SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 21, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Webber, Gesmer, Singh, JJ.

5008N Nationstar Mortgage, LLC, Index 35966/14E
Plaintiff-Respondent,

-against-

Silvia Martin,
Defendant-Appellant,

Mortgage Electronic Registration
Systems, Inc., etc., et al.,
Defendants.

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Bergstein & Ullrich, LLP, New Paltz (Stephen Bergstein of counsel), for appellant.

Shapiro, DiCaro & Barak, LLC, Rochester (Jason P. Dionisio of counsel), for respondent.

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Appeal from order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 28, 2016, which granted plaintiff's ex parte application for a default judgment and order of reference, deemed an application by defendant Silvia Martin pursuant to CPLR 5704 to vacate said order, and, so considered, said order unanimously vacated, without costs, and plaintiff's ex parte application for a default judgment and order of reference denied, without prejudice to renewal upon notice to defendant as required

by CPLR 3215(g)(1).

Defendant's appearance in this action by counsel at three settlement conferences was acknowledged in the motion court's settlement conference orders. As an appearing party, defendant was entitled to five days notice of the default motion (CPLR 3215[g]; *Walker v Foreman*, 104 AD3d 460 [1st Dept 2013]). Accordingly, plaintiff's ex parte motion seeking a default judgment and order of reference should have been denied. We exercise our authority under CPLR 5704(a) to vacate the order granting the motion, and to deny the relief requested, without prejudice to renewal upon proper notice to defendant.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Friedman, J.P., Kahn, Gesmer, Kern, Moulton, JJ.

5210 In re Andrew Fesler, Index 100587/14
Petitioner-Appellant,

-against-

William J. Bratton, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Qian J. Wang of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered October 26, 2015, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul respondents' determination, dated February 12, 2014, which denied petitioner's application for accidental disability retirement benefits pursuant to the World Trade Center Law (WTC Law) (Administrative Code of City of NY § 13-252.1[1][a]), unanimously affirmed, without costs.

If any condition or impairment of health is caused by a qualifying World Trade Center condition (Retirement and Social Security Law § 2[36][c]), "it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by the member's own willful negligence, unless the contrary is proved by

competent evidence" (Administrative Code § 13-252.1[1][a]). The significance of the presumption under the WTC Law is that first responders need not submit any evidence, credible or otherwise, of causation, to obtain enhanced benefits, if they have a qualifying condition (*see Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268, 281-282 [2012]; *Matter of Sheldon v Kelly*, 126 AD3d 138, 142 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015]). However, in order to obtain the benefit of the presumption of causation under the WTC Law, petitioner must suffer from a qualifying condition, and the burden is on petitioner to make that showing (*see Matter of Stavropoulos v Bratton*, 148 AD3d 449, 452-453 [1st Dept 2017]).

Here, the court correctly concluded that petitioner failed to present sufficient credible evidence that his Crohn's disease was a qualifying condition or "new onset disease[]" (Retirement and Social Security Law § 2[36][c][v]). His doctor opined only that it was "conceivable" that there was a link between his illness and exposure to toxins at the WTC site, and the articles he provided were not relevant. Respondents were entitled to rely on the Medical Board's conclusion that the medical literature did not provide evidence of such a causative link, and the medical data showed that first responders did not have a higher incidence

of these conditions.

Because the burden never shifted to respondents, petitioner was required to demonstrate a causative link between his illness and exposure to toxins at the World Trade Center site, which he failed to do (*see Stavropoulos* at 454-455).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5249 In re Georgianna N.,
Petitioner-Appellant,

-against-

Carmen V., et al.,
Respondents-Respondents.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondents.

John R. Eyerman, New York, attorney for the children.

Order, Family Court, New York County (Pamela Scheininger, Referee), entered on or about April 15, 2015, which dismissed petitioner maternal grandmother Georgianna N.'s petition for post-adoption visitation of the subject children, unanimously affirmed, without costs.

The court properly dismissed the petition for visitation by the maternal grandmother as not in the subject children's best interests (*see Matter of Ziarno v Ziarno*, 285 AD2d 793 [3d Dept 2001], *lv denied* 97 NY2d 605 [2001]). The adoptive mother testified that the children came into her care when they were one month old and three years old, respectively. At the time of her testimony, the grandmother had not seen the children in approximately three years and had no existing relationship with

them, nor did they ask about her. Additionally, the children have significant behavioral and emotional issues, which are being addressed by the adoptive parents, a behavioral specialist, and a school therapist, who have implemented a highly structured program, which includes constant supervision in both the home and at school. The adoptive parents have been trained in the children's behavioral program and how to address their behavior. The record strongly supports Family Court's determination that introducing grandparent visitation into the children's lives would significantly disrupt their routines, would be detrimental to their progress, and would present a risk of regression to their previous behavior. In addition, the grandmother has previously taken the children to visit their biological parents, and wrongly told them that they would once again live with the biological parents, whose rights were terminated in 2011. Moreover, the children's behavioral specialist has indicated that anyone with unsupervised, or even supervised, contact with the

children first must undergo extensive training regarding their special needs.

We have considered petitioner's remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5250 Sean Breitstein, Index 151240/14
Plaintiff-Appellant,

-against-

The Michael C. Fina Company, et al.,
Defendants-Respondents.

_____

Law Offices of Rosemarie Arnold, New York (Maria R. Luppino of counsel), for appellant.

Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Anthony J. Tomari of counsel), for The Michael C. Fina Company, Michael Fina, George Fina and Tinna Ginnas, respondents.

Gordon & Rees, LLP, New York (Benjamin A. Levine of counsel), for Maninder Rattu and Tim Lorenz, respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered October 5, 2016, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the religious discrimination, age discrimination, and retaliation causes of action under the State and City Human Rights Laws (HRLs), unanimously affirmed, without costs.

Plaintiff failed to raise an issue of fact as to whether defendants' proffered legitimate nondiscriminatory reason for terminating his employment was pretextual (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113-114 [1st Dept 2012]). The proffered reason is that plaintiff disclosed a prospective

client's confidential pricing information and engaged in unethical negotiating tactics with defendant Michael C. Fina Company's vendors.

Plaintiff contends that an issue of fact was raised by the conflict between his assertion that he was trained to, and throughout his 10 years at the company did, disclose pricing information unless told otherwise, and the testimony of defendant George Fina, who trained and supervised plaintiff, that he had told plaintiff never to reveal the name of a customer or prospective customer to a vendor. Plaintiff also contends that an issue of fact was raised by the conflict between his claimed training to disclose and the confidentiality agreement, receipts and acknowledgments he signed, in which he agreed not to disclose confidential information of the company or its clients. However, these purported issues of fact pertain to whether the company's decision to terminate plaintiff's employment was correct or justified. They do not raise an inference of pretext, i.e., that defendants' reason for the termination was false and that discrimination was the real reason (*Melman*, 98 AD3d at 120-121) or among the real reasons (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 n 27 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]).

Nor do the comments of defendant Tim Lorenz, plaintiff's

supervisor, show a discriminatory motive (*see Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 604 [1st Dept 2012], *affd* 22 NY3d 914 [2013]). The comments were not made in connection with a decision to terminate plaintiff, and, while Lorenz discovered the conduct that led to plaintiff's termination, the ultimate decision to terminate plaintiff was made by defendant Michael Fina, not Lorenz. Moreover, since plaintiff failed to specify when the remarks were made, there is no showing that any of them were close in time to his termination. In any event, these were "at most stray remarks," which, in these circumstances, "'even if made by a decision maker, do not, without more, constitute evidence of discrimination'" (*see Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 [1st Dept 2016], *lv denied* 28 NY3d 902 [2016], quoting *Melman*, 98 AD3d at 125). To the extent plaintiff relies on his former supervisor defendant George Fina's comments about Jewish people, there is no evidence that George Fina was involved in the decision to terminate him.

In support of his retaliation claim, plaintiff failed to demonstrate that he engaged in a protected activity (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Fletcher v Dakota*, 99 AD3d 43, 51-52 [1st Dept 2012]). He made one isolated complaint to defendant Maninder Rattu in Human Resources about Lorenz's conduct in general, which he

acknowledged was several years before he was terminated, and, although he claims that Lorenz's conduct worsened after he made that complaint, he acknowledged that he suffered no adverse employment action afterwards. Moreover, there is no evidence that any of the other defendants were aware of his complaint. The fact that Lorenz looked into whether plaintiff had breached his confidentiality agreement with the company does not create a causal connection between his complaint about discriminatory practice and his termination, which he admitted occurred years later.

Since plaintiff's notice limited his appeal to the portion of the order that dismissed his claims of religious discrimination, age discrimination, and retaliation, the dismissal of his hostile work environment claim, to the extent plaintiff addresses it, is not properly before us (*see Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009]).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5253 Arturo Aguila, Index 305280/13
Plaintiff-Appellant,

-against-

Jose D. Benitez, et al.,
Defendants-Respondents.

Mitchell Dranow, Sea Cliff, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about July 25, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants met their prima facie burden of demonstrating plaintiff's negligence. Defendants submitted the deposition testimony of both drivers, which established that the accident occurred when plaintiff attempted to make a left turn from the right-hand lane of the Cross Bronx Expressway service road, in violation of Vehicle and Traffic Law § 1160(c), and struck the side of defendants' vehicle as it was lawfully driving through the intersection (*see Maysonet v EAN Holdings, LLC*, 137 AD3d 517 [1st Dept 2016]; *Foreman v Skeif*, 115 AD3d 568 [1st Dept 2014]; *Mora v Garcia*, 3 AD3d 478 [2d Dept 2004]). Further, plaintiff admitted that he did not turn on his left-turn signal until right

before he started the turn and that he did not see defendants' vehicle to his left until he struck it.

Defendant driver's testimony established his lack of comparative fault. He testified that he was driving within the speed limit, with the traffic light in his favor, and could not avoid the accident since his vehicle was ahead of plaintiff's vehicle when plaintiff's vehicle hit the side of his vehicle. In opposition, plaintiff failed to submit anything other than conclusory and speculative assertions, and thus failed to raise a triable issue of fact as to defendant driver's comparative negligence (*see Revels v Schoeps*, 140 AD3d 661, 662 [1st Dept 2016], *lv denied* 28 NY3d 911 [2016]; *Foreman*, 115 AD3d at 569; *Mora*, 3 AD3d at 479).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5254 IDT Corp. et al., Index 652236/15
Plaintiffs-Appellants,

-against-

Tyco Group, S.A.R.L., et al.,
Defendants-Respondents.

_____

Boies Schiller Flexner LLP, Armonk (Jason C. Cyrulnik of counsel), for appellant.

Dewey Pegno & Kramarsky LLP, New York (Thomas E. L. Dewey of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 18, 2016, which granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

This action is barred by res judicata (*see Matter of Reilly v Reid,* 45 NY2d 24, 27 [1978]); this is the third time that plaintiffs have alleged the same cause of action, *viz.,* that defendants breached a settlement agreement that the parties entered into 17 years ago (*see IDT Corp. v Tyco Group, S.A.R.L.,* 23 NY3d 497 [2014]; *IDT Corp. v Tyco Group, S.A.R.L.,* 13 NY3d 209 [2009]). This is also the second time plaintiffs have alleged that defendants failed to fulfill their obligation to negotiate in good faith. The fact that the specific details of how defendants allegedly breached that obligation differ between plaintiffs' second lawsuit and the case at bar is of no moment

(*see Reilly*, 45 NY2d at 30; *Elias v Rothschild*, 29 AD3d 448 [1st Dept 2006]).

Plaintiffs contend that res judicata cannot apply because their current complaint is based on conduct by defendants that occurred after the Court of Appeals' second decision. However, defendants' January 2015 refusal to engage in further negotiations was "integrally intertwined and rooted in conduct that predated the commencement of this action" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, ___ AD3d __, 2017 NY Slip Op 7567, *2 [1st Dept, Oct. 31, 2017]).

Plaintiffs seem unwilling to accept that the obligation to negotiate in good faith "can come to an end without a breach by either party" (*IDT*, 23 NY3d at 503). However, the Court of Appeals has so ruled. "Considerations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation" (*Reilly*, 45 NY2d at 28).

Since we have decided the case based on res judicata, it is unnecessary to discuss collateral estoppel (*see id.* at 31).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern JJ.,

5255 Antonia Fomina, Index 309282/12
Plaintiff-Respondent,

-against-

DUB Realty, LLC et al.,
Defendants-Appellants,

Century Vertical Systems, Inc.,
Defendant-Respondent.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Robert G. Spevack, New York, for Antonina Fomina, respondent.

Gottlieb Siegel & Schwartz, LLP, New York (Michele Rosenblatt of counsel), for Century Vertical Systems, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Donna M. Mills, J.), entered May 5, 2016, which, in this action for personal injuries allegedly sustained when plaintiff tripped and fell while exiting an elevator in the apartment building in which she lived, denied as untimely the motion of defendants DUB Realty LLC and JRC Management LLC for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded for further proceedings.

In assessing the timeliness of a motion for summary judgment, the proper measure is whether the motion is served

within 120 days of the filing of the note of issue, not whether the motion is filed within that time frame (*see Derouen v Savoy Park Owner, L.L.C.*, 109 AD3d 706 [1st Dept 2013]; CPLR 2211). Here, the motion was timely served, and therefore the matter is remanded to the motion court for a consideration of the merits of the summary judgment motion in the first instance (*see e.g. Higgins v Consolidated Edison Co. of N.Y., Inc.*, 93 AD3d 443 [1st Dept 2012]; *Commission of the State Ins. Fund v Weissman*, 90 AD3d 417 [1st Dept 2011])).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5256 Barrington Morris, Index 301445/15
Plaintiff-Respondent,

-against-

Shelvis R. Green, Jr., et al.,
Defendants-Respondents,

Sheila Kiffin-Innis,
Defendant-Appellant.

_____

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Philip M. Aglietti of counsel), for Barrington Morris, respondent.

Russo & Tambasco, Melville (Yamile Al-Sullami of counsel), for Shelvis R. Green, Jr., and Giselle Marte-Green, respondents.

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Order, Supreme Court, Bronx County (Armando Montano, J.), entered on or about May 10, 2017, which denied defendant Sheila Kiffin-Innis's (defendant) motion for summary judgment dismissing the complaint as against her, unanimously affirmed, without costs.

Defendant failed to make a prima facie showing of her entitlement to summary judgment because the deposition transcripts submitted with her moving papers show that there are conflicting versions as to how the accident occurred (*see Castro v Rivera*, 116 AD3d 517 [1st Dept 2014]; *Lewis v Konan*, 39 AD3d 319, 319 [1st Dept 2007]; *Ramos v Rojas*, 37 AD3d 291, 292 [1st

Dept 2007]). Plaintiff and defendant testified that defendant's vehicle was in the middle lane when codefendant Shelvis R. Green, Jr.'s vehicle rear-ended defendant's vehicle. However, Mr. Green testified that he was in the middle lane, with defendant's vehicle to his left, when defendant's vehicle drifted into his lane and then slowed down, causing a collision (*see Jeffrey v DeJesus*, 116 AD3d 574, 575 [1st Dept 2014]; *Figueroa v Cadbury Util. Constr. Corp.*, 239 AD2d 285 [1st Dept 1997]).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5257-
5258 Index 602434/05

Ruth Kassover, etc., et al.,
Plaintiffs-Appellants,

-against-

Prism Venture Partners, LLC, et al.,
Defendants,

Richard Sabella,
Defendant-Respondent.

_____

Kaplan Landau LLP, New York (Mark S. Landau of counsel), for appellants.

Kucker & Bruh, LLP, New York (Catherine A. Helwig of counsel), of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 11, 2014, dismissing the complaint as against defendants Richard Sabella and GCC Realty Co., LLC (successor in interest to named defendants PVP-GCC Holdingco II, LLC and The Garden City Company, Inc.), unanimously affirmed, without costs. Appeal from order, same court (Barbara R. Kapnick, J.), entered September 25, 2013, which granted defendants' motion for summary judgment, and denied plaintiffs' motion to amend the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs claim that defendants violated Business

Corporation Law § 501(c) by giving them less consideration for their shares in connection with the merger of Prism Venture Partners and Garden City Company than other shareholders received.

Defendants established prima facie that plaintiffs were not entitled to the same compensation as other shareholders, because they declined to sign the letter agreement or assignment agreement that other shareholders signed in exchange for their compensation.

In opposition, plaintiffs failed to raise an issue of fact. They argue that the letter agreement presented to them required them to make an assignment that the other shareholders were not required to make to acquire the same benefit. However, the other shareholders signed separate assignment agreements, pursuant to which they agreed to relinquish "any and all rights and claims ... under the Shareholder Agreement ... with respect to all GCC stock owned." Plaintiffs failed to show that, on their face, those assignment agreements were different from or narrower in scope than the assignment instrument referred to in the letter agreement presented to them, or that different consequences followed, simply because other shareholders' assignments were memorialized in documents separate from their letter agreements.

Plaintiffs argue further that the letter agreements had a

discriminatory effect on them because they alone had claims to assign. However, the record does not support this argument either. Other shareholders were required, pursuant to their separate assignment agreements, to assign not only "claims" under the shareholder agreements but also rights, title, and interest. Moreover, Business Corporation Law § 501(c) provides, in pertinent part, that "each share shall be equal to every other share of the same class"; plaintiffs failed to demonstrate that the statute requires that the effect of a particular transaction upon each shareholder be equal. Nor did plaintiffs show that the letter agreement and assignment presented to them would have adversely affected their "claims."

The evidence submitted by plaintiffs fails to rebut the case otherwise established by the record, that plaintiffs, who vigorously opposed the merger, simply did not like its terms, and, in plaintiff Philip Kassover's own words, made a "business decision" to reject it. Having exercised their right to make that choice, plaintiffs will not now be heard to claim unfair treatment as a result (*see generally Cherry Green Prop. Corp. v Wolf*, 281 AD2d 367 [1st Dept 2001]).

We note in addition that plaintiffs failed to raise an issue `of fact whether defendant Sabella acted other than on behalf of the entities of which he was a managing member. Moreover, they

failed to show that a violation of Business Corporation Law § 501(c) could properly support a claim sounding in tort (*compare Fletcher v Dakota, Inc.*, 99 AD3d 43 [1st Dept 2012] [violation of human rights law]; *Matter of State of New York v Daro Chartours*, 72 AD2d 872 [3d Dept 1979] [fraudulent sale of vacation trips]; *La Lumia v Schwartz*, 23 AD2d 668 [2d Dept 1985] [invasion of privacy]).

The "new evidence" offered on plaintiffs' motion to amend the complaint is equivocal and fails to support their speculative argument.

We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5259 The People of the State of New York, Respondent, Ind. 3655/12

-against-

Antoine Todd, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered January 23, 2015, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him to a term of nine years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, based on *People v Middlebrooks* (25 NY3d 516 [2015]) and *People v Rudolph* (21 NY3d 497 [2013]),

defendant is entitled to an explicit youthful offender determination.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5260-
5261 In re Jayden N., H., (Anonymous),

A Child Under the Age
of Eighteen, etc.,

Alex H. (Anonymous),
Respondent-Appellant/Respondent,

Catholic Guardian Services,
Petitioner-Respondent/Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for Alex H., appellant/respondent.

Magovern & Sclafani, Mineola (Frederick J. Magovern of counsel), for Catholic Guardian Services, respondent/appellant.

Tennille M. Tatum-Evans, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about September 2, 2016, which, following a hearing, found that respondent father's consent to the adoption of the subject child was not required, pursuant to Domestic Relations Law § 111(1)(d), and that respondent abandoned the child, sub silentio granting the petition to transfer and commit the custody and guardianship of the child to petitioner and the Commissioner of Social Services of the City of New York, unanimously affirmed, without costs. Order, same court (Monica D. Shulman, J.), entered on or about January 19, 2017, which denied petitioner agency's motion to expedite the child's

adoption, and dismissed the adoption petition with leave to re-file when the appeal from the September 2, 2016 order has been resolved, unanimously affirmed, without costs.

Respondent failed to show that he "maintained substantial and continuous or repeated contact" with the child by way of payment toward the support of the child and either visiting the child at least monthly or communicating with him regularly, so as to demonstrate that his consent to the adoption of the child was required (Domestic Relations Law § 111[1][d]; *see Matter of Maxamillian*, 6 AD3d 349 [1st Dept 2004]). With respect to the support of the child, the record establishes that respondent was gainfully employed while at liberty but did not provide meaningful support for the child. Respondent's claim that he bought clothes and other such things for the child is unsubstantiated in the record. Respondent also claims to have given the mother a $2,700 debit card in 2013, when his incarceration was imminent, but, even if this one-time payment constituted sufficient financial support, there is no evidence that respondent made the payment.

With respect to contact and communication with the child, respondent did not legalize his parental relationship with the child for 10 years, and then only after the instant custody and guardianship petition had been filed. Nor is there any evidence

to support his claim that he has had contact with the child throughout the child's life. Respondent claims that while he was in prison he spoke with the child in three-way conversations facilitated by the mother, but the mother's trial testimony was stricken. Respondent did not have copies of any of the letters or cards he claimed to have written to the child on a regular basis, and the agency's witness testified that the agency did not receive any such letters or cards. Respondent also was unable to proffer any meaningful details of the child's life, including the child's multiple hospitalizations.

The court's alternative finding, that respondent abandoned the child, is supported by clear and convincing evidence (*see* Social Services Law 384-b[5][a]; *Matter of Annette B.*, 4 NY3d 509, 514 [2005]). Respondent failed to establish that the hardship resulting from his incarceration during the six months preceding the filing of the petition "so permeated his life that contact [with the child] was not feasible" (*Matter of Anthony M.*, 195 AD2d 315, 316 [1st Dept 1993]). The revocation of his phone privileges in prison did not prevent him from writing to the child or to the agency, but there is no evidence that he wrote to either. Respondent made only "[s]poradic and minimal attempts" to communicate with the child (*see Matter of Jahnel B. [Carlene Elizabeth B.]*, 143 AD3d 416, 417 [1st Dept 2016] [internal

quotation marks omitted]).

The court correctly denied the petition to expedite the adoption on the ground that the relevant Family Court rules provide that an adoption petition may not be filed until after an appeal from the order committing custody and guardianship is "finally resolved" (18 NYCRR 421.19[i][5][I]; 22 NYCRR 205.53[b][10]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5263 The People of the State of New York, Respondent,

-against-

Ioulia Guerman, Defendant-Appellant.

Ind. 2976/14

Robert S. Dean, Center for Appellate Litigation, New York (Anokhi Shah of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Meghan C. O'Brien of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 29, 2015, convicting defendant, after a nonjury trial, of burglary in the third degree, criminal possession of stolen property in the fifth degree, petit larceny and possession of burglar's tools, and sentencing her to an aggregate term of five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of a store employee's testimony that he

had communicated a trespass notice barring defendant from the store after a prior shoplifting incident.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5264 The People of the State of New York, Ind. 807/15
Respondent,

-against-

Jordan Martinez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Kress of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered July 5, 2016,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5266 Noemi Ramos, Index 303547/13
Plaintiff-Appellant,

-against-

2510 Westchester Avenue
Associates LLC, et al.,
Defendants-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about November 1, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 13, 2017,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5268N Wells Fargo Bank, N.A., Index 382162/09
Plaintiff-Respondent,

-against-

Mohamed Cisse,
Defendant-Appellant,

Bronx Supreme Court, et al.,
Defendants.

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Mohamed Cisse, appellant pro se.

Reed Smith LLP, New York (Kerren B. Zinner of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 13, 2015, which, to the extent appealed from, granted plaintiff's motion for an order of reference and a default judgment against defendant Cisse, unanimously affirmed, without costs.

It is unnecessary to consider whether defendant demonstrated a meritorious defense to this foreclosure action, because he failed to demonstrate a reasonable excuse, or indeed any excuse, for his failure to answer the complaint or otherwise timely appear in this action, which was commenced in 2009 (*see Mutual*

Mar. Off., Inc. v Joy Constr. Corp., 39 AD3d 417, 419 [1st Dept 2007]; *see also Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875 [2d Dept 2015]).

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Tom, J.P., Friedman, Renwick, Kahn, Kern, JJ.

5269 In re Jeffrey Jackson, O.P. 115/17
[M-4449] Petitioner,

-against-

Warden Mills (A.M.K.C.),
Respondent.

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Jeffrey Jackson, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Friedman, J.P., Gische, Webber, Kahn, Singh, JJ.

5295-
5296 Index 350108/10

Public Administrator of
Bronx County, etc.,
Plaintiff-Appellant,

-against-

New York City Transit
Authority, et al.,
Defendants-Respondents,

Arthur Gomez, et al.,
Defendants.

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Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Faviola Soto, J.), entered September 21, 2016, dismissing all pleadings against the Transit defendants, upon a grant of a directed verdict at the close of plaintiff's case, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial. Order, same court (Larry S. Schachner, J.), entered November 14, 2016, which granted the Transit defendants and Eric Roman's motion to vacate a prior order entered June 28, 2016 amending the caption to substitute Roman in the place of defendant "John Doe," dismiss the amended complaint filed July 28, 2016, and award sanctions against plaintiff's counsel,

unanimously reversed, on the law and in the exercise of our discretion, without costs, and the motion denied.

A directed verdict was not warranted. An eyewitness's testimony that decedent was in the roadway attempting to stand after being hit by codefendant Arthur Gomez's car and before being hit by the Transit defendants' bus, could allow a rational jury to find that Roman, the bus driver, was negligent in failing to see decedent (*see Herrera v New York City Tr. Auth.*, 269 AD2d 212, 213 [1st Dept 2000]; *see generally Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Moreover, the eyewitness and plaintiff's medical expert both testified that decedent was still alive at the time he was hit by the bus.

The criminal conviction of Gomez did not preclude plaintiff from demonstrating that Roman was a proximate cause of decedent's death. Plaintiff was not a party to the criminal proceeding and did not have a full and fair opportunity to litigate the issue (*see Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]).

Given the foregoing, the judgment of dismissal against the Transit defendants is vacated, the amended complaint filed July 28, 2016 reinstated, the order amending the caption to substitute Roman for John Doe as a defendant reinstated, and the matter remanded for a new trial.

We vacate the award of sanctions, as the record supports

plaintiff's assertion that plaintiff was not trying to defraud the court or prejudice the Transit defendants.

We have considered defendants-respondents' remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 21, 2017

DEPUTY CLERK

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3673 Joseph L.De'L.A., etc., et al., Index 8056/04
Plaintiffs-Respondents-Appellants,

-against-

The City of New York, et al.,
Defendants-Respondents,

Jewish Child Care Association of New York,
Defendant-Appellant,

Joseph S.,
Defendant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Brian J. Shoot of counsel), for Joseph L.De'L.A., and Deborah A., respondents-appellants.

Roberta L. DiGangi, Brooklyn, for Yolanda Jenkins, respondent-appellant.

Schnader Harrison Segal & Lewis LLP, New York (Bruce M. Strikowsky of counsel), for the City of New York, respondent.

Koster Brady & Nagler LLP, New York (Allyson P. Stavis of counsel), for Milcia Pineda, respondent.

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Order Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 20, 2015, affirmed, without costs.

Opinion by Gesmer, J. All concur except Sweeny, J.P., and Kahn, J. who dissent in part in an Opinion by Kahn, J.

Order filed.

Sweeny, J.P., Andrias, Moskowitz, Kahn, Gesmer, JJ.

3680 The People of the State of New York, Ind. 2906/12
Respondent,

-against-

Alexis Sanchez,
Defendant-Appellant.

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Richard Wojszwilo, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered March 20, 2015, affirmed.

Opinion by Kahn, J. All concur except Moskowitz and Gesmer, JJ. who dissent in an Opinion by Moskowitz, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Richard T. Andrias
Karla Moskowitz
Marcy L. Kahn
Ellen Gesmer JJ.

3673
Index 8056/04

_____x

Joseph L. De'L. A., etc., et al.,
Plaintiffs-Respondents-Appellants,

-against-

The City of New York, et al.,
Defendants-Respondents,

Jewish Child Care Association of New York,
Defendant-Appellant,

Joseph S.,
Defendant.
_____x

Cross appeals from the order of the Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 20, 2015, which, to the extent appealed from as limited by the briefs, granted defendant the City of New York's and defendant Milcia Pineda's respective motions for summary judgment dismissing the complaint against them, and denied defendant JCCA's motion for summary judgment with respect to the negligence claims against it.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for appellant.

Sullivan Papain Block McGarth & Cannavo, P.C., New York (Brian J. Shoot, Gregory J. Cannata, and Gregory J. Cannata & Associates of counsel), for Joseph, L. De'L. A. and Deborah A., respondents-appellants.

Roberta L. DiGangi, Brooklyn, for Yolanda Jenkins, respondent-appellant.

Schnader Harrison Segal & Lewis LLP, New York (Bruce M. Strikowsky of counsel), for the City of New York, respondent.

Koster Brady & Nagler LLP, New York (Allyson P. Stavis of counsel), for Milcia Pineda, respondent.

GESMER, J.

In this case, defendant Jewish Child Care Association (the agency or JCCA), placed the infant plaintiff, Joseph. L. De'L. A., in a foster home with defendant Milcia Pineda. The child suffered brain injury when he was left in the care of the teenage boyfriend of the foster mother's daughter. The child's biological and adoptive mothers brought this action on his behalf. The City of New York, the foster parent, and JCCA each moved for summary judgment. Supreme Court granted the motions by the City and Ms. Pineda, but denied JCCA's motion. We now affirm.

Our dissenting colleagues join us in finding that the motion court properly granted the summary judgment motions of the foster parent and the City, for the reasons discussed below. However, where an institutional defendant fails to comply with rules intended to protect the safety of those for whom the institution is responsible, and such an individual is assaulted, it is a question of fact as to whether the institutional defendant is liable (*Mirand v City of New York*, 84 NY2d 44, 51 [1994]; *Garcia v City of New York*, 222 AD2d 192, 197 [1st Dept 1996], *lv denied* 89 NY2d 808 [1997]; *Dawn VV. v State of New York*, 47 AD3d 1048, 1051 [3d Dept 2008]). That question cannot be resolved on the

agency's summary judgment motion because "[p]roximate cause is a question of fact for the jury where varying inferences are possible" (*Mirand*, 84 NY2d at 51). Because we do not view plaintiffs' claims against JCCA as one of "the rare cases in which it can be determined, as a matter of law, that a defendant's negligence merely created the opportunity for, but did not cause, the event that resulted in harm" (*Hain v Jamison*, 28 NY3d 524, 530 [2016]), we also affirm the motion court's denial of summary judgment to JCCA.

Facts

At least as of July 22, 2002, JCCA had determined that it was not appropriate to place a foster child under five in defendant Milcia Pineda's home. On August 20, 2002, JCCA reauthorized the use of Ms. Pineda's home for foster care, with the recommendation that she "should have school-aged children placed in her home." It reached this conclusion because Ms. Pineda was already caring for her newborn special needs grandson and her teenage daughter; her home was in "crisis" and needed to be "stabilized"; and she was working full time in a hair salon.[1]

[1] At another point, the JCCA records indicate that Ms. Pineda was home but looking for work. The February 3, 2003 progress notes record Ms. Pineda's new "work number," so the agency certainly had notice by then that she was working outside

In fact, it was the opinion of the assigned worker that no foster child should have been assigned to Ms. Pineda's home until it was "stabilized."

An agency report on the infant plaintiff in August 2002 stated that he "cries excessively" and is "very hard to cons[ole]," so that "caregivers have difficulty providing comfort to [him]." The agency was required to provide information such as this about the child's behavior problems to the foster parent (18 NYCRR 443.2[e][3][iii])

On September 5, 2002, the agency placed the then 29-week-old infant plaintiff in Ms. Pineda's home. There is no evidence in the record that Ms. Pineda's home had been "stabilized" by that date, or that JCCA advised Ms. Pineda of the baby's behavioral issue.

The regulations of the New York State Department of Social Services require that foster parents who seek to be employed must obtain prior agency approval of their "plans for the care and supervision of the child at all times" (18 NYCRR 443.2[c][1][iii]). It is the agency's responsibility to train foster parents as to their responsibilities (18 NYCRR

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the home.

443.2[d][1][vii] and [e]), and to sign an agreement providing that they may not "leave children under the age of 10 years alone without competent adult supervision" (18 NYCRR 443.3[b][3]). In support of this motion, JCCA submitted the testimony of their employees that these requirements were repeated in a manual for foster parents. However, since that manual is not in the record, JCCA has failed to establish that.

In any event, there is no evidence in the record establishing that a JCCA employee ever advised Ms. Pineda of these provisions, or gave her a copy of the manual or that she ever saw one. In addition, she testified that no one had ever advised her that she could not leave the child with a caretaker under 18 years of age. Moreover, the contract that JCCA asked Ms. Pineda to sign did not comply with State law, but rather provided that she would not leave a child under 10 years old alone "without competent supervision."

There is also no evidence that the agency, knowing at the very least that Ms. Pineda was likely to be working during the day, inquired as to her child care plans or made any effort to ensure that an appropriate child care plan was in place, as required by State regulation and its own policies when a foster parent works outside the home.

In November 2002, the infant plaintiff's birth mother observed a bruise on the baby and reported it to an agency worker and supervisor. Hospital records from February 26, 2003 revealed that the child had "multiple bruises differing in size and stage of healing" on his chest, back, buttock, and legs.

The agency's practice guide requires a minimum of two face-to-face contacts a month, one of which was to be in the home. Nevertheless, JCCA did not visit Ms. Pineda's home even once from November 27, 2002 to February 21, 2003, a three-month period.

The JCCA worker's notes from the February 21 visit indicate that "Joseph's babysitter, Abila" was present, but this person had not been approved by JCCA. JCCA's Program Director testified that the proper procedure in this circumstance would have been for the caseworker to tell the foster parent "she cannot work and cannot use the baby-sitter without being present." There is no evidence in the record that JCCA took any steps at or immediately after the visit to ensure that only agency-approved persons cared for the child.[2]

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[2] There is no support in the record for the dissent's conclusion that JCCA was "aware of Avila's role because she had accompanied Pineda on visits to JCCA offices . . . ." If true, however, JCCA had notice that Pineda was using an unapproved caretaker even earlier than February 21, 2003, but still failed to take any action to correct that.

On February 25, 2003, Ms. Pineda's daughter left for school, and Ms. Pineda went to work, leaving her grandchild and the infant plaintiff, who had been running a fever, in the care of then-17-year-old defendant Joseph S., the father of Ms. Pineda's grandchild.[3] When the infant plaintiff would not stop crying, S. apparently shook him, causing him to suffer brain damage.[4] The hospital records reveal that the infant plaintiff arrived at the emergency room with "multiple bruises, differing in size and stage of healing," suggesting that JCCA had failed to observe signs of mistreatment of the child predating the events of February 25, 2003. The City's investigation following the incident found that Ms. Pineda displayed "poor judgment" in leaving the infant plaintiff with S., who pleaded guilty to reckless endangerment of the child.

Analysis

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[3] Contrary to the dissent's characterization, Mr. S. was not merely "visiting" the infant plaintiff's foster home; he was there daily and, on that day, he was babysitting in violation of the agency's rules and applicable regulations. Contrary to the dissent's suggestion that Avila was the only unapproved babysitter caring for the infant plaintiff, the record suggests that S. had done so with some frequency on occasions prior to February 25, 2003.

[4] Although the dissent repeatedly characterizes the contents of S.'s "confess[ion]," the record contains no actual evidence of either his allocution or his plea.

The motion court correctly dismissed the complaint as against the City, since there is no evidence in the record that the City had notice that the child would be entrusted to an unqualified babysitter (*see Lillian C. v Administration for Children's Servs.*, 48 AD3d 316, 317 [1st Dept 2008]). Accordingly, the City is not liable for the injuries sustained by the child. The motion court also properly dismissed the complaint against the foster mother because a child does not have a legally cognizable claim for damages in this case (*McCabe v Dutchess County*, 72 AD3d 145, 148 [2d Dept 2010]; *see also Holodook v Spencer*, 36 NY2d 35 [1974]). For the reasons discussed below, we also find that the motion court properly denied the agency's summary judgment motion.

The record suggests that JCCA may have been negligent in at least five respects. First, the agency placed the child in Ms. Pineda's home when he was a newborn, even though it had previously determined that children under five should not be placed with her because she was working or looking for work, and that her home required "stabilizing," because her 16 year-old-daughter had recently given birth to a baby with special needs. Second, JCCA failed to ensure that an appropriate child care plan was in place after it had determined that Ms. Pineda was employed

outside the home, as the applicable regulation requires (18 NYCRR 443.2[c][1][iii] [requiring that a "suitable plan[]" for child care by agency approved caretakers be made part of the foster family record where the foster parent works outside the home]). Moreover, there is no evidence that JCCA had ever advised Ms. Pineda that she needed to seek approval of her child care plan. Third, JCCA had notice, prior to the date on which the child was injured, that at least one unauthorized person was caring for him, but failed to take any action to rectify this, violating its own rules and the relevant regulation (*id.*). Fourth, JCCA's contract with Ms. Pineda stated merely that she was not to leave the infant plaintiff without competent supervision. This violates the applicable regulation, entitled "Certification or approval of foster family homes," which requires agencies to have foster parents acknowledge in writing that they will not "leave children under the age of 10 years alone without competent *adult* supervision" (18 NYCRR 443.3[b][3][emphasis added]). Moreover, Ms. Pineda testified that she was never advised that she was not permitted to leave a foster child in the care of someone under 18. Finally, at the time of the February 21, 2003 home visit, JCCA had failed to visit the home for a three-month period, in violation of its own requirement of at least two contacts per

month, with at least one to take place in the home. Under these circumstances, a jury could find that, had the agency followed the applicable regulations and its own rules, the special needs infant plaintiff might never have been left alone with a teenager already caring for his own special needs infant,[5] and who was prohibited from caring for the infant foster child.

Where the acts of a third person intervene between a defendant's negligent conduct and a plaintiff's injury, the causal connection between the two is not severed as a matter of law. Rather, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. An intervening act may break the causal nexus when it is "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent or far removed from the defendant's conduct" (*see Maheshwari v City of New York*, 2 NY3d 288, 295 [2004] [internal quotation marks omitted]). However,

> "[a]n 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. . . . That defendant could not anticipate the precise manner

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[5]Although the dissent describes S.'s behavior as "solicitous," there is no evidence in the record to support this.

> of the accident or the exact extent of injuries. . . does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316-317 [1980]).

Accordingly, in cases where an assault occurs under circumstances where an institutional defendant violated its own procedures designed to protect those it is responsible for, the harm may be foreseeable and the defendant is not automatically relieved of liability (*Mirand v City of New York* (84 NY2d at 50-51] [school liable for assault on student where, inter alia, it failed to have security personnel present in violation of its own security plan]; *Garcia v City of New York* (222 AD2d at 194 [school liable where student sexually assaulted by older child after being permitted to go to the bathroom alone, in violation of school memoranda requiring children to go to the bathroom in pairs]; *Dawn VV. v State of New York*, 47 AD3d at 1051 ["it was foreseeable that a resident could engage in some type of physical assault against another resident if the enacted safety plans were not adhered to"]).

Here, the agency violated its own policies and applicable regulations requiring a child care plan for foster children whose foster parents work outside the home, permitting only agency approved caretakers, and prohibiting anyone under 18 from

providing child care. Those policies are designed to protect a foster child from being injured as a result of being left alone with a person who is not qualified to care for him. A jury could find that it is foreseeable that the agency's failure to follow those policies and regulations might result in the very harm suffered by the infant plaintiff.[6]

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[6] The dissent concedes that the agency was negligent, but fails to acknowledge the degree to which it violated applicable regulations and its own rules, policies and recommendations. Accordingly, the cases cited by the dissent in which a person in an agency-supervised setting was injured and the agency escaped liability are distinguishable, since in none of those cases was there an allegation that the agency had failed to follow regulations or its own policies or that it failed to act after it had knowledge of a regulation or policy violation (*Lillian C.*, 48 AD3d at 316; *Piazza v Regeis Care Ctr., L.L.C.*, 47 AD3d 551 [1st Dept 2008]; *Belinda L.G. v Fresh Air Fund*, 183 AD2d 430 [1st Dept 1992]; *Simpson v County of Dutchess*, 35 AD3d 712 [2d Dept 2006]). Indeed, *Lilian C.*, cited by the dissent, cites to *Mirand* (84 NY2d at 44), in which the Court of Appeals sustained a jury verdict against a school district for negligent supervision where the student plaintiff was assaulted by another student and her nonstudent brother, resulting in injury. The Court of Appeals held that "[t]he test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence" (*Mirand*, 84 NY2d at 50), and that "[p]roper supervision depends largely on the circumstances surrounding the event" (*id.* at 51). The Court found that there was sufficient evidence to permit the jury to determine that the school was liable for negligent supervision where, inter alia, the school failed to have security personnel present in violation of its own security plan (*id.* at 48), and the plaintiff had notified school staff prior to the assault of the absence of security personnel (*id.* at 50). *Belinda L.G.* is further distinguishable because the decision in that case does

In *Hain v Jamison* (28 NY3d 524 [2016], *supra*), the Court discussed the elements common to those rare cases in which courts have found, as a matter of law, that an intervening act broke the chain of causation. The Court noted that in such cases one of the following elements is present: (1) "the risk created by the original negligence was not the risk that materialized into harm; in other words the intervening act was unforeseeable," or (2) "defendant's acts of negligence had ceased, and merely fortuitously placed the plaintiff in a location or position in which a secondary and separate instance of negligence acted independently upon the plaintiff to produce harm" (*Hain*, 28 NY3d at 531-532).

Neither element is present in this case. The risk created by JCCA's failure to follow its own policies and applicable regulations was that the child would be left with someone not competent to care for him, and he would be injured as a result. That is precisely what occurred.

Nor had JCCA's negligence ceased at the time of injury. The

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not indicate that the defendant had any special duty to the plaintiff; in contrast, the JCCA has a specific duty under its contract with the City to promote the "optimal health, well-being, and development" of children placed with it, and to protect those children from abuse and neglect.

agency's duty to the infant plaintiff, and its apparent negligence, began on September 5, 2002, when it placed the child in a home that it had previously determined was not appropriate for an infant; it continued through February 3, 2003, when the agency noted in its file that Ms. Pineda was working, but failed to ensure that she had an appropriate child care arrangement in place; it continued through February 21, 2003, when its caseworker recognized that Ms. Pineda was using an unapproved babysitter for the child, but apparently did nothing to ensure that Ms. Pineda knew that this was not permitted; and it continued through the moment when the foreseeable consequence of the agency's ongoing negligence, injury by an unsuitable caregiver, occurred on February 25, 2003.

The dissent views the absence of Ms. Avila on the day the infant plaintiff was injured as "unforeseeable" and an "extraordinary circumstance[]." This misses the point that the agency had notice that Ms. Pineda was working, but it had never approved, or even requested, a child care plan. Therefore, it already had notice that the child was being left with at least one unapproved caretaker, making what occurred more, not less, foreseeable.

It was also foreseeable, given what the agency knew of Ms.

Pineda, her home, and her work, that she might not be able to manage a second special needs infant; that she might turn to a free resource for child care; that she might turn to S., who was at her home every day; and that S., a teenager, would not be capable of handling, alone, both his own special needs infant son, and the infant foster child, whom the agency knew often cried inconsolably.[7]

We dispute the dissent's claim that the agency had no reason to know that S. or anyone else in frequent contact with the infant plaintiff might hurt him. In fact, the old bruises found by the hospital indicate that someone may have hurt him prior to the events of February 25, 2003, and the agency missed it, despite the mother's complaints to a caseworker and supervisor about bruises.

We also find unpersuasive the dissent's conclusion that "JCCA could not have reasonably foreseen that S. would attack Joseph." The factor of foreseeability is not focused on "the precise manner of the accident or the exact extent of injuries,"

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[7] Thus, the dissent's claim that JCCA had no "control" over S. overlooks that JCCA had control over Ms. Pineda, and it failed to exercise that control to ensure that she only leave the infant plaintiff with approved adult caregivers. Joseph S. was plainly not in that category.

but on whether "the intervening act occurring is the very same risk which renders the actor negligent" (*Derdiarian*, 51 NY2d at 316-317). There is at least a question of fact, based on the record before us, as to whether JCCA took any steps to ensure that an appropriate child care plan was in place, although Ms. Pineda had advised the JCCA worker that she was working outside the home. Moreover, the record does not show that JCCA advised Ms. Pineda that all caregivers had to be approved by the agency and that she could not leave the child alone with anyone under 18. Since all of these policies and regulations are intended to prevent foster children from being injured by persons unqualified to care for them, the harm in this case may have been a foreseeable consequence of JCCA's alleged negligence.[8]

The dissent's conclusion that S.'s acts were "independent of and far removed from JCCA's original acts of negligence" ignores the "uniquely fact-specific" nature of proximate cause determinations, and the Court of Appeals' admonition that

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[8] Indeed, even the particular harm suffered by the infant plaintiff in this case is, sadly, not uncommon (*see* Shaken Baby Syndrome Prevention, Children Ages Birth to Four Years, https://www.health.ny.gov/prevention/injury_prevention/children/fact_sheets/birth-4_years/shaken_baby_syndrome_prevention_birth-4_years.htm, accessed Aug. 24, 2017 [likely more than 3,000 children per year are shaken in the U.S.]).

> "where the risk of harm created by a defendant's conduct corresponds to that which actually results--absent an extraordinary intervening act or significant facts weighing in favor of attenuation--it cannot be said, as a matter of law, that a defendant's negligence merely furnished the occasion for the harm . . . . Under such circumstances, the determination of proximate cause is best left for the factfinder"

(*Hain*, 28 NY3d at 530). Here, as the dissent concedes, the agency's failure to monitor Ms. Pineda's employment search "resulted in her being absent . . . at the time of S.'s attack, and entrusting Joseph to the care and supervision of the underage S." It should be left to the factfinder to determine whether or not this negligence was a proximate cause of the infant plaintiff's injuries.

Our dissenting colleagues would hold, as a matter of law, that JCCA cannot be held liable for the baby's injuries because S.'s conduct was an independent intervening act having no relationship to the risk created by JCCA's negligence. This would be inconsistent with the governing decisions of the Court of Appeals. The Court of Appeals has declined to find, as a matter of law, that a defendant was relieved of liability by intervening acts in situations where the harm suffered was much less obviously tied to the risk created by defendant than in this case. For example, in *Derdiarian*, relied on by the dissent, the

plaintiff was repairing a pipe with molten enamel when a passing driver had an epileptic seizure and crashed his car through a gate on the construction site, hitting the plaintiff, knocking him into the air, and causing him to be covered with the molten enamel and to burst into flames. The Court affirmed the judgment against the defendant construction company, holding that the factfinder could have found that the defendant negligently failed to protect the site, and that a prime hazard of such negligence was the possibility that a car might enter and injure a worker (*Derdiarian*, 51 NY2d at 316).

In *Hain* (28 NY3d at 524), also cited by the dissent, a woman was struck by a car and killed after she stopped her car on a road at night and got out to assist a newborn calf that had broken out of its enclosure on a nearby farm. When the defendant farmer moved for summary judgment, the Court denied it, holding that it was for the jury to decide if his negligence in letting the calf escape was the proximate cause of the plaintiff's injury (*id.* at 534). In reaching that result, the Court, in its more recent pronouncement on this subject, stated, "A review of our case law highlights the distinction between instances where proximate cause is a question for the jury and the rare cases in which it can be determined, as a matter of law, that a

defendant's negligence merely created the opportunity for, but did not cause, the event that resulted in harm" (*id.* at 530). If *Hain* was not such a case, then certainly this case is not.[9]

In sum, JCCA placed the infant plaintiff in harm's way by disregarding its own guidelines and New York regulations, all meant to protect the child and keep him free from precisely the kind of danger that ultimately occurred. Accordingly, JCCA has failed to meet its burden to show, as a matter of law, the absence of a material question of fact that its negligence was a proximate cause of the infant plaintiff's injury.

Accordingly, the order of the Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about October 20, 2015, which, to the extent appealed from as limited by the briefs, granted defendant the City of New York and defendant Milcia Pineda's respective motions for summary judgment dismissing the

[9] An even more unusual set of facts led to a determination that there was an issue of fact as to the defendant's liability in *Cook v Wanees* (2017 WL 4355378 [Sup Ct, Queens County 2017]).

complaint as against them, and denied defendant JCCA's motion for summary judgment with respect to the negligence claims against it, should be affirmed, without costs.

All concur except Sweeny, J.P. and Kahn, J. who dissent in part in an Opinion by Kahn, J.

KAHN, J. (dissenting in part)

I am in agreement with the majority that the complaint was properly dismissed as to the City and the foster mother. Because the agency's negligence was not a proximate cause of the injury to the infant plaintiff, however, I respectfully dissent in part and would grant the agency's motion for summary judgment dismissal of the complaint.

This case involves an infant placed in foster care who was shaken and beaten by the 17-year-old boyfriend of the foster mother's daughter while the foster mother was not at home, resulting in injury to the infant. Negligence claims were brought by the natural and subsequent adoptive mothers of the child against JCCA, the agency that placed the infant in the foster home; Milcia Pineda, the foster mother; and the City of New York. All three defendants moved for summary judgment of dismissal. Supreme Court denied JCCA's summary judgment motion as to the negligence claims against the agency, finding issues of fact as to the agency's negligence in several respects and as to whether the boyfriend's attack of the infant was a superseding act severing the causal connection between JCCA's alleged negligence and the injury to the child, but granted the summary judgment motions of Pineda and the City.

I. *Statement of Facts*

On July 22, 2002, JCCA completed an evaluation of Pineda's home, in which the agency had successfully placed foster children twice before, as a potential foster home. In that report, JCCA stated its conclusion that the home would best serve a foster child above the age of five. Nonetheless, on September 5, 2002, with JCCA's facilitation, the infant plaintiff Joseph L.De'L.A. (Joseph), born February 12, 2002 and then nearly seven months old, was placed as a foster child in Pineda's home. Pineda, a certified foster parent, had already fostered two children through JCCA. Although those children no longer lived in Pineda's home when Joseph arrived there, as stated in the JCCA report, another infant did. That child, Angel S. (Angel), born August 5, 2002, was the newborn son of Pineda's daughter, Pilar E., who was then 16 years old and also lived in the Pineda home. The agency noted in its Annual Reauthorization Narrative for the period from September 15, 2002 to September 16, 2003 that the Pineda home was "in need of stabilizing" since Pilar has recently given birth to a son and that Pineda "should have school-aged children [rather than another infant] placed in her home due to the fact that she is employed full-time."

Joseph S., Pilar's boyfriend, the 17-year-old father of

Angel, was a frequent visitor to the Pineda home but did not live there. JCCA was aware of S. because JCCA caseworkers had met him during home visits.

S. was not the only nonresident of the Pineda home who was frequently present there, however. Beginning in November 2002, because Pineda was routinely at work and Pilar was at school during the day, Venica Avila, then 53 years old, began babysitting for Joseph and Pilar's son. JCCA was aware of Avila's role because she had accompanied Pineda on visits to JCCA offices, together with Joseph and Angel.

On Friday, February 21, 2003, a JCCA caseworker came to the Pineda home to conduct a home visit and found nothing out of ordinary. She noted that Joseph was "a pleasant baby that's easy to care for," and that he had greeted her with a smile.

On Sunday, February 23, 2003, Avila was notified that her mother, who lived in the Dominican Republic, was ill. Avila left country that same day to attend to her family emergency.

On Monday, February 24, 2003, Pineda left home for work and Pilar left to attend school, leaving S. at home with Joseph, who by that time was one year old, and his own son, Angel, who by that time was nearly seven months old and had been diagnosed as a special needs child.

On Tuesday, February 25, 2003, Pineda took Joseph to the hospital because he was vomiting. A doctor informed Pineda that Joseph had been shaken and beaten, had bruises on his back and head and that his body was covered with multiple old and new bruises. S. later confessed that during the time that he was alone in the house with Joseph and his own son, he had shaken Joseph because he was crying. As a result of having inflicted these injuries on Joseph, resulting in permanent brain damage to the child, S. was indicted and convicted of reckless endangerment in the first degree and was sentenced to one to three years in prison.

II. *Discussion*

Summary judgment is appropriate where "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212[b]). In negligence cases, a defendant is entitled to summary judgment where the defendant "establishe[s], as a matter of law, that the alleged negligence was not a proximate cause of plaintiff's injuries" (*Gerrity v Muthana*, 7 NY3d 834, 836 [2006]).

The facts as to JCCA's conduct in this case are undisputed. JCCA negligently failed to meet its own standards and those set

forth in the New York Social Services Law by placing the infant plaintiff in a home unsuitable for an infant below the age of five, as Pineda was working or looking for work; where Angel, another infant with special needs, was already residing and shortly after JCCA noted that the home needed "stabilizing"; by failing to ensure that an appropriate child care plan was in place; by failing to approve a babysitter upon determining that Pineda was employed outside the home; by failing to arrange for a caseworker to conduct home visits for a period of three months following placement (although, three days prior to S.'s attack of Joseph, a JCCA caseworker did visit the Pineda home but reported finding nothing out of the ordinary); and by failing to follow its own rules by not monitoring Pineda's search for employment, which resulted in her being absent from the house at the time of S.'s attack, and entrusting Joseph to the care and supervision of the underage S.. Notwithstanding the indisputably negligent actions of JCCA, however, "[e]vidence of negligence is not enough by itself to establish liability, for it also must be proved that the negligence was a proximate, or legal, cause of the event that produced the harm sustained by the plaintiff" (*Hain v Jamison*, 28 NY3d 524, 528 [2016] [internal quotation marks omitted]).

Although the issue of whether a defendant's negligence was

the proximate cause of a plaintiff's injury is normally the province of the finder of fact, as the Court of Appeals has explained:

> "There are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law. Those cases generally involve independent intervening acts which operate upon but do not flow from the original negligence" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Such is the case before us. Here, S., a person with whom JCCA had no direct relationship and over whom the agency had no authority or control, attacked Joseph while visiting a home in which Joseph had been negligently placed as a foster child by JCCA. Thus, S.'s attack of Joseph was an independent intervening act of a third party which operated on, but did not flow from, JCCA's original negligence. Following the instructions of the Court of Appeals in *Derdiarian*, therefore, this Court may review the record evidence and determine, as a matter of law, whether, given S.'s independent intervening act of attacking Joseph, JCCA's negligence was a proximate cause of Joseph's injury. In doing so, we must evaluate the conduct of S. along the following dimensions, as directed by the Court of Appeals:

> "An intervening act may break the causal nexus when it is 'extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct'" (*Maheshwari v City of New York*, 2 NY3d 288, 295 [2004], quoting *Derdiarian*, 51 NY2d at 315).

Put otherwise, if the intervening act in question meets any one of the three *Maheshwari-Derdiarian* criteria, the intervening act is a superseding act sufficient to break the causal connection between the defendant's negligent acts and the harm to the plaintiff, rendering the defendant's negligence not a proximate cause of the plaintiff's injury (*see Derdiarian*, 51 NY2d at 315).

In this case, S.'s attack of Joseph meets not only one, but all three of the *Maheshwari-Derdiarian* criteria. With respect to the first criterion, S.'s attack was clearly extraordinary under the circumstances. Prior to the attack, S. had been a frequent visitor to the Pineda home for a period of nearly six months. Throughout that period, S. did not engage in any acts of violence or display any violent tendencies. Indeed, the JCCA caseworker who visited the Pineda home only three days prior to the attack reported that she found nothing out of the ordinary. Moreover, S. was left alone with Joseph and his own infant son under circumstances where their regular babysitter, Avila, was called

away the preceding day on an unexpected family emergency and neither Pineda nor Pilar could remain at home. Under these extraordinary circumstances, S.'s intervening act of attacking Joseph was clearly a superseding act sufficient to break the causal connection between JCCA's negligent acts and Joseph's injuries. For this reason alone, JCCA's negligence is not a proximate cause of the harm to Joseph.

S.'s attack of Joseph also meets the second *Maheshwari-Derdiarian* criterion, as it was not foreseeable in the normal course of events. Examination of the issue of foreseeability begins with the seminal case of *Palsgraf v Long Is. R.R. Co.* (248 NY 339 [1928]). As Chief Judge Cardozo there observed, a "[n]egligent . . . act . . . is . . . wrongful and unsocial in relation to other[s], . . . only because the eye of vigilance perceives the risk of damage" (*id.* at 344). "The risk reasonably to be perceived defines the duty to be obeyed" (*id.*). In *Palsgraf*, employees of the defendant railroad company assisted a man carrying a package wrapped in newspaper in boarding a moving train. The man dropped the package, which turned out to contain fireworks. The package exploded, knocking over scales at the other end of the train station platform which fell on the plaintiff, injuring her. The *Palsgraf* Court held that because

the injury to the plaintiff was not foreseeable by the defendant railroad company, the defendant's actions were not a proximate cause of the plaintiff's injury. The *Palsgraf* Court explained:

> "[T]here was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security" (*id.* at 345).

Palsgraf teaches that the key consideration on a foreseeability inquiry is whether the possibility of harm was apparent to the alleged tortfeasor. For an injury to a plaintiff to be foreseeable, however, the alleged tortfeasor need not have "anticipate[d] the precise manner" in which the harm was caused to the plaintiff, but only the "general risk and character of [the] injuries" (*see Derdiarian*, 51 NY2d at 316-317).

In cases where the alleged tortfeasor is a social services agency and where the victim of an assault is a person under that agency's charge, this Court has made clear that if the assailant is a visitor to a setting supervised by that agency and has no known history of violence, the assault is not reasonably foreseeable by the agency. For example, in *Piazza v Regeis Care*

Ctr. L.L.C. (47 AD3d 551 [1st Dept 2008]), the plaintiff was assaulted by her brother while they were visiting their mother in the defendant's nursing home facility. In *Piazza*, the plaintiff's brother had previously visited the nursing home without violent incident and without giving the defendant agency any other indication of violent tendencies prior to assaulting her. We found that the assault was not foreseeable by the defendant, reasoning that because "there was no evidence that [plaintiff's brother] had a history of physical violence toward plaintiff or their mother prior to the subject incident[,] . . . defendant had no reason to anticipate the assault or duty to take steps to prevent contact between plaintiff and her brother" (*id.* at 553). Here, as was the case in *Piazza*, S., in the period of nearly six months from the day of Joseph's foster home placement to the day before his attack of Joseph, was known to JCCA to visit the foster home frequently and yet neither committed any acts of violence in the foster home nor gave any other indication to JCCA that he had violent tendencies.

Similarly, in the context of child placement cases, in order for an act causing injury to be foreseeable by a placement agency, the placement agency must have "'sufficiently specific knowledge or notice of the dangerous conduct which caused

injury'" (*Lillian C. v Administration for Children's Servs.*, 48 AD3d 316, 317 [1st Dept 2008], quoting *Mirand v City of New York*, 84 NY2d 44, 49 [1994]). Where the agency has no such knowledge or notice of such conduct, there is no foreseeability. In *Lillian C.*, a foster child was sexually abused by her foster father. The child's mother and legal guardian sued on her behalf, and the defendant placement agency moved for summary judgment of dismissal. This Court looked to the information the placement agency had during its placement and monitoring of the home and found that although background information had been gathered about the foster parents, that information yielded no criminal records, and the foster father specifically denied having any prior arrests or convictions (*id.*). We therefore found that the plaintiffs had failed to raise a triable issue of fact as to whether the placement agency had specific knowledge or notice of information suggesting any risk of sexual assault, i.e., whether an assault was foreseeable.

Likewise, in *Simpson v County of Dutchess* (35 AD3d 712 [2d Dept 2006]), a foster child was purportedly assaulted by the foster mother's adult daughter, who also lived in the foster home. The daughter had no criminal history and no history of violence or child abuse or neglect. The *Simpson* Court held that

the foster care agency was entitled to summary judgment because "the assault upon the infant plaintiff purportedly committed by [the foster parent's daughter] was not foreseeable" (*id.* at 713).

In *Belinda L.G. v Fresh Air Fund* (183 AD2d 430 [1st Dept 1992]), a case with striking factual similarities to this case, a child placed with a host family by the defendant child placement organization was assaulted by one of the host parents. A question was raised as to whether the defendant agency had negligently failed to personally and more thoroughly reinterview the host family, among other errors. We unanimously affirmed the order of the motion court granting the defendant's summary judgment motion, reasoning that even assuming that the defendant was negligent in failing to conduct personal and more thorough reinterviews of the host family and in other respects, the criminal assault of the child by the host parent "was not a foreseeable consequence of such failure" (*id.* at 430), given that the agency had successfully placed children with that same family for years, the child had spent two previous summers with the host family without any incident of abuse, and the host parent assailant had previously had an "unblemished record" (*id.* at 431). We therefore held that the assault there was "an intervening, unforeseeable act and the sole proximate cause of

[the] plaintiff's injury" (*id.* at 431). Similarly, in this case, JCCA had successfully placed foster children in the Pineda home twice before, Joseph had spent several months in that home without violent incident and S. had had no previous record of violence or abuse.

Here, the case for JCCA is even stronger than for the defendant placement agencies in *Lillian C.*, *Simpson* and *Belinda L.G.* The record shows that although JCCA conducted no background check on S. because he was not a resident in the foster home and the agency was therefore not under any obligation to do so, even had JCCA conducted such an inquiry, it would have revealed that S. had no criminal history or history of violence or abuse. Thus, in this case, as in *Piazza, Lillian C., Simpson* and *Belinda L.G.*, the injury to the infant plaintiff was unforeseeable by the agency.

By contrast, in *Garcia v City of New York* (222 AD2d 192 [1st Dept 1996] *lv denied* 89 NY2d 808 [1997]), cited by the majority and plaintiffs, where a five-year-old student, who was permitted by a kindergarten teacher to go to the bathroom alone in violation of school rules, was sexually assaulted in the bathroom by a attacker later identified as another student in that school, we found that the jury "could reasonably have come to the

conclusion that the danger of the assault which occurred was foreseeable and preventable by proper supervision" (*id.* at 197). *Garcia*, however, involved two students, left unsupervised, both of whom the school had a responsibility to supervise and the ability to monitor on a continuous basis. Under these circumstances, an assault of one student by another was eminently foreseeable.

Similarly, in *Dawn VV. v State of New York* (47 AD3d 1048 [3d Dept 2008]), also cited by plaintiffs, a resident of a facility for the developmentally disabled was sexually assaulted by another resident of that same facility after she was left in a room with him unattended. Under these circumstances, involving two residents the facility had responsibility to monitor on a continuous basis, the *Dawn VV.* Court held that "it was foreseeable that a resident could engage in some type of physical assault against another resident if the enacted safety plans were not adhered to" (*id.* at 1051). By contrast, here, as in *Piazza*, the assailant was not a resident of a facility that the agency had the responsibility and capability to monitor continuously, but a visitor to a foster home. Thus, it is not *Garcia* and *Dawn VV.*, but *Piazza* and *Lillian C.*, that are the guiding precedent for us, based on the divergent duties the respective agencies had

to protect their charges against harm which was foreseeable under the circumstances.

It was also unforeseeable that Avila, who had been Joseph's babysitter for more than two months prior to the incident, would be called out of the country one day prior to S.'s attack of Joseph due to a family emergency. There was nothing to indicate to the JCCA caseworker who had visited Pineda's home the preceding Friday that Avila would not be present the following Monday. Indeed, Avila herself was unaware until two days after the visit that she would not be present. Additionally, JCCA caseworkers were aware of S.'s frequent visits to the foster home and had repeatedly observed his solicitous behavior toward his own son during the nearly six-month period of Joseph's placement, and therefore had no reason to fear his presence. Moreover, S. had displayed no violent tendencies during that period and had no prior history of criminal violence. A JCCA caseworker who had visited the home three days prior to the incident observed that Avila, not S., was the babysitter, and therefore had no reason to suspect that S. would be called in to babysit for Joseph and Angel in Avila's stead. Thus, under the particular circumstances presented in this case, "there was nothing in the situation to suggest to the most cautious mind" that S. would attack Joseph

(*Palsgraf*, 248 NY at 345). Given the uncontroverted facts of this case and the inferences that may be drawn from them, JCCA could not have reasonably foreseen that S. would attack Joseph (*see Maheshwari*, 2 NY3d at 295), or that even the "general risk and character of [the] injuries" inflicted on Joseph was foreseeable (*see Derdiarian*, 51 NY2d at 317).[1] Put simply, as there was no foreseeability, there could be no finding of proximate cause (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518 [1980] ["it [is] logically impossible for [a] jury to find that foreseeability [is] lacking . . . while, at the same time, finding that defendants' negligence was the proximate cause of plaintiff's injury, because . . . foreseeability is an essential element of negligence"]). Therefore, S.'s attack of Joseph was not foreseeable by JCCA in the normal course of events. Satisfaction of this second *Maheshwari-Derdiarian* criterion, even taken alone, is a sufficient basis for our conclusion that JCCA's negligence was not a proximate cause of Joseph's injury.

The positions advanced by plaintiffs and the majority as to

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[1] There is no basis in the record for the conclusion reached by the majority that the unfortunately common-place nature of "shaken baby syndrome" cases and the efforts by the New York Department of Health to provide information to the public as to prevention of such incidents somehow made S.'s attack of Joseph foreseeable to JCCA.

foreseeability miss the mark. While the majority correctly observes that evidence of the foreseeability by JCCA of the precise manner in which an incident occurred is not required in order to establish a causal nexus between JCCA's negligence and Joseph's injury, this does not mean that the attack on Joseph "should lead to liability even though the injury-producing [incident] itself occurred in an unexpected manner" (*Di Ponzio v Riordan*, 89 NY2d 578, 584 [1997]). Here, as noted above, even the general risk of violence or neglect by S., let alone the specific manner in which he would attack Joseph, was unforeseeable.

S.'s physical attack of Joseph also meets the third *Maheshwari-Derdiarian* criterion, as it was so independent of and far removed from JCCA's original acts of negligence as to constitute a superseding act sufficient to break the causal nexus between any negligence on JCCA's part and the injury to Joseph (*see Derdiarian*, 51 NY2d at 315). Specifically, the attack of Joseph was committed unilaterally by an underage visitor with whom JCCA had no relationship and over whom JCCA had no supervisory oversight or control. Moreover, there is no evidence demonstrating that the tragic injury to Joseph was brought about by anything other than S.'s unanticipated attack on him, or that

negligence on JCCA's part contributed to Joseph's injury. Thus, the third *Maheshwari-Derdiarian* criterion is satisfied. This reason, taken alone, is a sufficient basis for my conclusion that JCCA's negligence is not a proximate cause of Joseph's injury.

The majority argues that the fact that Avila, a 53-year-old woman who had babysat for Joseph for more than two months without incident, had not been approved as a babysitter by the agency, was an example of JCCA's ongoing negligence. As already explained, any negligence on JCCA's part in failing to address the issue of Avila's unapproved status, however, has no bearing on whether S.'s wholly unexpected attack of Joseph was a superseding act that served to break the causal nexus between JCCA's negligence and the injury to Joseph.

In sum, having considered the record evidence in light of each of the *Maheshwari-Derdiarian* criteria, I would find that S.'s attack of Joseph was extraordinary under the circumstances, not reasonably foreseeable in the normal course of events and so independent of and far removed from JCCA's original acts of negligence as to constitute a superseding act. Satisfaction of any one of these criteria is sufficient to break the causal nexus between any negligence on JCCA's part and the injury to Joseph (*see Maheshwari*, 2 NY3d at 295; *Derdiarian*, 51 NY2d at 315). In

this case, where all three criteria are satisfied, the causal connection is clearly severed. Therefore, JCCA's negligent acts, independently or cumulatively, were not a proximate cause of Joseph's injury (*see Nallan*, 50 NY2d at 518).

Accordingly, I would modify the order of Supreme Court to the extent of granting JCCA's motion for summary judgment and dismissal of the complaint as against it, and otherwise affirm.

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

ENTERED: DECEMBER 21, 2017

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Richard T. Andrias
Karla Moskowitz
Marcy L. Kahn
Ellen Gesmer, JJ.

3680
Ind. 2906/12

_____x

The People of the State of New York,
Respondent,

-against-

Alexis Sanchez,
Defendant-Appellant.
_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered March 20, 2015, convicting him, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and imposing sentence.

Richard T. Wojszwilo, New York, for appellant.

Darcel D. Clark, District Attorney, Bronx (Eric C. Washer and Nancy D. Killian of counsel), for respondent.

KAHN, J.

Defendant Alexis Sanchez was convicted, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, arising out of the shooting death of Stephen Mari. Defendant, who did not testify, put forth a justification defense based on a videotaped statement that he gave to the police giving his version of the shooting, which the People introduced into evidence to definitively place the defendant at the scene.

On this appeal, we are asked to decide whether the jury's verdict convicting defendant of murder in the second degree was against the weight of the evidence.

I. *Standards of Review*

Weight of the evidence review involves a two-step approach. (*People v Romero*, 7 NY3d 633, 643 [2006]). First, the Court must determine whether, based on all the credible evidence, an acquittal would not have been unreasonable (*id.*; *People v Bleakley*, 69 NY2d 490, 495 [1987]). If so, then the appellate court must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony (*People v Danielson*, 9 NY3d 342, 348 [2007]; *Romero*, 7 NY3d at 643; *Bleakley*, 69 NY2d at 495). That step is performed by weighing the evidence against

the elements as charged to the jury (*Danielson*, 9 NY3d at 349). The evidence must be of such weight and credibility as to convince the Court that the jury's finding of the defendant's guilt beyond a reasonable doubt was justified (*People v Mateo*, 2 NY3d 383, 410 [2004], *cert denied* 542 US 946 [2004]).

The relationship between the role of the jury in the finding of facts and the role of the intermediate appellate court in review of the facts has been stated as follows:

> "Empowered with this unique factual review, intermediate appellate courts have been careful not to substitute themselves for the jury. Great deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor. Without question the differences between what the jury does and what the appellate court does in weighing evidence are delicately nuanced, but differences there are" (*Romero*, 7 NY3d at 644, quoting *Bleakley*, 69 NY2d at 495).

This Court has held that reversal of a judgment of conviction on weight of the evidence review is not warranted in the absence of record evidence indicating "that the jury's findings of credibility and fact were 'manifestly erroneous and so plainly unjustified by the evidence that rejection is required in the interest of justice'" (*People v Bartley*, 219 AD2d 566, 567 [1st Dept 1995], quoting *People v Corporan*, 169 AD2d 643, 643 [1st Dept 1991]; *see People v Castillo*, 223 AD2d 481, 481 [1st Dept 1996] [same]).

The defense of justification of use of deadly physical force may be raised where the defendant "believes that [another] person is using or about to use deadly physical force" (Penal Law § 35.15[2][a]) and "to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person" (Penal Law § 35.15[1]). Weight of the evidence analysis is applicable to the defense of justification, which the People are required to disprove beyond a reasonable doubt (*see People v Umali*, 37 AD3d 164, 165 [1st Dept 2007], *affd* 10 NY3d 417 [2008], *cert denied* 556 US 1110 [2009]; *see People v Gibson*, 141 AD3d 1009, 1011-1012 [3d Dept 2016]).

II. *The Trial*

The following facts were uncontested at trial. During the evening hours of November 2, 2011, Stephen Mari was shot in an alleyway located in the vicinity of 1523 Purdy Street in the Bronx, 130 yards from the high school defendant had attended, and left to die. There were no eyewitnesses to the actual shooting. Shortly after the shooting took place, police officers found Mari's body lying facedown in a pool of blood inside the alleyway, which was 20 feet 6 inches in length and 7 feet wide. Mari, who was 5 feet 11 inches tall and weighed 250 pounds, had

sustained six gunshot wounds - one each to his head and upper left arm and four to his torso. There was no blood found on the tee shirt Mari was wearing and no fouling or stippling on the skin near any of the entrance wounds on his body. The police, who arrived on the scene shortly after the shooting, recovered a wallet from Mari's body containing Mari's identification, but no money. Police detectives also recovered eight shell casings, one of which was found just outside the alleyway.

The People's case at trial was as follows. Mamadou Bah testified that on the night of the shooting, he saw an Hispanic man wearing a hooded sweatshirt sitting alone in the driver's seat of a car which was double-parked on Purdy Street. He then witnessed the man exiting the car and proceeding toward the alleyway. Bah then heard several shots fired, and then saw the man run back from the alleyway to the car and drive off.

Ricardo Campos, a New York Police Department sergeant who was off duty on the night of the shooting, testified that on that night he was waiting in his car to pick up his girlfriend's son from school when he heard four shots fired in quick succession. Two seconds later, he heard two more shots. He walked in the direction of the shots and then saw a man run out of an alleyway, jump into a dark sports utility vehicle and drive off.

Faye Rosa, who also heard the shots, called 911. Her

statement was that she told the 911 operator that she heard "four shots followed by a pause followed by four shots" but was too scared to look outside.

The People presented evidence that after the shooter fled, the investigating detectives ascertained further information from conversations with Mari's son, Stephen Mari, Jr. Mari, Jr. stated that two days before the shooting a man named "Alex" had come to Mari's house in order to buy drugs from him. Mari, Jr. stated that Mari let "Alex" into his home and told his son to make him "feel comfortable" while Mari assembled his drugs and accepted only partial payment for the drugs from "Alex," allowing him to depart amicably, with "Alex" promising to pay the balance of $35 in a couple of days. Mari, Jr. told police that "Alex" still owed Mari the money. He also mentioned that his father could bench press 350 pounds and would "manhandle" him. Using Mari's cell phone records, police identified "Alex" as defendant. A detective went to defendant's house several times, but defendant's mother told the detective that defendant was in "a program" and that she had no knowledge of his whereabouts. In fact, defendant had absconded, and his location was unknown to the police from November 2011 to August 2012.

Detective Robert Schlosser testified that he learned on August 18, 2012 that defendant was expected to arrive at a

building near the intersection of Glebe and Parker Avenues to buy drugs. Detective Schlosser intercepted defendant at the building and defendant agreed to go with the detective to the precinct. Once there, defendant stated that he had used drugs and had bought them from someone named "Stephen." The detective told defendant that he wanted to talk to him about "Stephen" and defendant replied that "Stephen" had disappeared and that he didn't know where "Stephen" had gone. Detective Schlosser then told defendant that Mari had been shot and killed and that defendant was seen with Mari on the day of the murder. Defendant then admitted that he had been with Mari on the day he was murdered and had driven him to Purdy Street. Defendant further stated that he dropped Mari off at Purdy Street and never saw Mari again after that. Upon further questioning by Detective Schlosser, defendant admitted that he had shot Mari, but made verbal, written and videotaped statements to the effect that he had done so in self-defense. Detective Schlosser further testified that after the shooting, Mari's car was found parked a block from defendant's home.

Dr. Kristen Landi of the New York Office of the Chief Medical Examiner testified that she supervised the autopsy of Mari's body. She testified that the shot to Mari's head would have resulted in catastrophic brain injury and a precipitous loss

of blood pressure. Additionally, Dr. Landi testified that the shot to Mari's head and another shot that injured his lumbar spine would have incapacitated him almost instantly. Dr. Landi opined that, given the lack of stippling found on Mari's tee shirt or adjacent to his torso wounds, it is unlikely that defendant fired at Mari from a distance of one foot or less. She also testified that because Mari was apparently wearing a hat when he was shot, she could not opine on the distance between the shooter and Mari's head. Although Dr. Landi further stated that the absence of stippling or fouling did not definitely prove that the muzzle of the gun was two feet or more from the site of a wound, when asked whether a gunshot fired from only one foot away would be consistent with a lack of stippling or fouling, she responded that such a scenario would be "pushing the realm of possibility." She also testified that superficial scrapes and bruises were found on the backs of Mari's hands.

Defendant did not testify at trial, but his videotaped statement was introduced by the prosecution. In that statement, defendant claimed that on the day of the shooting, Mari had come to defendant's home to collect some money defendant owed him for drugs. Defendant gave Mari $145, which was $35 short of the amount he owed Mari. Mari then became upset and hit defendant repeatedly, threatening to kill him and his family. Mari then

directed defendant to get into defendant's car, telling him to move over from the driver's seat so that Mari could drive the car somewhere "to make a sale." Mari drove defendant's car to Purdy Street and then ordered defendant out of the car. They proceeded to an alleyway, where Mari pulled out a gun with his right hand and demanded the money defendant owed him. Defendant said that he did not have all of the money and Mari told defendant that he was going to kill him and pointed the gun at him while searching defendant's pockets and taking the money he had. A struggle ensued, and defendant managed to take control of the gun. Defendant pointed it at Mari and warned him to back up or he would shoot. Instead, according to defendant, Mari advanced on defendant and punched him in the right side of his face using his left hand. Defendant fired the gun once, but Mari kept punching him, so defendant fired the gun again and kept pulling the trigger to defend against Mari's attack until the gun was empty. Mari then fell to the ground, and, as he was falling, defendant claimed that he accidentally shot Mari one last time, striking him in the head. Defendant fled from the alleyway.

In further describing his departure from the scene, defendant first stated that he took his car keys from Mari when he first left him and did not return to the alleyway. Later in the videotaped statement, defendant stated that after the

shooting he ran out of the alleyway to the car and, realizing that he did not have his car keys, ran back to the alleyway, took the keys out of Mari's hand, returned to the car and drove off. Upon arriving at his home, he immediately threw the gun into the garbage.

Frank Leone, called by defendant, testified that he knew both Mari and defendant, and that on the day of the shooting, Mari went to defendant's house looking for money. Leone further testified that while he was on the telephone with Mari that same day, he heard Mari threaten to "kill him if he didn't get the money." He then heard the voice of a second person whom he assumed was defendant respond that "he was going to get the money for him." On cross-examination, Leone testified that Mari often made empty threats similar to the one that he heard on the telephone.

Another defense witness, Tamara Pagan, testified that she lived on Purdy Street near the alleyway, and that while at home on the night of the shooting, she heard shots ring out. She then went to her window and saw a person run from the alleyway to a large, dark colored car and return to the alleyway. She stated that she did not know how long the man stayed in the alleyway, but that she saw him run out of it a second time, get into the car and drive away.

Sharine Talavera testified that she lived in the same house as defendant and was the wife of defendant's cousin. She further testified that on the day of the shooting, she heard a "bang" at the front door of her house, then looked outside and saw an altercation between defendant and another man outside of the house. She then observed the other man grab defendant's legs and push defendant into the passenger seat of his own car. The other man then got into the driver's seat of the car and drove off. She characterized the other man's actions as having "kidnapped" defendant. Talavera further testified that she told only defendant's aunt of the incident she had witnessed and that she decided not to call 911. She also testified that she had seen defendant on the day after the shooting and that defendant had a black eye, although when she asked him about it he replied that "everything [is] okay."

Defendant introduced medical records into evidence showing that he sought treatment for what he described as a facial injury.

At the conclusion of the trial, the court instructed the jury that in order to find defendant guilty of the crime of murder in the second degree in this case, the jury must find that defendant "caused the death of Stephen Mari," "did so with the intent to cause the death of Stephen Mari" and "was not

justified" in doing so.

III. *Weight of the Evidence Review*

Viewing all of the record evidence in light of the first prong of the *Romero-Bleakley* standard, had the jury credited defendant's account of the events surrounding the shooting, it could have reasonably found that defendant was, as the trial court instructed, "justified in the use of deadly physical force, . . . hav[ing] honestly believed that it was necessary to defend himself from what he honestly believed to be the use or imminent use of such force by Steven Mari and [that] a reasonable person in the defendant's position, knowing what the defendant knew, and being in the same circumstances would have believed that too." Thus, had the jury credited defendant's statement, it would not have been unreasonable for the jury to have acquitted defendant (*Romero*, 7 NY3d at 643; *Bleakley*, 69 NY2d at 495).

Turning to the second step of the *Romero-Bleakley* analysis, at the outset, there is no basis for disturbing the jury's rejection of defendant's videotaped statement. Defendant's statements to Detective Schlosser were materially inconsistent, and defied credulity. The jury learned that defendant provided three different accounts of his role in the shooting, first stating that Mari had disappeared and that defendant had played no role in his disappearance, then stating that he drove Mari to

Purdy Street and dropped him off there and had no further contact with him afterward, and finally, upon further questioning by Detective Schlosser, admitting that he shot Mari but claiming that he did so in self-defense. Given the magnitude of the event in the life of defendant, who had never previously been convicted of a crime, the disparity in his accounts could not reasonably have been attributable to memory lapse over the passage of several months' time. In view of the irreconcilable inconsistencies of defendant's accounts, which reasonably could be ascribed to defendant's effort to obfuscate his role in the shooting, the jury was justified in finding them incredible.

Furthermore, defendant's videotaped statement was patently implausible. It strains credulity that defendant could have wrested the pistol away from Mari, who was 5 feet 11 inches tall, weighed 250 pounds and, as corroborated by Mari Jr.'s testimony, could bench press 350 pounds even when taking methadone, and would "manhandle" his son.

Other aspects of defendant's ultimate account of what occurred at the time of the shooting, especially given the relative strength of conflicting testimony given by the People's witnesses, appear to be and were likely seen by the jury as implausible. For example, it is unlikely that Mari, who would have been holding the keys to defendant's car in his left hand

and the gun in his right hand, repeatedly punched defendant in the face with his left hand while still holding the car keys. In addition, in his videotaped statement, defendant gave two conflicting accounts of his departure from the scene, first stating that he took the car keys from Mari when he first left him and did not return to the alleyway, and later stating that he ran out of the alleyway toward the car, realized he did not have the car keys, returned to the alleyway, pried the keys from Mari's hand, returned to the car and drove off. This latter version of his departure was at odds with the testimony of the independent witnesses Bah and Sergeant Campos. Although defendant's version of his departure in this latter, contradictory explanation was consistent with Pagan's testimony, weighing this aspect of defendant's account in light of other implausible aspects of his statement, including his contested claims that it was Mari who drove defendant's car to a location familiar to defendant and that Mari had held the car keys in his left hand fist, while searching him with that hand, and then pummeling defendant with one hand and holding the gun with the other, the jury was justified in rejecting both defendant's statement and Pagan's testimony as incredible.

Moreover, weighing defendant's videotaped statement against the uncontroverted fact that no money was found in Mari's wallet,

and the fact that defendant made no mention of having retrieved the money in his videotaped statement, the jury was justified in rejecting his statement and, instead, drawing the stronger, conflicting inference that defendant retrieved the money from that wallet, including money Mari had allegedly taken from him. The jury could have thus concluded that recovery of the money was a motivating factor in defendant's shooting of Mari, and that defendant's failure to mention the money reflected his consciousness of guilt.

Further, Mari, Jr.'s statement was that two days before the shooting, Mari had let defendant into his home, told his son to make him "feel comfortable" while Mari assembled his drugs and then accepted only partial payment for the drugs from defendant, allowing him to depart amicably with defendant promising to pay Mari the balance of $35 in a couple of days. This testimony undermines the credibility of defendant's account that, two days later, Mari would try to kill defendant because he was $35 short of full payment, even if Mari were intoxicated by drugs, especially since no money was found on Mari's body when the police discovered it shortly after the shooting took place.

Moreover, defendant's videotaped description of his departure from his home with Mari is markedly different from the description offered by Sharine Talavera, as defendant makes no

mention of Mari grabbing his legs and physically forcing defendant into his car, in the manner of a kidnapping. For this reason, the jury could have discredited both the defendant's statement and Talavera's testimony in this regard.

Defendant's contention that Mari drove him to the alleyway is likewise undermined by the fact that the shooting took place in an isolated spot known to defendant. That fact supports the conflicting inference that it was defendant who chose and directed Mari to that isolated location because he intended to shoot Mari there. Thus, the jury was justified in rejecting defendant's evidence and adopting the stronger, conflicting inferences that Mari's car was found near defendant's house because Mari encountered defendant there, and that from there defendant drove his car to Purdy Street with Mari in order to put an end to Mari's demands for money by murdering him in a narrow, dead-end alley.

The credibility of defendant's statement is further diminished by the evidence that after the shooting, defendant absconded for several months, as well as by Detective Schlosser's testimony that the police went to defendant's home and that his mother told them that defendant was "in a program," but could not identify it further. This evidence provides further justification for the jury's rejection of defendant's statement,

in that defendant's flight raises the conflicting inference of consciousness of guilt on defendant's part.

Accordingly, viewing the evidence presented at trial in a neutral light (*see People v Gibson*, 141 AD3d at 1011), and weighing the relative probative force of the conflicting testimony and evidence, as well as the relative strength of the conflicting inferences to be drawn therefrom, and according deference to the jury's opportunity to view the witnesses, hear their testimony and observe their demeanor, this Court finds that there is no reason to disturb the jury's findings discrediting defendant's self-serving account of the shooting (*Romero*, 7 NY3d at 643-644).

Beyond the relative weakness of the evidence supporting defendant's version of the events in question, the weight of the affirmative evidence introduced at trial significantly favors the People. Notably, there is ample support in the record for the jury's determination to credit the statements of three objective, third-party witnesses over defendant's videotaped statement and the testimony of two of the defense witnesses. The independent eyewitness testimony of Bah and Sergeant Campos, taken together, was that they saw a man, later determined to be defendant, exit his car and enter the alleyway; heard gunshots fired in the alleyway; and then saw the same man run from the alleyway, return

to his car and drive off. Furthermore, from Sergeant Campos's testimony and Ms. Rosa's statement that there were shots fired, followed by a pause, followed by more shots, and from the evidence of the position of the one shell casing found outside the alleyway, the jury could have reasonably inferred that the pause was intentional, with defendant firing initially from outside the alleyway and then pausing and firing again inside the narrow alleyway at closer range. Taken together, this testimony, statement and evidence undermines defendant's statement that he fired rapidly, continuously and repeatedly in order to stop Mari's advance toward him.

The forensic evidence presented by the People at trial, the inferences to be drawn therefrom, and the testimony presented in connection with that forensic evidence, strongly support the People's version of the events that occurred on the day of the shooting. For example, the fact that one of the eight shell casings was found outside the alleyway strongly supports the inference that defendant began shooting at Mari from outside the alleyway when there was a substantial distance between the two men. The lack of any blood or stippling on Mari's T-shirt, considered together with Dr. Landi's testimony that a shot to the head would have led to a precipitous loss of blood pressure, leaving no blood or stippling from the wounds to Mari's torso,

strongly supports the inference that, contrary to defendant's videotaped statement, defendant first shot Mari in the head.

The dissent argues that no reasonable inference as to the distance between the two men can be drawn based on Dr. Landi's testimony, given her statements that Mari was apparently wearing a hat and that the absence of stippling or fouling does not definitively prove that the muzzle of the gun was two feet or more from the site of a wound. When asked whether a gunshot fired from only one foot away would be consistent with a lack of stippling or fouling, however, Dr. Landi in fact responded that such a scenario would be "pushing the realm of possibility."

Defendant highlights the testimony of Sharine Talavera in support of his version of the events leading to the shooting. As Talavera is the wife of defendant's cousin and both were living with defendant at the time, the jury could have rationally rejected her testimony as interested. Because she testified that she told only defendant's aunt about the kidnapping of defendant she claimed to have witnessed and decided not to call 911, and because her characterization of his departure did not comport with defendant's videotaped recounting of the events, the jury could have reasonably rejected her testimony as unreliable.

In support of defendant's justification defense, defendant presented medical records indicating that after the shooting he

sought treatment for what he said was a facial injury. That evidence is undermined by Talavera's testimony that defendant responded that "everything [is] okay" when she asked about his black eye. Additionally, to the extent that the jury might have believed that defendant suffered any facial injuries inflicted by Mari, they were not so serious as to justify defendant's use of deadly physical force on Mari.

In any event, the nature and multiplicity of Mari's wounds (six) and defendant's own lack of serious injuries, together with the inconsistencies in defendant's own statements and the other evidence already discussed, are strong evidence in support of the jury's determination that defendant's justification defense was disproved beyond a reasonable doubt (*see People v Rubin*, 200 AD2d 376, 377 [1st Dept 1994], *lv denied* 83 NY2d 876 [1994]; *People v King*, 128 AD2d 806, 806 [2d Dept 1987]).

Based upon our weighing of defendant's own incredible statements and the other evidence presented by the defense against the probative force of the evidence presented by the People and the strength of the inferences to be drawn therefrom, and according deference to the jury's credibility findings, we conclude that the jury was justified in finding that the People sustained their burden of disproving defendant's justification defense beyond a reasonable doubt (*People v Every*, 146 AD3d 1157,

1162 [3d Dept 2017], *affd* 29 NY3d 1103 [2017]; *see People v Gibson*, 141 AD3d at 1011-1012 ["viewing the evidence in a neutral light and mindful of the deference accorded to the fact-finder[,] . . . we find no reason to disturb the jury's rejection of the justification defense"]; *People v Massey*, 61 AD3d 1433, 1433 [4th Dept 2009], *lv denied* 13 NY3d 746 [2009]).

The dissent's analysis of the issues presented on this appeal departs from the standard of review articulated by the Court of Appeals, in that it is based on a selective identification of singular items of evidence which, it concludes, support a verdict contrary to that reached by the jury. In isolating discrete portions of the overall trial testimony and evidence that it deems to be significant while ignoring the remainder of the evidence presented at trial, the dissent puts itself in the perilous position of substituting its view of the evidence for that of the jury (*see Romero*, 7 NY3d at 644 ["Empowered with this unique factual review, intermediate appellate courts have been careful not to substitute themselves for the jury"] [internal quotation marks omitted]). That is not the role of this Court in a weight of the evidence review, however. Rather, the proper approach is to weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the

testimony and evidence overall, while according great deference to the jury's credibility findings (*id.* at 643-644). Here, upon weighing the relative probative force of the conflicting trial testimony and evidence and the inferences to be drawn from that evidence overall, and according great deference to the jury's credibility findings, it is clear that the selected items of testimony and evidence upon which the dissent narrowly focuses do not outweigh the probative force of the testimony and evidence supporting a guilty verdict.

For example, the dissent casts Leone's testimony that he overheard Mari on the telephone threatening to kill someone with him, whom Leone assumed was defendant, as well as defendant's statement that Mari threatened to kill defendant and his family, as supportive of defendant's justification defense. The dissent fails to consider, however, that Mari had a habit of making empty threats, a fact that undermines the strength of Leone's and defendant's statements in this regard. The dissent also ignores other aspects of Leone's testimony from which inferences favorable to the People could be derived. For example, from defendant's statement to Mari, overheard by Leone, that "he [defendant] was going to get the money for him [Mari]," the jury could have reasonably inferred that defendant was attempting to lure Mari into his car so he could bring him to the alleyway and

shoot him.

Accordingly, weighing the evidence against the elements of the crime of murder in the second degree as charged to the jury (*Danielson*, 9 NY3d at 349), and according great deference to the jury's credibility findings (*Romero*, 7 NY3d at 644), this Court finds that the weight and credibility of the evidence are such as to convince us that the jury was justified in finding proof beyond a reasonable doubt that defendant caused the death of Stephen Mari with the intent to do so, and that the People disproved defendant's justification defense beyond a reasonable doubt. Therefore, we conclude that the jury's verdict of guilty was not against the weight of the evidence (*see Mateo*, 2 NY3d at 410).

IV. *Suppression Claim*

Supreme Court properly denied defendant's motion to suppress his statements to the police. The confidential informant was reliable, as the information he provided was consistent with the details already learned by the detectives during their investigation (*see People v DiFalco*, 80 NY2d 693, 697 [1993]). There was a sufficient basis for the confidential informant's knowledge, as he personally knew both Mari and defendant and overheard defendant admit his involvement in the shooting (*see Matter of Dominique P.*, 812 AD3d 478 [1st Dept 2011]). Thus,

both prongs of the *Aguilar-Spinelli* test (*Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]) were satisfied, and there was probable cause to arrest defendant, leaving no basis to suppress his statements.

V. *Excessive Sentence*

Defendant's excessive sentence claim is unavailing. Supreme Court considered defendant's substance abuse problems, his lack of a criminal record and his remorse for what he had done, and it providently determined that an 18-year to life prison sentence was warranted.

Accordingly, the judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered March 20, 2015, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years to life, should be affirmed.

All concur except Moskowitz and Gesmer, JJ. who dissent in an Opinion by Moskowitz, J.

MOSKOWITZ, J. (dissenting)

I respectfully dissent, as I believe that the jury's verdict was against the weight of the evidence. Defendant's self-defense claim had ample support in the record, and the People presented no evidence directly refuting that theory. Accordingly, I would reverse and dismiss the indictment.

Decedent Stephen Mari, a drug dealer, was shot and killed on Purdy Avenue in the Bronx. Mari's son testified that, on the night that Mari was killed, a man named Alex had arrived at the Mari home, seeking to buy drugs; the police eventually found defendant by way of Mari's cell phone records.

In his statement to police, which the People offered into evidence, defendant stated that in fact, he had killed Mari in an argument over drugs. According to defendant, Mari came to defendant's home looking for money that defendant purportedly owed for a drug purchase. Defendant said that Mari physically assaulted him and threatened to kill not only defendant, but also defendant's family.

Defendant said in his statement that Mari then told defendant to get into his car, and Mari drove the car to Purdy Street in the Bronx. In an alleyway, Mari pulled out a handgun and again demanded money. When defendant responded that he did not have all the money he owed for the drugs, Mari again

threatened to kill him. Mari and defendant then struggled, and during that struggle, defendant was able to take the gun from Mari. According to defendant, he warned Mari to step back or be shot. Mari did not step back, but instead advanced and punched defendant; defendant then fired the gun numerous times until Mari fell to the ground. Defendant then fled the alleyway. Toxicology analysis revealed the presence in Mari's system of Zyrtec, methadone, morphine, and cocaine, and the pathologist who performed the autopsy opined that at the time of his death, Mari, who was 5 feet 11 inches tall and weighed 250 pounds, was acutely intoxicated.

We agree with defendant that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). The only direct evidence of the homicide was defendant's statement that he believed Mari was about to shoot defendant over a drug debt, that defendant took away Mari's pistol in a struggle, and that defendant repeatedly fired at the deceased, who was advancing on defendant in an effort to regain the weapon. Other evidence corroborated defendant's statement to police. One witness, a friend of Mari's son, testified that Mari threatened to kill defendant for the money owed, thus corroborating defendant's claim of the threats. Further, after the murder, Mari's car was found around the corner from

defendant's home, substantiating defendant's theory that Mari came there to collect the debt. Medical records also showed that Mari had abrasions on his hand and defendant had a black eye, thus supporting defendant's claim that he and Mari struggled. By contrast, none of the People's evidence, either testimonial or forensic, directly refuted defendant's self-defense claim.

Although the majority correctly notes that there was no stippling on Mari's wounds, they do not accurately recount the pathologist's testimony on that topic. The pathologist did note that the lack of stippling would normally indicate that the gun must have been more than two feet from the site of the injury. The pathologist also noted, however, that Mari was apparently wearing a hat when he was shot, thus preventing the pathologist from opining on the distance between the shooter and Mari's head injury. Further, although there was no evidence of fouling or stippling on the skin near the other entrance wounds on Mari's body, the pathologist agreed that, depending upon the ammunition and weapon, stippling may not be present even for weapons fired from close range. In any event, even if defendant had shot Mari from two feet away, that evidence would not be inconsistent with defendant's account that he tried to distance himself from Mari after the struggle for the gun and that Mari continued to advance upon him even after Mari was shot.

The majority's analysis also proceeds from the incorrect premise that a weight of the evidence review requires us to view the evidence in the light most favorable to the People. That is the standard to be applied when we review the legal sufficiency of the People's evidence, which requires us to "marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained its burden of proof" (*Danielson*, 9 NY3d at 349). By contrast, weight of the evidence review allows this Court to sit, in effect, "as a thirteenth juror" (*id.* at 348) without viewing the evidence in the light most favorable to the People, and is a "unique factual review" power possessed solely by the intermediate appellate court (*People v Bleakley*, 69 NY2d 490, 495 [1987]).

When the jury has been charged with the defense of justification, the People bear the burden of proving beyond a reasonable doubt that the defendant was not justified (*Matter of Y.K.*, 87 NY2d 430, 433 [1996]). Here, the evidence corroborating defendant's statement outweighed the minimal evidence tending to contradict it. Although defendant fired many shots, and the infliction of numerous wounds is often indicative of homicidal intent and the lack of justification, on the facts of this case, the deceased's 250-pound size, strength, and high level of drug

intoxication tended to explain defendant's need to fire at the deceased rapidly and repeatedly in order to stop his advance. Moreover, the deceased's threats to kill defendant supported the reasonableness of defendant's belief that deadly force was necessary (*People v Morgan*, 99 AD3d 622, 623 [1st Dept 2012]; *see also* Penal Law § 35.15[2]; *Y.K.*, 87 NY2d at 433-434). Under these circumstances, in the exercise of our factual review power "in effect, as a second jury" (*People v Delamota*, 18 NY3d 107, 117 [2011]), we find that the People did not disprove defendant's justification defense beyond a reasonable doubt.

Finally, the majority's suggestion that the jury could have drawn an adverse inference from defendant's exercise of his right not to testify is completely at odds with the Criminal Procedure Law and the jurisprudence of the Court of Appeals (CPL300.10[2]; *People v Britt*, 43 NY2d 111, 113-115 [1977]). Defendant requested, and the trial court properly gave, a "no inference" charge.

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

ENTERED: DECEMBER 21, 2017

CLERK