiCembrino v Verizon N.Y. Inc.* (149 AD3d 541, 541-542 [1st Dept 2017]), *Ozimek v Holiday Val., Inc.* (83 AD3d 1414, 1415-1416 [4th Dept 2011]) and *Hamill v Mutual of Am. Inv. Corp.* (79 AD3d 478, 479 [1st

Dept 2010]), are all distinguishable inasmuch as, in each of those cases, there was evidence raising a triable issue of fact whether an adequate safety device was present at the work site.

Defendant's failure to raise a triable issue of fact with respect to the first element of the sole proximate cause defense precludes, by necessity, the existence of a triable issue of fact on the second or third elements inasmuch as a defendant must first submit evidence that an adequate safety device was present at the work site before it can raise an issue of fact whether the plaintiff knew that safety device was available and that he was expected to use it, or that the plaintiff chose for no good reason not to use it (*see Miles*, 103 AD3d at 1167).

With respect to the fourth element of the sole proximate cause defense, our reading of the record reveals that the only evidence that plaintiff's actions may have been the cause of his fall is a single entry in the history and physical of the emergency department notes from the night of plaintiff's accident stating that he "blames the darkness and missing a step." It is well established that notations in a plaintiff's medical record that are "not germane to the plaintiff's diagnosis or treatment . . . [are] not admissible for their truth under the business records exception to the hearsay rule . . . [and] cannot . . . be the only evidence submitted to raise a triable issue of fact" (*Gomez v Kitchen & Bath by Linda Burkhardt, Inc.*, 170 AD3d 967, 969 [2d Dept 2019]; *see generally Williams v Alexander*, 309 NY 283, 287-288 [1955]). Even assuming, arguendo, that there is evidence that an adequate ladder–and lighting–were present at the work site, in our view, defendant nonetheless failed to submit any non-hearsay evidence sufficient to raise a triable question of fact with respect to the fourth element of the sole proximate cause defense (*see Mosqueda v Ariston Dev. Group*, 155 AD3d 504, 504 [1st Dept 2017]).

Moreover, even if there was non-hearsay evidence that plaintiff mis-stepped and missed a rung while descending the ladder, defendant still does not raise a triable question of fact with respect to proximate cause. "It is well settled that [the] failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240 (1)" (*Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996]) and, here, defendant does not dispute plaintiff's allegations that defendant failed to properly erect, secure or place the ladder to prevent it from shifting. Missing a rung while descending the ladder is not an act of "such an extraordinary nature or so attenuated from the statutory violation as to constitute a cause sufficient to relieve [defendant] of liability" (*Alati*, 137 AD3d at 1578 [internal quotation marks omitted]).

Entered: May 10, 2024

Ann Dillon Flynn
Clerk of the Court