SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 22, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13809 The People of the State of New York, Respondent, Ind. 6140/11

-against-

Jose Morel,
Defendant-Appellant.

_____

John R. Lewis, Sleepy Hollow, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David M. Cohn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered February 6, 2013, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of eight years, unanimously affirmed.

In this prosecution for assault in the first degree, a month after the trial jury found defendant guilty, he moved pursuant to CPL 330.30(1) to set aside the verdict and dismiss the indictment because the justification defense had not been presented to the grand jury. The court denied the motion as untimely (*see* CPL 250.20[1], [3]) and declined to consider it on the merits in the interest of justice. We affirm on the ground that, even

assuming, without deciding, that defendant's motion was timely made, the record establishes that this matter does not present one of the "rare cases of prosecutorial misconduct" entitling a defendant to "the exceptional remedy of dismissal [of the indictment]" (*People v Thompson*, 22 NY3d 687, 699 [2014] [internal quotation marks omitted]). Here, defendant chose not to testify before the grand jury, and, absent his testimony, there was no evidence before the grand jury to support a claim of justification, a defense that was ultimately presented to the trial jury and rejected.

According to the People's evidence, at approximately 9:00 to 9:30 P.M. on October 16, 2011, defendant was returning his four year old daughter to her mother, Engis Maracallo, on West 145th Street between Broadway and Amsterdam Avenue in Manhattan. At that time, Maracallo was living at the apartment of her boyfriend Luis Valdez. Defendant arrived in his car with his daughter in the back seat. As Maracallo and Valdez approached the car, Maracallo tried to open the rear passenger side door in order to remove her daughter but defendant moved his vehicle forward a short distance. Maracallo again tried to open the car door but defendant again moved forward. Defendant then got out of his car, approached Valdez with his hand concealed behind his back and swung a machete first at Valdez's leg, cutting through the

entire muscle, and then at his left arm, nearly severing it. Valdez then pulled out an ASP baton, an expandable metal stick that he used in his work as a private security officer, but he was too weak to extend it or strike defendant with it. While Valdez's friends pulled him to the sidewalk, Maracallo retrieved her daughter from the car. Defendant placed the bloody machete in the car and took out a metal bat before getting back into his car and driving away.

The next day, Detective Jose Oliveras arrested defendant. The DD5 form completed by the detective reflects that defendant told him that he acted in self defense, and that Valdez was banging on his car window while holding a stick. The case was ultimately submitted to a grand jury, before which defendant opted not to testify. The grand jury returned an indictment charging defendant with one count of assault in the first degree. At defendant's arraignment, the People served him with a voluntary disclosure form containing his statement claiming to have acted in self defense.

Defendant's trial commenced on November 8, 2012. Defense counsel, in his opening statement, maintained that it was Valdez who started an argument with defendant when the latter was dropping off his daughter, that it was Valdez who attacked defendant with a police-type baton called an ASP baton, and that

defendant used a knife only to protect himself.

Valdez, the People's first witness, testified upon direct examination that defendant attacked him with a machete and, after being struck twice by the machete, Valdez pulled out the ASP baton. During cross examination, Valdez claimed that he did not tell anyone about the baton at the crime scene or in the emergency room. When asked if he told the assistant district attorney (ADA) about the baton, he responded in the affirmative. As to the timing of that disclosure the following exchange occurred:

> "Q When did you tell the district attorney you had an ASP baton?
>
> "A When I spoke to her when I came to see her.
>
> "Q When? Before your testimony before the grand jury?
>
> "A Right around the same – right after. If I'm not mistaken.
>
> "Q And was that around the time of the incident? . . .
>
> "A No, it wasn't.
>
> "Q Well, when was it?
>
> "A It was after.
>
> "Q How long after?
>
> "A A few months after.
>
> "Q This happened October 16, 2011?
>
> "A Yes.

"Q Was it in December?

"A Yes.

"Q That's two months after, correct?

"A Yes.

"Q Did you tell the district attorney before you testified before the grand jury?

"[ADA]: Objection. . . It's all hearsay . . . It is prior consistent statements . . .

"[Defense counsel]: Can I explain, Judge? . . . What's happening here is that I had advised the district attorney around that time that my client had stated that the complainant had an ASP baton. The district attorney never acknowledged that my client – that the complainant had an ASP baton. And I believe that if she was aware before the case was presented to the grand jury, and I believe that if that was the case, and given the fact that my client had also stated to a detective that the complainant had a stick and that he acted in self-defense.

First, I think that would have been Brady material that should have been provided to the defense.

Two, I believe that would have definitely required an investigation and potentially the presentation to the grand jury regarding the justification defense in this case.

It is only at this time that I confirm through the complainant's testimony that there was in fact an ASP that the People and potentially the police department knew existed all along. My client has been telling me there was an ASP.

"THE COURT: Well, getting into it would be an issue or not. And without getting into whether this puts upon the prosecutor any kind of burden to charge the jury, the grand jury the justification defense.

I'm going to allow this line of questioning and give you some latitude to exposed [sic] questioning if that would go to the complainant's credibility.

If in fact he had an ASP at the time of the incident and that he took measures to conceal that — to keep it from the prosecution, it could go to his credibility. For that reason I'm allowing — I'm not going to rule whether it's a Brady issue. Should have been brought to the attention of the grand jury."

The ADA objected that the court was permitting Valdez to be impeached by omission (i.e., by what he failed to tell the grand jury), although he had only been asked to briefly summarize what happened. Nevertheless, this line of cross examination was permitted and, upon further questioning by defense counsel and repetition of the question as to when he told the ADA about the baton, Valdez indicated that he told her about the baton before testifying to the grand jury.

Later in the trial, defendant testified in his own behalf that he did not have a machete with him but rather a punal knife, which is thin and 12 to 14 inches in length, and that he took the knife out from under the seat of the car when he saw Valdez coming

at him swinging his baton, which was small and not extended. While Valdez made many unsuccessful attempts to hit defendant with the baton, defendant struck Valdez with the knife twice. Later that day, defendant threw the knife into the river.

Before summations began, defendant moved for a trial order of dismissal on the grounds that the People had not proved the elements of assault in the first degree beyond a reasonable doubt; that the People had not established a prima facie case; and that the People had not established that Valdez suffered serious physical injury. The court reserved decision. Thereafter, the jury was charged on justification but, nevertheless, on November 16, 2012, it convicted defendant of assault in the first degree.

After the verdict was announced, the court asked whether there were any applications or motions, whereupon defense counsel stated that he was "reserving at this time," although he believed that the verdict was against the weight of the evidence. The case was adjourned to December 3, 2012, for sentencing. On that date defendant orally moved to set aside the verdict pursuant to CPL 330.30(1). This was followed by a written motion filed on December 17, 2012, seeking an order setting aside the verdict and ordering a new trial because the People had committed a *Brady* violation by denying the existence of the ASP baton notwithstanding that the ADA knew about it even before presenting

the case to the grand jury. Defendant also sought an order dismissing the indictment on the ground that Valdez's possession and use of the baton required the grand jury to have been informed that Valdez possessed an ASP baton and charged on the defense of justification. While defendant recognized that his motion was not timely, he claimed that any lateness should be excused because he first learned from Valdez's cross examination at trial that the ADA had known of the baton when the case was presented to the grand jury. In an opposing affirmation, the People denied knowing about the baton before presenting the case to the grand jury.

Supreme Court denied the motion. It found that there was no *Brady* violation because defendant knew about the baton from the outset of the prosecution and he did not need the People to confirm its existence in order to assert his justification defense. In regard to the request to dismiss the indictment for failure to present a justification defense to the grand jury, the court found that the motion was not timely and declined to consider it in the interest of justice.

On appeal, while defendant does not challenge the trial court's rejection of his *Brady* claim, he argues that his motion to dismiss the indictment, based on the People's failure to charge the grand jury on justification, was timely made and should have been granted. In the alternative, he argues that the motion, even

if untimely, should have been considered on its merits in the interest of justice. We affirm on the ground that, on the merits, defendant was not entitled to the extraordinary relief of dismissal of the indictment.

It is axiomatic that a prosecutor, in presenting evidence and potential charges to a grand jury, is "'charged with the duty not only to secure indictments but also to see that justice is done'" (*People v Huston*, 88 NY2d 400, 406 [1996], quoting *People v Pelchat*, 62 NY2d 97, 105 [1984]). The role of the grand jury is not only to investigate criminal activity to see whether criminal charges are warranted but also to protect individuals from needless and unfounded charges (*People v Lancaster*, 69 NY2d 20, 25 [1986], *cert denied* 480 US 922 [1987]). For that reason, justification, as an exculpatory defense that if accepted eliminates any grounds for prosecution, should be presented to the grand jury when warranted by the evidence (*People v Valles*, 62 NY2d 36 [1984]). However, a prosecutor, in presenting a case to a grand jury, is "not obligated to search for evidence favorable to the defense or to present all evidence in [the People's] possession that is favorable to the accused . . . In the ordinary case, it is the defendant who, through the exercise of his own right to testify . . . , brings exculpatory evidence to the attention of the Grand Jury" (*People v Lancaster*, 69 NY2d at

25-26 [citations omitted]). Thus, a prosecutor is not obligated to present to the grand jury a defendant's exculpatory statement made to the police upon arrest (*see People v Mitchell*, 82 NY2d 509, 513-515 [1993]). Where, however, a prosecutor introduces a defendant's inculpatory statement to the grand jury, he is obligated to introduce an exculpatory statement given during the course of the same interrogation which amplifies the inculpatory statement if it supports a justification defense (*People v Falcon*, 204 AD2d 181 [1994], *lv denied* 84 NY2d 825 [1994]).

Here, defendant does not claim that the People introduced his inculpatory statement without also introducing a connected exculpatory statement making out a justification defense. Hence, the prosecutor was under no obligation to introduce defendant's claim upon arrest of having acted in self-defense.

An instructive contrast to the case at bar is provided by *People v Samuels* (12 AD3d 695 [2d Dept 2004]). While the *Samuels* conviction was reversed based on a failure to charge the grand jury on justification, in *Samuels*, unlike the instant case, the defendant testified before the grand jury and presented a version of events that arguably made out a justification defense. The majority held that, notwithstanding the trial jury's rejection of the defense, reversal was warranted because of the failure to charge the grand jury on justification (*id.* at 698-699). In

Samuels, the defendant herself placed evidence supporting her justification defense before the grand jury and was therefore entitled to have the grand jury charged on the issue (*id.* at 699). That is not the situation here, where the grand jury did not hear *any* testimony that would have supported a charge on justification. Not only did the complainant not testify that he had an ASP baton in his possession during the incident, defendant himself, with direct knowledge of the incident and of any circumstances that would have justified his actions, chose not to exercise his right to testify before the grand jury.

Assuming arguendo that, as claimed by defendant and denied by the People, the ADA did know about the ASP baton at the time of the grand jury proceedings, dismissal of the indictment based on the failure to charge the grand jury on justification still would not be warranted. "[A] Grand Jury proceeding is not a mini trial . . . The prosecutor . . . need not disclose certain forms of exculpatory evidence . . . [Nor is] the prosecutor . . . obligated to present the evidence or make statements to the grand jurors in the manner most favorable to the defense" (*People v Thompson*, 22 NY3d at 697-698 [internal quotation marks and citations omitted]). As previously noted, a prosecutor is "not obligated to search for evidence favorable to the defense or to present all evidence in [the People's] possession that is

favorable to the accused . . . In the ordinary case, it is the defendant who, through the exercise of his own right to testify . . . , brings exculpatory evidence to the attention of the Grand Jury" (*People v Lancaster*, 69 NY2d at 25-26 [citations omitted]). Moreover, as to defendant's statement in the police report claiming to have acted in self defense, we reiterate that the People are not required to introduce the accused's exculpatory statements to the grand jury when those statements are not part of a single statement, the inculpatory portions of which were presented to the grand jury (*see People v Mitchell*, 82 NY2d at 513). Again, the People did not present to the grand jury any portion of defendant's statement to the police.

We are mindful, of course, that "due process imposes upon the prosecutor a duty of fair dealing to the accused and candor to the courts," a duty that "extends to the prosecutor's instructions to the grand jury and the submission of evidence" (*People v Thompson*, 22 NY3d at 697 [internal quotation marks omitted]). Nonetheless, the "exceptional remedy of dismissal" is not available here, where defendant has not shown any misconduct by the prosecutor, much less that his indictment resulted from "an over-all pattern of

bias and misconduct that [was] pervasive and . . . willful" (*id.* at 699 [internal quotation marks omitted]).[1] As defendant does not raise any other arguments for reversal, the judgment of conviction is affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 22, 2015

CLERK

[1]Again, given that defendant chose not to testify before the grand jury, we observe that it is questionable whether a justification charge would have been warranted had Valdez testified that he was in possession of the ASP baton during the incident, without further evidence to support defendant's position that he reasonably believed that the use of deadly force by Valdez was imminent (*see* Penal Law § 35.15[1]; *People v Torres*, 252 AD2d 60, 65 [1st Dept 1999], *lv denied* 93 NY2d 1028 [1999]).

Mazzarelli, J.P., Saxe, Feinman, Clark, JJ.

14506 In re Juanita Murray, Index 100138/2013
Petitioner-Appellant,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Respondents.

_____

Richard E. Casagrande, New York, (Eric W. Chen of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York, (Fay Ng of counsel), for respondents.

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered October 1, 2013, denying the petition seeking, inter alia, to annul respondents' determination, dated September 19, 2012, which denied petitioner's appeal of an unsatisfactory rating (U-rating) for the 2010-2011 school year, and granting respondents' motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, and the petition granted to the extent of annulling the U-rating.

Petitioner is a tenured school social worker employed by the Department of Education (DOE) (sued here as the Board of Education). She challenges a year-end overall U-rating issued by her principal, Robert Mercedes, in her Annual Professional

Performance Review (APPR) for the 2010-2011 school year. The APPR, which she received on June 21, 2011, indicated unsatisfactory ratings in seven categories: attendance and punctuality, where Mercedes indicated that petitioner's attendance was "nearing limit"; professional attitude and professional growth, where he indicated that she lacked professional growth based on observation; resourcefulness and initiative, where he wrote that she lacked initiative and growth; analysis and interpretation of assessment data, where he indicated that she was unable to provide information upon which to base progress; translates assessment findings into educationally relevant goals and objectives, where he wrote that she was unable to assist students served; appropriateness and flexibility of counseling approaches, where he wrote that she was not flexible; and assessment reports, where he wrote that assessment reports were not submitted on time.

The documentation accompanying the APPR consisted of three letters written by Principal Mercedes to petitioner. The first, a May 31, 2011 letter, noted that petitioner had not provided Mercedes with previously requested particularized information concerning her work with, and the progress of, three of her students selected as a sample. The second, a June 7, 2011 letter, indicated that the documentation she subsequently submitted was

unsatisfactory. The third, a June 15, 2011 letter, detailed the information previously requested and what petitioner had provided, and requested details of her specific strategies to improve her students' coping skills, the interventions she used that could be "qualitatively analyzed," and evidence that she conferenced with teachers and measured and tracked the success of her students. The June 15, 2011 letter concluded that because the documentation she provided was intended to be used "in lieu of a formal observation" (as had been set forth in a letter of May 10, 2011 included in the record on appeal but not as an attachment to the APPR), she would receive an unsatisfactory evaluation.

As was her right under the parties' collective bargaining agreement, petitioner appealed her U-rating to the Chancellor of the DOE. A hearing took place in May 2012, at which both petitioner and Principal Mercedes testified. No transcript is included in the record; respondents instead rely on the report of the hearing issued by the Chancellor's Committee, which described the parties' arguments, made findings of fact, and recommended that the U-rating be sustained. The Committee concluded that petitioner had not countered respondents' claims that she took nine absences, all of which were before or after weekends and holidays, that she had been told at the beginning of the year that she was responsible for submitting logs but had not submitted any,

that Principal Mercedes was unable to determine what techniques and strategies she was using or how often she met with any of the students, and that her claim that her work had been favorably reviewed by an in-discipline supervisor during the year was "hearsay," as she provided no documentary substantiation. The Committee also noted that the principal was accountable for evaluating all pedagogues in a school.

By letter dated September 19, 2012, petitioner was notified that the U-rating was sustained "as a consequence of a pattern of excessive absence (before and after weekends and holidays), and a lack of impact on student growth."

Pursuant to CPLR 7804, petitioner timely commenced this proceeding. Because she challenges the entirety of the U-rating, there was no need for her to have first filed a grievance based on her unsatisfactory rating for attendance and punctuality. The appeal to the Chancellor's Committee was her exclusive contractual and administrative remedy.

Petitioner establishes that in evaluating her performance, respondents did not adhere to their procedures or those provided in the parties' collective bargaining agreement. Special Circular No. 45, a memorandum issued by respondents in response to the mandate set forth in the Commissioner of Education Regulations (8 NYCRR) § 100.2(o), outlines the procedures for rating professional

personnel, as does the related manual produced by the New York City Public Schools, entitled Rating Pedagogical Staff Members. Specifically, as a pedagogical employee, petitioner was to be given at least one full period of review during the school year by her principal, followed by a meeting with the principal to discuss her strengths and any areas in need of improvement. Additionally, as a social worker employed at a school, she should have been evaluated by the school principal in consultation with the in-discipline supervisor, in accordance with the collective bargaining agreement.

Respondents point to Principal Mercedes' May 15, 2013 affidavit wherein he states that he had in fact observed a group counseling session conducted by petitioner in April 2011 but felt that a single observation was insufficient to gauge the effectiveness of her work. However, he apparently he did not testify about the April observation at the Chancellor's Committee hearing, and petitioner disputes that it occurred. There is no documentation of the April observation, and Mercedes makes no claim to have spoken with petitioner following that observation.

It is also of great concern that an in-discipline supervisor did not critique petitioner's work as required by the collective bargaining agreement. Because there is no transcript of the Chancellor's Committee hearing, we have only petitioner's

assertions, made in her underlying papers and again on appeal, that Principal Mercedes admitted to not having the experience or qualifications to evaluate petitioner without input from the in-discipline supervisor prior to asking petitioner for documents.[1] Mercedes' May 15, 2013 affidavit offers the additional statement, made in response to petitioner's claim that he did not collaborate with the in-discipline supervisor when making his year-end evaluation, that the supervisor position for his school was dissolved "after May 2010." There is nothing in the record to substantiate this claim. Presumably such a decision would have

---

[1] Respondents cite *Batyreva v New York City Dept. of Educ.* (50 AD3d 283 [1st Dept 2008]), to argue that the Board of Education is not required to include a transcript of a Chancellor's Committee hearing when a proceeding is commenced under CPLR 7803(3). *Batyreva* addressed whether that particular proceeding should have been brought pursuant to CPLR 7803(4), requiring a substantial evidence analysis, and concluded that it was properly brought under the arbitrary and capricious standard (CPLR 7803[3]). As to the hearing transcript, which had not been included in the record, we noted that the petitioner had not "demonstrated that a full transcript of the hearing before the Chancellor's Committee . . . was unavailable upon request." (*Id.* at 283-284). However, the evidence in *Batyreva* included eleven unsatisfactory classroom evaluation reports over the course of two years, and there was no question that the administrative decision to uphold the U-ratings was not arbitrary and capricious. Here, in contrast, while respondents have provided a litany of petitioner's failings, the issue is whether petitioner had notice of the complaints, or was in essence blindsided at the end of the school year. The hearing transcript might have shed some light on this question, as well as on the issue of Mercedes's alleged admission that he lacked the competence to evaluate social workers.

been made by persons with more authority than the principal. Moreover, such an action seemingly contradicts the provision in the collective bargaining agreement. In any event, left unstated is that it appears on the record that Mercedes apparently had never conferred with the in-discipline supervisor about petitioner's work prior to the dissolution of the supervisor's position.

There is no evidence that petitioner was notified before the end of the school year in June 2011 that her work was considered unsatisfactory. Although Principal Mercedes testified at the Chancellor's Committee hearing that petitioner was told to keep and be prepared to submit logs of her work, and that she always stated that they were unavailable, there is no indication that she was advised that this was unacceptable and would result in an unsatisfactory evaluation. Mercedes testified that teachers complained they were unable to discuss their students with petitioner, but there is nothing to show petitioner was aware of that criticism prior to the annual performance review, or that she was directed to change her practices. Petitioner was also apparently not cautioned about her absences prior to June 2011, as the only letter sent to her concerning her attendance, oddly not included as part of the APPR, is dated June 2011.

The record is clear that petitioner was deprived of her

substantial rights in the review process culminating in her U-rating, when compared with, for instance, *Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.* (102 AD3d 586 [1st Dept 2013]). In *Cohn*, the petitioner's second annual U-rating was based on "detailed observations in reports prepared by the principal and two assistant principals, describing petitioner's poor performance in class management, engagement of students, and lesson planning" (102 AD3d at 586). He had been provided with a professional development plan at the start of the school year, and he received professional support throughout the year, including several classroom observations by the principal and two assistant principals, all of whom gave "detailed" letters making specific recommendations to improve his instructional deficiencies (*id.* at 587). Thus, although the petitioner in *Cohn* did not receive pre-observation conferences before every classroom observation, as required by the collective bargaining agreement and respondents' manual, Rating Pedagogical Staff Members, the U-rating was rationally based. In comparison, the instant record does not show that petitioner was provided with support, or formal constructive criticism, of any kind.

This case also differs from *Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.* (117 AD3d 605 [1st Dept 2014]), where we found no violation of a lawful procedure or substantial right despite the probationary teacher's arguments that she did not receive any mandatory prescreening conferences before classroom observations, was not provided a curriculum or a professional development plan, did not receive help to manage disciplinary problems in class, and did not receive model lesson plans from another teacher (*id.* at 606). However, the record showed that the petitioner was given three formal observation reports describing her poor performance in class management and engagement of students, and was sent to professional development sessions after receiving her first unsatisfactory report, but her instructional skills did not improve (*id.* at 606-607). In contrast, here respondents have not demonstrated by competent proof that they gave petitioner, who was tenured, any feedback of any kind.

The facts alleged here are more akin to those in *Matter of Kolmel v City Of New York* (88 AD3d 527, 527-529 [1st Dept 2011]), where the U-rating given to the probationary teacher in his fourth year of teaching was arbitrary and without a rational basis because the principal who awarded the U-rating did not observe the petitioner's teaching during either of his last two years at the

school, and because the year-end report indicated that all but two categories were unsatisfactory even when there was no evidence to support the rating, or the rating was contradicted by evidence in the report.[2] In *Matter of Kolmel*, the respondents' failure to adhere to the regulations tainted the findings of two negative classroom observations cited in the year-end report, two file letters claiming unbecoming conduct, and the year-end U-rating (*id.*).

Similarly, in *Matter of Brown v City of New York* (111 AD3d 426, 427 [1st Dept 2013]), we held that the deficiencies in rating the petitioner "undermined the integrity and fairness of the entire review process." There, the petitioner, in her second year, was observed by the principal, informally and for the first time, at the end of January and was criticized for failing to have a daily plan. She was formally observed about a month later and, although found deficient in other areas, was not provided with the written evaluation until early June; nine days after receiving the formal evaluation, she was formally evaluated for a second time

[2] Additionally, the principal had stated at the administrative hearing that she did not rely on the file letters in making her tenure recommendation, and the petitioner submitted a statement by a current DOE employee who formerly worked at the high school, that the principal pressured assistant principals to give negative U-ratings without observing the teachers (*Kolmel* at 528-529).

and found, unsurprisingly, to have made no improvement.

In short, the complete absence of constructive criticism and warnings during the entire school year, compounded by the lack of a formal observation and accompanying feedback during the school year, "undermined the integrity and fairness of the process" (*Matter of Kolmel*, 88 AD3d at 529). Accordingly, the judgment should be reversed, and the petition granted to the extent of annulling the U-rating.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 22, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15047 Waterside Plaza Ground Lessee, LLC, Index 105487/11
Plaintiff-Appellant,

-against-

John G. Rwambuya, et al.,
Defendants-Respondents.

_____

Belkin Burden Wenig & Goldman, LLP, New York, (Magda Cruz of counsel), for appellant.

Law Office of Harry Kresky, New York, for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohen, J.), entered July 10, 2014, which denied plaintiff's motion for summary judgment, and granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny defendants' motion for summary judgment and reinstate the complaint, and otherwise affirmed, without costs.

Plaintiff (owner) is the net lessee and owner of 10 Waterside Plaza, a building within a Manhattan residential apartment complex. Defendants John G. Rwambuya and Yunia C. Rwambuya (parents) are the tenants of record of apartment 20-F (apartment) in the building. Defendant Joseph Rwambuya is their adult son (son). Owner seeks to recover the apartment based on its claim that the parents no longer occupy the premises as a primary residence. The parents concede that they no longer occupy the

apartment as a primary residence. In fact, defendants all agree that the parents permanently vacated the apartment in 2000. They ague that the son has a right to succession, which under the operative law and agreements is only triggered if the tenants of record have permanently vacated. If the parents continue to use the apartment as non-primary residents, no right of succession is triggered and the owner would have the right to rescind the lease. Thus, while a typical non-primary residence dispute involves tenants claiming that they have a greater nexus to the apartment than is claimed by the owner, in this case defendants maintain that the parents' nexus to the apartment is actually less than owner claims it is. Because we believe that there is an issue of fact as to whether the parents' limited use of the apartment qualifies as a permanent vacatur or merely non-primary use, we hold that the motion court erred in granting defendants' motion for summary judgment dismissing the complaint. The disputed issue of fact, however, supports the motion court's denial of the plaintiff's motion for summary judgment. The building was formerly regulated under Private Housing Finance Law Article 2, commonly known as the Mitchell-Lama program. Pursuant to a settlement agreement dated July 26, 2001 (Settlement Agreement), approved by the New York City Department of Housing Preservation and Development, and so ordered by the New York State Supreme

Court, the complex was converted to fair market housing. Any tenant of record who elected to accept the terms of the Settlement Agreement (settling tenant) by signing a Tenant Acceptance of Agreement form, obtained certain protections under the Rent Stabilization Law (RSL) that might not otherwise have been available to them, including the limited right to pass on their apartment to certain family members.

Pursuant to Paragraph 8 of the Settlement Agreement, settling tenants are entitled to successive, one year leases that automatically renew each November 1st during the settling tenant's lifetime, provided the tenant is not in default. These renewals are automatic and, as provided for by the settlement agreement, are not actually executed by the settling tenant. Paragraph 19 of the Settlement Agreement provides that "[i]n order to retain the benefits of this [Settlement] Agreement, a Settling Tenant must maintain his/her/their apartment as a primary residence and the failure to so maintain the apartment . . . shall be a breach of this [Settlement] Agreement . . . ." Except as otherwise provided, upon the death of the settling tenant or the surrender of said apartment by the settling tenant, owner is entitled to enter and recover said apartment. Although the rights provided under the Settlement Agreement are personal to the settling tenant, those rights may be passed on to settling tenant's spouse,

domestic partner and children, if the individual purporting to have succession rights satisfies the co-occupancy requirements set forth in Paragraph 13 of the Settlement Agreement which are modeled after, and apply the same evidentiary burdens found in, the Rent Stabilization Code [9 NYCRR] § 2523.5[b][2]. Paragraph 13 states:

> "In determining entitlement to receive succession rights . . . the criteria, requirements, co-occupancy period (in the apartment as a joint primary residence with Settling Tenant) and evidentiary burdens normally used in rent stabilized contests pertaining to succession rights as exist on the date of this Agreement shall apply; however, with regard to children of the Settling Tenant, the co-occupancy period (in the apartment as a joint primary residence with Settling Tenant) shall be no less than three (3) years immediately preceding the permanent vacatur by the Settling Tenant. In the event of [sic] a Settling Tenant's tenancy is succeeded to, the successor tenant and Owner shall execute an agreement binding the Owner and successor tenant to the terms of the Lease, renewal (if any) and this Agreement, and such successor shall thereafter be a Settling Tenant . . ."

The parents are settling tenants. They moved into the apartment in 1977 with their then five year old son, Joseph and three other children. The apartment has two-bedrooms. Respondents contend that Joseph (now in his 40's) has lived in the apartment almost his entire life (except while attending college),

that he co-occupied the apartment with his parents before they permanently relocated to Uganda and that he remained in the apartment after his parents relocated. Thus, they contend that their son, who was raised in the apartment, is a successor tenant, and is entitled to a lease in his own name.

Owner contends that the son is not qualified for succession rights because his parents breached the Settlement Agreement by failing to maintain the apartment as their primary residence. Owner argues that this breach entitles it to rescind the lease and recover possession of the apartment. Owner claims that the parents never permanently vacated the apartment, but used it on an ongoing, albeit limited, basis. Plaintiff also relies on certain activities by the parents, such as their use of keycards to access the building and other amenities (for example, the laundry room), the existence of utility bills (phone and cable) in their names until 2007, and their receipt of mail at the building. According to owner, these activities show that the parents did not really relocate to Uganda as they claim, but kept two homes.

The parents, now ages 83 (John) and 70 (Yunia), retired after long careers in New York City, the mother as a nurse and the father as a senior budget director at the United Nations. They are natives of Uganda, where they live, having built a home there before they retired. Both parents readily concede that they still

visit New York to see their doctors[1] and visit friends and family, but claim that by at least 2000, they had permanently vacated the apartment with no intention of keeping it as their primary residence. The father testified that he has a Ugandan driver's license and passport. According to both parents, their son continued to reside in the apartment after they moved and when they come to New York for visits, they stay with him in the apartment. With limited exceptions, the son personally pays the majority of expenses associated with the apartment. Although the parents use their keycards to gain access to the building when visiting and they store some personal belongings in the apartment, they argue that this does not constitute a non-primary use of the apartment, but rather a practical alternative to staying at a hotel. While they also admit that they refer to the apartment as their "home," the parents contend they mean this in a general sense because of fond memories and their son's presence there, and not because they actually still live in the apartment.

It is clear that the parents either have ceased using the apartment as their primary residence or have permanently vacated it, given their statements that they only visit New York for several weeks each year (*see Claridge Gardens v Menotti*, 160 AD2d

[1]Parents cite the superior medical care available in the United States.

544, 545 [1st Dept 1990]). In either event, the parents have no legal right to continue as the lease tenants. If the apartment is no longer the parents' primary residence, then they have breached the residency requirements of the Settlement Agreement. If, on the other hand, the parents permanently vacated the apartment, they are no longer entitled to renewal leases. Under either scenario, the parents no longer have any rights in the apartment because Paragraph 13 of the Settlement Agreement conditions the retention of benefits upon the settling tenant maintaining the apartment as his/her/their primary residence.

The son's claimed right to a lease as a successor tenant is a separate legal issue governed by Paragraph 13 of the Settlement Agreement which incorporates the requirements and terms of Rent Stabilization Code [9 NYCRR] § 2325.5(b)(1), extending the minimum required co-occupancy period by one year, from two years to three. Paragraph 13 specifically refers to the "evidentiary burdens" normally associated with such claims. Since the parents have vacated the apartment, to qualify for succession rights, the son has the burden of establishing that he jointly co-occupied the apartment with his parents as their primary residence for a period of no less than three years immediately preceding his parents' permanent vacatur (*see Matter of Quinto v New York City Dept of Hous. Preserv. & Dev.*, 78 AD3d 559 [1st Dept 2010]; *68-74 Thompson*

Realty, LLC v McNally, 71 AD3d 411 [1st Dept 2010]). The son's proof that he has maintained the apartment as his primary residence for all of his adult life, including three years before his parents moved to Uganda, is unrefuted (*see Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649 [2013]). Although the parents no longer have rights to the apartment, there are still disputed issues of fact regarding whether at the time the parents moved to Uganda, they permanently vacated the apartment or continued to use the apartment as nonprimary residents. This issue and disputed facts directly affect the son's right (if any) to a successor tenancy. If the parents permanently vacated, then the son would have rights as a successor. If, however, the parents continued to use the apartment as non-primary residents, the son's claim would fail This issue precludes the grant of summary judgment to either side on the issue of whether the son has successor rights.

Plaintiff's argument, that the parents were not qualified to enter into the Settlement Agreement in the first place because of

their present claim that they vacated the apartment in 2000 which was not raised below, but raised for the first time in its reply brief, was not considered by us.

We have considered and rejected the plaintiff's remaining arguments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 22, 2015

CLERK

Mazzarelli, J.P., Sweeny, Saxe, Richter, Manzanet-Daniels, JJ.

15693 Juan Gonzalez, as Administrator of the Estate of Nancy Barbosa, et al., Plaintiffs-Appellants, Index 23580/04

-against-

231 Ocean Associates et al., Defendants-Respondents.

_____

Bierman & Associates, New York, (Mark H. Bierman of counsel), for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York, (Patrick J. Lawless of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 14, 2013, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiffs' cross motion for preclusion of a nonparty witness's deposition testimony, sanctions for failing to produce another witness, and severance of defendants' third-party action, unanimously modified, on the law, to deny defendants' motion for summary judgment as to plaintiffs' negligence cause of action, and to grant plaintiffs' cross motion to the extent of precluding the nonparty deposition of the assailant, and severing the third-party action, and otherwise affirmed, without costs.

In this action for negligent security, defendants are not entitled to judgment as a matter of law on plaintiffs' negligence

cause of action. There are triable issues of fact as to whether defendants breached their duty to take minimal security precautions to protect plaintiff's decedent from the criminal acts of third-party intruders and as to whether any such failure was a proximate cause of the attack on her (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]). Viewing the evidence in the light most favorable to plaintiffs, questions of fact exist as to whether the lock on the building's front door entrance, through which the assailant entered, was broken. In addition, the evidence of a history of prior crimes, including assaults, in and around the building raises an issue of fact as to whether defendants' alleged negligence was a proximate cause of the attack (*see Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]).

It was not improper for the court to address the parties' motions, made before decedent's death, in the order on appeal. Although the court recalled and vacated its previous order (*see* CPLR 1015), there was no need to renew the motions that were previously made. However, the court abused its discretion in denying the portion of plaintiffs' cross motion seeking to preclude the deposition testimony of the assailant, who improperly terminated the deposition, thereby depriving plaintiffs a full and fair opportunity to conduct the cross

examination of the witness, to which they were entitled (*see Matter of Ciraolo* [*Whitey Produce Co., Inc.*], 37 AD3d 461 [2d Dept 2007], *lv dismissed* 9 NY3d 943 [2007]).

The court properly dismissed plaintiffs' gross negligence and punitive damages claims. The alleged negligent conduct did not evince a "reckless disregard for the rights of others" or "smack[] of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993][internal quotation marks omitted]). Nor do plaintiffs allege anything unusual or extraordinary about defendants' conduct to warrant punitive damages (*see Munoz v Puretz*, 301 AD2d 382, 384-385 [1st Dept 2003]).

In light of the above preclusion ruling, plaintiffs' cross motion seeking to dismiss or sever defendants' third-party action against the assailant should be granted, despite its timely filing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 22, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15435 Keyla Virginia Gonzalez, as Administratrix of the Estate Of Shirley Fontanez, Plaintiff-Appellant, Index 308383/08

-against-

The City of the New York, Defendant-Respondent.

_____

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 13, 2014, reversed, on the law, without costs, and defendant's motion denied.

Opinion by Renwick J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Karla Moskowitz
Sallie Manzanet-Daniels
Paul G. Feinman, JJ.

15435
Index 308383/08

_____x

Keyla Virginia Gonzalez, etc.,
Plaintiff-Appellant,

-against-

The City of the New York,
Defendant-Respondent.
_____x

Plaintiff appeals from the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 13, 2014, which granted defendant's motion for summary judgment dismissing the complaint.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac and Michael H. Zhu of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor and Richard Dearing of counsel), for respondent.

RENWICK, J.

This action arises from the shooting death of Shirley Fontanez by her boyfriend, Police Officer Frederick Maselli, at his home, on July 23, 2007. After the shooting, Maselli killed himself. Fontanez was 16 years old when she began her relationship with Maselli, who was then 38 years old. Fontanez is survived by her infant daughter, Angeshely Sasha Gonzalez, the sole distributee of Fontanez's estate. Plaintiff Keyla Virginia Gonzalez, as administrator of the Estate of Fontanez, alleges that numerous complaints were made to the City of New York concerning Maselli's abusive conduct toward Fontanez and Sasha, that the City was negligent in hiring, training, supervising and retaining Maselli, and in failing to take action to remove his firearm, and thereby caused Fontanez's wrongful death. Supreme Court, however, granted the City summary judgment dismissing the action on the ground that any negligence on defendant City's part for failing to discharge a police officer with violent propensities could not have been the proximate cause of Fontanez's death, since at the time of the fatal shooting, Maselli was off-duty and was acting outside the scope of his employment. Thus, the dispositive issue that we must resolve is whether the fact that the police officer was off duty when he

committed the fatal shooting breaks any connection, as a matter of law, between the fatal injuries and the employer's alleged negligence regarding an employee with violent propensities. For the reasons explained below, we find that it does not.

This case raises classic issues of duty and proximate cause. Integral to each element is a question of foreseeability. However, the questions of foreseeability are distinct. In determining duty, a court must determine whether the injured party was a foreseeable plaintiff - whether she was within the zone of danger created by defendant's actions (*Palsgraf v Long Is. R.R. Co.,* 248 NY 339 [1928]). A plaintiff must show that defendant's actions constituted a wrong against her, not merely that defendant acted beneath a required standard of care and that plaintiff was injured thereby (*id.*). She must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff (*id.* at 342). The existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law (*id.*; see also Prosser & Keeton's Torts § 37 [5th ed 1984])

In determining proximate cause, an element of foreseeability is also present - the question then is whether the injury to plaintiff was a foreseeable result of defendant's breach, i.e.,

what manner of harm is foreseeable? (*see* Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, The Law of Torts § 16.9, at 466-469 [2d ed 1986] [discussing the history of the nexus between breach and foreseeability]). The question of proximate cause is generally a question of fact for a jury.

In this case, the alleged duty owed to plaintiff stems from New York's long recognized tort of negligent hiring and retention (*see Haddock v City of New York*, 75 NY2d 478 [1990]; *Ford v Gildin*, 200 AD2d 224 [1st Dept 1994]; Detone v Bullit Courier Serv., 140 AD2d 278 [1st Dept 1988], *lv denied* 73 NY2d 702 [1988]). This tort applies equally to municipalities and private employers (*see Haddock,* 75 NY2d 478). This theory of employer liability should be distinguished from the established legal doctrine of "respondeat superior," where an employer is held liable for the wrongs or negligence of an employee acting within the scope of the employee's duties or in furtherance of the employer's interests (*see* Restatement [Second] Agency §§ 219[1], 228). In contrast, under the theory of negligent hiring and retention, an employer may be liable for the acts of an employee acting outside the scope of his or her employment (*see id.* at § 219[2]; *see also id.* at § 213 [comment d]); Restatement [Second] of Torts § 317).

Thus, in this case, plaintiffs' negligence claims do not depend on whether Maselli acted within the scope of his employment or whether the City participated in, authorized, or ratified Maselli's tortious conduct. Rather, the alleged breach of duty stems from the claim that during Maselli's employment with the City, the City became aware or should have become aware of problems with Maselli that indicated he was unfit (i.e. possessed violent propensities), that the City failed to take further action such as an investigation, discharge, or reassignment, and that plaintiff's damages were caused by the City's negligent retention, or supervision of Maselli.

The negligent retention or supervision of a police officer, which results in the employee having possession of a dangerous instrumentality, is similar to if not indistinguishable from the tort of entrusting a dangerous instrumentality to another. The duty analysis should be the same. "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm

resulting to them" (Restatement [Second] of Torts § 388. The duty not to entrust a gun to a dangerous or incompetent police officer thus extends to any person injured as a result of the negligent entrustment.

Consistent with this theory of liability, New York courts have held governmental employers liable for placing employees, like police officers who are known to be violent, in positions in which they can harm others (*see e.g. Haddock*, 75 NY2d at 480; *Hall v Smathers*, 240 NY 486 [1925]; *McCrink v City of New York*, 296 NY 99 [1947]). For instance, in *McCrink*, an off-duty New York City police officer, while intoxicated, shot and killed one citizen and seriously wounded another. In three separate disciplinary proceedings prior to the incident, he was found guilty of intoxication and punished for the offense. However, the City retained the officer in its employ despite the fact that his retention as a police officer who was permitted to carry a revolver at all times posed a potential danger to the public. The Court of Appeals held that this disciplinary record was proof from which a jury might find that the Police Department was fully aware that the officer was not to be trusted to perform the duties of a police officer and that it could be found negligent for retaining him. Thus, the Court of Appeals held that when the

retention of an officer may involve a risk of bodily harm to others, the government has a duty to abate the risk of dangers to others *(McCrink*, 296 NY at 106).

Similarly, in *Wyatt v State* (176 AD2d 574 [1991]), this Court held the State liable for placing a correction officer who was known to be violent in a position in which he could harm others. In 1984, Robinson, an off-duty Department of Correctional Services officer, shot a puppy named "Princess" for barking too loudly (*id*. at 575). When Princess's owner, Marquez, confronted him, Robinson responded, "I going [sic] to shoot you too" (*id*.) The police soon arrived, but did not arrest Robinson after he displayed his correction officer's badge (*id*.). Marquez notified Corrections of the incident and was told an investigation would be made (*id*.). Apparently accepting Robinson's account that the puppy was about to attack him, and in violation of the Department's own rules, the Department never performed a full investigation (*id*.). The file was subsequently closed and no disciplinary action was ever taken (*id*.). Robinson was not suspended and his privilege to carry a pistol while off duty was not revoked (*id*. at 576).

Two years later, while off duty, Robinson shot and wounded two men following a traffic dispute (*id*. at 574). After shooting

one of the men in the hip and one in the abdomen, Robinson approached and kicked one of them in the head (*id.*). Despite his assertion that the two men had attacked him, the only injury Robinson sustained was a bruised right foot (*id.*). After a bifurcated nonjury trial, the State was found not liable. This Court reversed the trial court's dismissal, finding that the negligent supervision and retention claim was supported by the fact that Corrections had failed to comply with its own disciplinary rules (*id.* at 576) This Court reasoned, "[S]uch omission cannot be cured by later supposition that, had a proper investigation been made of the 1984 incident, the employee's status would have remained unchanged" (*id.* at 576-577).

Likewise, in *Jones v City of Buffalo* (267 AD2d 1101 [1999]), the Appellate Division, Fourth Department, found that the City of Buffalo could be held liable for placing a police officer who was known to be violent in a position in which he could harm others. In Jones, the off-duty police officer, who was estranged from his wife, shot and seriously wounded her. Prior to the shooting, the officer had informed his superiors of a previous assault and arrest, but no action was taken against him. The wife's claims included negligent retention and failure to provide psychological services. The Fourth Department upheld the motion court's denial

of the City's motion for summary judgment as to those claims because there were genuine issues of material fact as to whether the City negligently retained the officer and failed to provide him with psychological services following his first violent assault on his wife.

As *McCrink*, *Wyatt* and *Jones* illustrate, the torts of negligent retention and supervision of governmental employees with dangerous propensities do not specifically require allegations that the employees' misconduct occur within the course and scope of the employment. Rather, what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance. In this case, plaintiff alleges such a connection or nexus. The City is alleged to have played a part in both creating the danger (by training and arming an officer) and rendering the public more vulnerable to the danger (by allowing him to retain his weapon and ammunition after it allegedly learned of his dangerous propensities). Thus, Officer Maselli's alleged tort was made possible through the use of his pistol, which he carried by authority of the City.

In our view, both the type of harm that occurred and the person on whom the injury was inflicted were foreseeable within a

degree of acceptability recognized by New York law. Clearly, the government has a duty to minimize the risk of injury to members of the public that is presented by the policy of permitting police officers to carry guns off duty. The City could reasonably have anticipated that its negligence in failing to discipline an officer who had violent propensities would result in the officer injuring someone with his gun. Thus, when an officer misuses his weapon, a jury might reasonably find that the misuse was proximately caused by the government's negligence, if proven, in supervising or retaining a police officer with known violent propensities. Furthermore, it was reasonably foreseeable that such an officer would injure a member of his own family, including his girlfriend. "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent" *(Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 [1980]; *see also Nallan v Helmsley-Spear*, Inc., 50 NY2d 507, 520-521 [1980]; *Pagan v Goldberger*, 51 AD2d 508 [2nd Dept 1976]), and the occurrence of that act did not approach that degree of attenuation condemned *in Palsgraf (*248 NY at 342-344; Restatement [Second] of Torts §§ 448- 449).

We are not persuaded that the cases relied on by defendant

mandate a different result. In *Maldonado v Hunts Point Coop. Mkt.* (82 AD3d 510 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]), the plaintiff was shot and injured by her boyfriend, Machado, during a domestic dispute in their home. Machado used a revolver he had surreptitiously removed from Hunts Point Produce Market, where he worked as a security guard, and concealed before leaving work. After shooting the plaintiff, Machado shot and killed himself. This Court found that Hunts Point was not negligent in entrusting Machado with a weapon to use for security purposes at his employer's premises. Apparently, in this Court's view, the injured party was not a foreseeable plaintiff - that is, she was not within the zone of danger created by the defendant's action. In that respect we agree with *Maldonado*, that the security guard's unauthorized and surreptitious removal of a revolver from his place of employment and subsequent use during a domestic dispute was not a risk created by entrusting the gun to the security guard to use only at work.

Maldonado, however, also held, albeit in dicta, that even if the employer breached a duty of care arising from entrustment of a firearm to the security guard, any such breach did not proximately cause the girlfriend's injuries because the guard was not acting within the scope of his employment when he shot the

girlfriend, and his independent intervening acts arising out of their personal relationship severed any nexus between the employer's alleged negligence and the girlfriend's injuries. Thus, while not explicitly discussed, it appears that in *Maldonado*, in the private employment context, this Court viewed New York law as limiting a foreseeable plaintiff and harm, both in the context of duty and proximate cause, to only those members of the public who have a connection to the defendant employer's business.

The instant case, however, involves the type of governmental inaction like that in *McCrink*, *Wyatt* and *Jones*, where the Court of Appeals, the Fourth Department and this Court all have declined to draw a bright line rule that would preclude recovery in a negligent hiring or retention claim in situations where, as here, the City employee was not acting within the course of his employment. In our view, whether the City employee was acting within the course and scope of employment in this factual scenario is a relevant factor that the jury may consider in determining foreseeability of harm in the context of proximate cause, but it is not dispositive as a matter of law, in all instances.

Nor are we persuaded that *Cardona v Cruz* (271 AD2d 221 [1st

Dept 2000]) should control here. In that case, a police officer entered a restaurant while off duty and in civilian clothes, and, with his off-duty revolver in his hand, approached within four or five feet of the plaintiff, yelled and cursed at him, shot him once in the head, and then threw at him a summons and temporary order of protection issued on behalf of a woman who was the officer's ex-wife and the plaintiff's girlfriend. This Court found that the City couldn't be held liable, under a theory of respondeat superior, for those actions because the defendant police officer was acting purely out of personal motives, and not within the scope of his employment or in furtherance of the City's interests.

With regard to negligent hiring and training claims, the *Cardona* court also held that "[l]eave to amend the complaint was also properly denied, as plaintiff's factual allegations were insufficient to support his claim that the City was negligent in hiring, training, supervising or retaining defendant police officer" (271 AD2d at 222). Significantly, *Cardona* did not find that the tort claim (negligence in hiring, training, supervising or retaining defendant police officer) was deficient because of the lack of any factual allegation on the issue of notice of any violent propensity on the part of the officer. Rather, Cardona

held that such tort claim was deficient because "[a]s the officer was not acting within the scope of his employment or under the City's control, any alleged deficiency in its hiring or training procedures could not have proximately caused plaintiff's injuries" (*id.*).

We find the implications of this secondary holding in *Cardona* problematic. Carried to its logical conclusion, *Cardona* appears to hold that a connection between a police officer's employment and the injured plaintiff (i.e. that the officer's misconduct toward the injured plaintiff occurred while he was on duty) is a sine qua non for imposing liability on the City under the theory of negligent hiring and retention of a police officer with violent propensities. Such limitations, however, would be inconsistent with the Court of Appeals holding in *McCrink* and its progeny, and we therefore decline to follow it. Significantly, the cases cited by *Cardona*, namely *K. I. v New York City Bd. of Educ.* (256 AD2d 189, 192 [1st Dept. 1998]) and *McDonald v Cook* (252 AD2d 302, 305 [3rd Dept 1998], *lv denied* 93 NY2d 812 [1999]), do not support such a limited scope of liability toward the City for negligently hiring, retaining or supervising a police officer with violent propensities. In fact, neither case relied upon by *Cardona* addresses, let alone distinguishes, the

Court of Appeals precedent, clearly applicable here, of *McCrink* and its progeny, as to whether the City negligently retained or supervised a police officer by placing the officer who was known to be violent in a position in which he could harm others.

Finally, we are cognizant of the fact that all police officers involved in this case have adamantly denied ever receiving even a single complaint about the offending officer's alleged violent propensities. In contrast, plaintiff has presented evidence that the City was informed on numerous occasions, prior to the fatal shooting, about the officer's abusive conduct toward Fontanez and her daughter. Under the circumstances, this case presents genuine issues of material fact as to whether the City negligently supervised and retained an officer with violent propensities, and whether the intervening intentional tort of the off-duty officer was itself a foreseeable harm that shaped the duty imposed upon the City when it failed to guard against a police officer with violent propensities. When such questions of breach of duty and proximate cause exist, summary judgment is not proper. These questions of fact must be reserved for the jury. The City's motion for summary judgment on the issue of proximate cause should have been denied.

Accordingly, the order of the Supreme Court, Bronx County

(Larry S. Schachner, J.), entered February 13, 2014, which granted defendant's motion for summary judgment dismissing the complaint should be reversed, on the law, without costs, and defendant's motion denied.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: SEPTEMBER 22, 2015

CLERK