SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 4, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4467 The People of the State of New York, Respondent, Ind. 1579/15

-against-

Cristobal Colon,
Defendant-Appellant.

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Glenn A. Garber, P.C., New York (Glenn A. Garber of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered January 7, 2016, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of two years, unanimously affirmed.

The Court properly denied defendant's suppression motion. The record supports the court's finding that the totality of the information available to the police supported a reasonable conclusion that there was a weapon in defendant's van that posed an actual, specific danger to the officers' safety, justifying a limited protective search of the specific area associated with

defendant's suspicious behavior (*see People v Mundo*, 99 NY2d 55, 57-59 [2002]). During a lawful traffic stop at a particular location known to police for significant drug activity and numerous recent shootings, the police saw defendant leaning down and reaching into an area below the center area of the dashboard. After a slight delay, defendant responded to the officers' request for a license and registration by answering that he had those documents in his back pocket. Meanwhile, defendant continued to use his right leg to push against a lower compartment area beneath the dashboard, and he appeared to be nervous. After defendant got out of the van as directed, the totality of circumstances warranted the limited intrusion of shining a flashlight on the lower compartment area that defendant had been pushing with his right leg (*cf. People v Hardee*, 126 AD3d 626 [1st Dept 2015], *affd* __ NY3d __, 2017 NY Slip Op 08038 ["(D)efendant's furtive behavior, suspicious actions in looking into the back seat on multiple occasions and refusal to follow the officers' legitimate directions" justified the limited

intrusion into the vehicle after the occupants had been removed and frisked]). As a result, an officer saw what he recognized to be a bag of drugs in the partly opened compartment.

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

ENTERED: JANUARY 4, 2018

CLERK

Gische, J.P., Webber, Oing, Singh, Moulton, JJ.

5241 In re Michael Chorney, Index 101123/15
Petitioner,

-against-

New York State Office of Children
and Family Services, et al.,
Respondents.

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Law Office of Elliot S. Schlissel, Lynbrook (Andrea E. Miller of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondents.

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Determination, after a hearing, of respondent New York State Office of Children and Family Services, dated February 23, 2015, which sustained an indicated report of child maltreatment against petitioner Michael Chorney, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alexander W. Hunter, J.], entered January 12, 2016) dismissed, without costs.

The determination is supported by substantial evidence (*see Matter of Parker v Carrion*, 90 AD3d 512 [1st Dept 2011]; *Matter of Irving v Carrion*, 120 AD3d 500, 500 [2d Dept 2014]).

Respondent met its burden of proving maltreatment by petitioner by a preponderance of the evidence. The out-of-court

statements of then 3 ½-year-old child, T.W., that petitioner kicked him during a toilet-training session, were corroborated so as to ensure reliability and to allow admission into evidence (*see* Family Court Act § 1046[a][vi]; *Matter of Tristan R.*, 63 AD3d 1075 [2d Dept 2009]; *Matter of Department of Social Servs. v Waleska M.*, 195 AD2d 507 [2d Dept 1993], *lv denied* 82 NY2d 660 [1993]; *Matter of Nicole V.*, 71 NY2d 112, 116 [1987]). The level of corroboration required under the Family Court Act is not the same as that required under the Penal Law. "Family Court Act § 1046 broadly provides that the child's prior out of court statements may be corroborated by [a]ny other evidence tending to support reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision" (*Tristan R.*, 63 AD3d at 1076 [internal quotation marks omitted]). T.W. made repeated and consistent statements that petitioner kicked him in the penis. These statements were corroborated by notations in the hospital records, made shortly after the incident, indicating that T.W. sustained mild penile swelling, significant swelling to head of the penis, ecchymosis to both thighs and left scrotum. The records also stated that the examining physician reported that the injuries were consistent with an impact.

The ALJ also properly considered T.W.'s consistent,

unrecanted description of the incident, as well as T.W.'s lack of a motive to fabricate, as contrasted by petitioner's inconsistent and waffling accounts of the incident.

Substantial evidence also supported the determination that petitioner's maltreatment of T.W. was relevant and reasonably related to petitioner's employment as a special education teacher (*see* Social Services Law § 422[8][c][ii]).

For the first time in this proceeding, petitioner argues that the ALJ's decision was erroneous because petitioner was not a "person legally responsible" for T.W. under Social Services Law § 412 and, therefore, could not have maltreated T.W. under Social Services Law § 422. Petitioner's argument is unpreserved, and we decline to review it (*Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]; *Matter of Khan v New York State Dept. of Health*, 96 NY2d 879 [2001]).

Accordingly, we find that respondent's prosecution of petitioner was proper, as was the determination of maltreatment.

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

ENTERED: JANUARY 4, 2018

CLERK

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

5248 The People of the State of New York, Respondent,

Ind. 3232/14
2075/14
1301/14

-against-

Johnny Mason,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at motions; Arlene D. Goldberg, J. at jury trial and sentencing), rendered December 21, 2015, as amended January 5, 2016, convicting defendant of 18 counts of criminal possession of stolen property in the fourth degree and 17 counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 16 to 32 years, unanimously affirmed.

The court providently exercised its discretion in denying defense counsel's midtrial request for a CPL article 730 competency examination (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 881 [1995]). The issue of competency arose for the first time in the midst of trial,

when defense counsel relayed to the court his conversation with a friend of defendant who had expressed concerns about defendant's mental health and had recounted some bizarre statements defendant had allegedly made. However, defendant's understanding of the charges and ability to assist in his defense was evident throughout all pretrial and trial proceedings, as well for the remainder of the trial (*see People v Russell*, 74 NY2d 901 [1989]). Moreover, the timing of the phone call and the surrounding circumstances suggest that, despite his disclaimers, defendant arranged for the phone call and fabricated the delusions relayed by the caller, in an effort to disrupt the trial.

The motion court correctly denied, as untimely, defendant's motion to suppress, under *Payton v New York* (445 US 573 [1980]), the fruits of his allegedly unlawful warrantless arrest at the men's shelter where he had been residing. The 45-day period in which to make such a motion (CPL 255.20[1], 710.40[1]) had elapsed and successor defense counsel failed to demonstrate good cause for the delay. The original defense counsel had ample opportunity, and all the necessary information, to make a timely motion, and defendant's arguments to the contrary are unavailing. The fact that the motion court also opined that the motion lacked merit does not require us to reach the merits; the issue is

timeliness of a motion rather than preservation of an issue, and thus the portion of CPL 470.05(2) referring to issues actually decided is inapplicable.

In any event, we conclude that the motion would have been unsuccessful, even if timely made. The record shows that employees of the shelter lawfully permitted the police to enter (*see People v Nalbandian*, 188 AD2d 328 [1st Dept 1992], *lv denied* 81 NY2d 890 [1993]). Furthermore, defendant's original counsel did not render ineffective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]) by failing to make a timely motion. Given the prevailing law, it was objectively reasonable for the original counsel to forgo this motion, and, as indicated, the motion would not have succeeded. Moreover, since the fruits of the alleged *Payton* violation were tangential to defendant's guilt, defendant has not demonstrated that even a successful suppression motion would have affected the outcome of the trial.

After the motion court dismissed a count of criminal possession of stolen property on the ground that legally insufficient evidence had been presented to the grand jury, it granted the People leave to re-present that count, and the People lawfully did so. The record fails to support defendant's

assertion that the court actually authorized a re-presentation of a different charge.

We have considered and rejected defendant's arguments for dismissal of the counts relating to a nontestifying victim. In this case involving stolen credit and debit cards, one of the eight victims did not testify. As a result, there was no direct evidence of the circumstances under which her property was taken. However, upon our review of the extensive circumstantial evidence, we conclude that, as to each element of the charges at issue, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Porter*, 119 AD3d 438, 439 [1st Dept 2014], *lv denied* 24 NY3d 1046 [2014]; *People v Meador*, 279 AD2d 327 [1st Dept 2001], *lv denied* 96 NY2d 865 [2001]), and that the larceny charge satisfied the requirements of geographical jurisdiction as set forth in CPL 20.20 and 20.40.

We perceive no basis for reducing the sentence, which we note is deemed by operation of law to be a sentence of 10 to 20 years.

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

ENTERED: JANUARY 4, 2018

CLERK

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

5267 The People of the State of New York, Ind. 312/13
Respondent,

-against-

Kyle Harleston,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James Burke, J.), rendered August 3, 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: JANUARY 4, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5358- Ind. 1191/15
5359 The People of the State of New York, 932/15
Respondent,

-against-

Ralph Ben Cotto,
Defendant-Appellant.

_____

Usher Law Group, P.C., Brooklyn (Thomas S. Mirigliano of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 2, 2016, convicting defendant, upon his pleas of guilty, of two counts of operating as a major trafficker, and sentencing him to concurrent terms of 12½ years, unanimously affirmed. Purported appeal from orders, same court and Justice, entered on or about September 28, 2015, to the extent they denied in part defendant's omnibus motions, unanimously dismissed, as subsumed in the appeal from the judgment.

Defendant's challenge to the validity of his guilty plea is unpreserved (*see People v Conceicao*, 26 NY3d 375, 381 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we find that defendant knowingly,

intelligently, and voluntarily pleaded guilty, after fully waiving his rights under *Boykin v Alabama* (395 US 238 [1969]).

To the extent the limited record permits review, it establishes the geographic jurisdiction of New York State and County (*see People v Carvajal*, 6 NY3d 305 [2005]; *People v Kassebaum*, 264 AD2d 664, 666 [1st Dept 1999], *affd* 95 NY2d 611 [2001], *cert denied* 532 US 1069 [2001]).

Defendant's guilty plea forecloses appellate review of the legal sufficiency of the evidence presented to the grand jury (*see People v Kazmarick*, 52 NY2d 322, 326 [1981]).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5360 Amaury Abreu, Index 161303/13
Plaintiff-Respondent,

-against-

Police Officer Otis Casey, et al.,
Defendants-Respondents,

William Adu-Agyei,
Defendant-Appellant.

_____

Bruno, Gerbino & Soriano, LLP, Melville (Nathan M. Shapiro of counsel), for appellant.

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for Amaury Abreu, respondent.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for Otis Casey, The New York City Police Department and the City of New York, respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about November 22, 2016, which, to the extent appealed from as limited by the briefs, denied defendant William Adu-Agyei's (defendant) motion to dismiss the amended complaint, unanimously affirmed, without costs.

This action for personal injuries arises from a motor vehicle accident that occurred on September 7, 2012. Defendant was operating one of the vehicles involved in the accident.

On August 25, 2015, 13 days before the statute of limitations expired, plaintiff moved to amend the complaint to,

among other things, add defendant as a party. A copy of the proposed amended summons and complaint were annexed to plaintiff's moving papers.

By order dated February 4, 2016, and entered on February 5, 2016, the court granted plaintiff's motion. Upon entry of the order granting leave, plaintiff had until February 18, 2016 to serve defendant with the amended pleadings within the applicable statute of limitations (*see Perez v Paramount Communications*, 92 NY2d 749, 755-756 [1999]; *Long v Sowande*, 27 AD3d 247, 248 [1st Dept 2006]).

On February 10, 2016, plaintiff served all parties including defendant with a copy of the February 4, 2016 order with notice of entry, annexing the amended summons and amended verified complaint. Those papers were filed with the Clerk of the Court on that same date.

Contrary to defendant's contention, plaintiff was not required to serve him with the motion to amend before the Supreme Court could decide the motion (*see Eastern States Elec. Contrs. v Crow Constr. Co.*, 153 AD2d 522, 524 [1st Dept 1989]). Plaintiff's filing of the motion to amend and annexed proposed amended pleadings tolled the applicable statute of limitations (*see Perez*, 92 NY2d at 755-756).

In addition, the record shows that plaintiff's claims

against defendant were interposed eight days before the statute of limitations expired, as the amended pleadings were annexed to the February 4, 2016 order with notice of entry, which was served upon defendant and filed with the Clerk of the Court on February 10, 2016. Plaintiff's failure to file the amended pleadings as a separate docket entry is not fatal to his maintaining the action against defendant, because the amended pleadings were timely filed with the Clerk of the Court after being served upon defendant (*see* CPLR 305), and defendant has not shown any prejudice (*see* CPLR 2001). Further, CPLR 2001 authorizes the court to direct plaintiff to correct this type of filing mistake (*see Matter of Miller v Waters*, 51 AD3d 113, 117-118 [3d Dept 2008]).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5361-
5362 In re Jerell P.,

A Child Under Eighteen Years
of Age, etc.,

Qubilah G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Anne Reiniger, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

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Order of fact-finding and disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about October 27, 2016, which, upon granting petitioner agency's motion for summary judgment, found that respondent mother had derivatively neglected the subject child, unanimously affirmed, without costs. Appeal from decision and order, same court, Judge and date, which granted the motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the order of fact-finding and disposition.

The agency made a prima facie showing of derivative neglect as to the subject child, based on prior orders finding that the

mother had neglected and derivatively neglected her four older children (*see Matter of Camarrie B. [Maria R.]*, 107 AD3d 409 [1st Dept 2013]). The prior neglect findings, issued over a two-year period between 2014 and 2016, support a finding that the mother, by reason of her cognitive limitations and impaired judgment, was unable to care for any child (*see Matter of Phoenix J. [Kodee J.]*, 129 AD3d 603 [1st Dept 2015]*; Matter of T-Shauna K.*, 63 AD3d 420 [1st Dept 2009]). Further, the conduct underlying the prior findings of neglect was sufficiently proximate in time to the derivative neglect proceeding to support the conclusion that the conditions still existed (*see T-Shauna K.*, 63 AD3d at 420). Moreover, the repeated findings of neglect against the mother and her ongoing failure to participate in services as evidenced by the fact that her children were never returned to her care and by the transfer of guardianship, all established that the conditions that led to the prior findings still existed and that the child would be at risk in her care (*see Matter of Neveah AA. [Alia CC.]*, 124 AD3d 938 [3d Dept 2015]).

In opposition to the agency's motion, the mother failed to

rebut the presumption that the conditions leading the neglect of the child's siblings had not been remedied (*see Matter of Phoenix J.* at 603-604).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5363 Kathleen Bruno, Index 156291/12
Plaintiff-Respondent,

-against-

The Port Authority of New York
and New Jersey,
Defendant-Respondent,

Hudson Transit Lines, Inc.,
Defendant-Appellant.

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Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for appellant.

Hannum Feretic Prendergast & Merlino, LLC, New York (William C. Lawlor of counsel), for the Port Authority of New York and New Jersey, respondent.

Ephrem J. Wertenteil, New York, for Kathleen Bruno, respondent.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about April 18, 2016, which, insofar as appealed from, denied defendant Hudson's motion for summary judgment dismissing all claims and cross claims against it, unanimously affirmed, without costs.

Issues of fact exist as to whether Hudson breached its duty as a common carrier to provide plaintiff with a safe place to disembark (*see Malawer v New York City Tr. Auth.*, 18 AD3d 293, 294-295 [1st Dept 2005], *affd* 6 NY3d 800 [2006]; *Conetta v New York City Tr. Auth.*, 307 AD2d 333, 333 [2d Dept 2003]). The

record shows that 15 or 20 passengers exited the bus before plaintiff. As she alighted, she stepped into a hole on the sidewalk and fell. The bus driver corroborated this testimony, stating that the hole was on the sidewalk, "[w]ithin one step" of where plaintiff disembarked. The bus driver further admitted that the hole caused plaintiff to fall. Additionally, plaintiff testified that, upon seeing where she fell, the bus driver exclaimed, "[Y]ou fell in that hole, they're supposed to fix that hole." Under the circumstances, where plaintiff stepped into a hole immediately upon alighting from the bus, the fact that a number of passengers safely descended before she did does not entitled Hudson to summary judgment (*see Orlick v Granit Hotel & Country Club*, 30 NY2d 246, 250 [1972]; *Noskewicz v City of New York*, 155 AD2d 646, 646 [2d Dept 1989]).

Issues of fact as to, among other things, whether Hudson breached its contractual duty to notify Port Authority of any

needed repairs at the gate where the accident occurred compel denial of summary judgment on Port Authority's contractual indemnification claim.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5365 The People of the State of New York, Ind. 2373/14
Respondent,

-against-

Anthony Gregory,
Defendant-Appellant.

_____

Rosemary Herbert,, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 8, 2015, convicting defendant, upon his plea of guilty, of conspiracy in the first degree, attempted murder in the second degree and criminal possession of a weapon in the second degree and sentencing him to an aggregate term of 5 to 15 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the conspiracy conviction to 3⅓ to 10 years and reducing the sentence on the weapon possession conviction to 3½

years, with 5 years' postrelease supervision, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5366 Carlos Perez, Index 307323/13
Plaintiff-Appellant,

-against-

Victor Steckler,
Defendant-Respondent.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Richard T. Lau & Associates, Jericho (Irene A. Schembri of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 26, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established his prima facie entitlement to judgment as a matter of law by his testimony that as he was driving next to plaintiff's parked vehicle, plaintiff suddenly opened his driver's side door, in violation of Vehicle and Traffic Law § 1214, causing defendant to strike the door, and defendant was unable to avoid the accident (*see Tavarez v Castillo Herrasme*, 140 AD3d 453, 453 [1st Dept 2016]).

In opposition, plaintiff failed to raise an issue of fact as

to whether he violated Vehicle and Traffic Law § 1214, or whether defendant could have avoided the accident.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5367-
5368 Siras Partners LLC, et al., Index 650868/15
850216/15
Plaintiffs-Respondents,

-against-

Activity Kuafu Hudson Yards LLC, et al.,
Defendants-Appellants.

- - - -

[And a third party action]

_____

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for appellants.

Cole Schotz P.C., New York (Joseph Barbiere of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 31, 2017, and June 6, 2017, which, to the extent appealed from, denied defendants' motion to dismiss the complaint as against defendant 462-470 11th Avenue LLC, and granted plaintiffs' motion to compel production of documents pertaining to defendants' waiver of the attorney-client privilege, unanimously affirmed, with costs.

By disclosing to a third party by email certain advice given to them by counsel, defendants waived the attorney-client privilege as to other documents pertaining to that advice (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *Arkin Kaplan Rice LLP v Kaplan*, 118 AD3d 492 [1st

Dept 2014]).

The complaint alleges sufficient wrongful conduct on the part of defendant 462-470 11th Avenue LLC, an affiliate of the other defendants, to support the claims for injunctive and declaratory relief as against that defendant (*see Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 59 [1st Dept 2012]).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5369 Mai Rahhal, et al., Index 24450/16E
Plaintiffs-Respondents,

-against-

Sarika Downing, R.N., et al.,
Defendants,

Anacleta Villamor, R.N., et al.,
Defendants-Appellants.

Turken & Heath, LLP, Armonk (Jason D. Turken of counsel), for appellants.

Arnold E. DiJoseph, P.C. New York (Arnold E. DiJoseph, III of counsel) for respondents.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 29, 2017, which, to the extent appealed from, denied defendants-appellants' motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction due to lack of effective service, unanimously affirmed, without costs.

Appellants are doctors and a nurse who were employed by defendant Bronx Lebanon Hospital at the time plaintiff commenced this medical malpractice action. Plaintiffs properly served appellants, as well as the hospital, by delivering copies of the summons and complaint to the hospital's Department of Risk Management and leaving them with the Coordinator of Risk Management, and thereafter mailing copies for each defendant.

Although appellants contend that their actual place of business is located in the Bronx Lebanon buildings where they provide medical services, for purposes of service of process pursuant to CPLR 308(2), Bronx Lebanon's Risk Management Office constitutes their "actual place of business" (*see Colon v Beekman Downtown Hosp.*, 111 AD2d 841 [2nd Dept 1985]; *see also Leung v New York Univ.*, 2016 WL 1084141, *8-9, 2016 US Dist LEXIS 34764, *27-29 [SD NY 2016]; *Scheib v Curran*, 227 AD2d 328 [1st Dept 1996], *affd* 89 NY2d 968 [1997]; *cf. Glasser v Keller*, 149 Misc 2d 875, 878-879 [Sup Ct, Queens County 1991], *affd on opinion below* 197 AD2d 561 [2nd Dept 1993]). The Risk Management Coordinator accepted service on behalf of defendant Bronx Lebanon, which was sued as the individual appellants' employer, to be liable for their actions pursuant to respondeat superior (*see Leung* at *8-9). The Risk Management Department was well suited to accept process on behalf of the hospital's employees (*see Di Giuseppe v Di Giuseppe*, 70 Misc 2d 188 [Civil Ct of the City of New York, NY County 1972] [personnel office]; *Leung, supra* [general counsel's office]).

In the cases relied on by appellants, the defendant doctors were not employed by the hospital where service was attempted, and thus service was not proper pursuant to CPLR 308(2) (*see Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979 [2d Dept 2011], *lv*

denied 19 NY3d 810 [2012]; *Kearney v Neurosurgeons of N.Y.*, 31 AD3d 390 [2nd Dept 2006]).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5370 Barbara Dzidowska, Index 452293/14
Plaintiff-Respondent,

-against-

The Related Companies, LP, et al.,
Defendants-Respondents-Appellants,

Fujitec America Inc. doing business as
Fujitec Serge of New York,
Defendant-Appellant-Respondent.

_____

Swartz Law Offices, New York (Gerald N. Swartz of counsel), for appellant-respondent.

London Fischer LLP, New York (Brian P. McLaughlin of counsel), for respondents-appellants.

The Platta Law Firm, PLLC, New York (Brian J. Vannella of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendant 400 E. 84th Street Associates, LP's motion for summary judgment, and denied defendant Fujitec America Inc.'s cross motion for summary judgment, unanimously affirmed, without costs.

Supreme Court correctly denied 400 E. 84th Street (the owner) summary judgment dismissing the complaint, as issues of fact exist as to whether the owner of the apartment building where plaintiff fell while entering an elevator had notice of a

misleveling/releveling condition of the elevator (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]; *Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86, 91 [1st Dept 2002]). The record contained ample evidence from which a jury could find that the owner had actual notice of a recurring, misleveling problem with the elevator, based on prior similar incidents shown in the building's logbook and based on service records of Fujitec, which had contracted to maintain the elevator (*see Martin v Kone, Inc.*, 94 AD3d 446, 447 [1st Dept 2012]; *Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [1st Dept 2007]). Fujitec's servicing of the elevator in response to those prior complaints raises an issue of fact as to notice (*see Ardolaj v Two Broadway Land Co.*, 276 AD2d 264, 265 [1st Dept 2000]).

Supreme Court correctly denied the owner conditional summary judgment on its cross claim for common-law indemnification against Fujitec, as there is an issue of fact as to whether the owner's liability, if any, is vicarious (*see Linares v Fairfield Views*, 231 AD2d 418, 420 [1st Dept 1996], *lv dismissed in part and denied in part* 89 NY2d 978 [1997]). Due to the adverse inference charge the court previously granted against the owner, a jury might find that the owner had actual notice of the misleveling defect on the day of the accident, before plaintiff's injury. In addition, given the adverse inference charge, a jury

could find that the owner was negligent in either failing to timely notify Fujitec of the misleveling defect, or in failing to remove the elevator from service. Such negligence would bar the owner from obtaining common-law indemnification from Fujitec (*see Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]).

Supreme Court correctly denied Fujitec's motion for summary judgment. Given the disputed issues of fact as to notice of the misleveling/releveling condition of the elevator, and the fact that the accident occurred less than a week after Fujitec had serviced the elevator for releveling, an issue of fact exists as to whether Fujitec failed to maintain the elevator in a reasonably safe operating condition (*see Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]).

In addition, the doctrine of res ipsa loquitur precludes summary judgment (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 162 [1st Dept 2015]). "The misleveling of an elevator does not ordinarily occur in the absence of negligence" (*Rojas v New York El. & Elec. Corp.*, 150 AD3d 537, 537-538 [1st Dept 2017]). Further, the misleveling was apparently caused by an instrumentality within Fujitec's exclusive control and was not due to any voluntary action on plaintiff's part. The application

of res ipsa loquitur is not "overcome by [Fujitec's] evidence that the elevator was regularly inspected and maintained" (*Ardolaj*, 276 AD2d at 265). Given the applicability of res ipsa loquitur, plaintiff was not required to identify a malfunction or defect in the elevator (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]).

We have considered appellants' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5371 The People of the State of New York, Ind. 2840/15
Respondent,

-against-

Kofi Amankwah,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J.), rendered March 2, 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: JANUARY 4, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5372 In re Corey J., and Others,

Children Under the Age of
Eighteen, etc.,

Corey J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Rachel J. Stanton of counsel), attorney for the children.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about June 22, 2016, which, to the extent appealed from as limited by the briefs, found that respondent father neglected the oldest of the subject children and derivatively neglected the others, unanimously affirmed, without costs.

The court properly found that petitioner Administration for Children's Services (ACS) proved by a preponderance of the evidence that the father neglected the oldest child and derivatively neglected the other children, based on the testimony of an ACS child protective specialist and the mother, the medical

records, and the father's admissions (*see* Family Court Act § 1012[f][i][A] and [B]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The medical records and the testimony of the child protective specialist and the mother reflect a long-standing pattern of domestic violence by the father against the mother, in the presence of the children, and the use of excessive corporal punishment on the oldest child. Although the father denied engaging in such conduct and attributed the violence to the mother, he admitted grabbing her by the throat and "popping" the child on the hand. The hospital records reflected that the oldest child was afraid of the father and trained hospital personnel did not find that this fear was feigned.

The father argues that the oldest child's statements were vague, failed to indicate when the events took place, and were not sufficiently corroborated. Out of court statements of a child are admissible "and if properly corroborated, will support a finding of abuse or neglect" (*Matter of Nicole V.*, 71 NY2d 112, 118 [1987]; *see* Family Court Act § 1046[a][vi]). Family Court judges have "considerable discretion" to determine whether a child's out of court statements describing neglect have been corroborated (*see Matter of Christina F.*, 74 NY2d 532, 536 [1989]).

The child's statements were sufficiently corroborated in

that the parents both testified that the incidents he described actually occurred, although the father disputed the child's account of what transpired. Moreover, the child's statements, which were reflected in the medical records, were consistent with the testimony of the child protective specialist and the mother regarding the domestic violence and excessive corporal punishment by the father.

The court correctly concluded that the father's use of excessive corporal punishment on the child, which was supported by the record, demonstrated a flawed understanding of his parental duty such that the younger children were derivatively neglected by him and were at risk of harm (*see Matter of Angie G.[Jose D.G.]*, 111 AD3d 404, 404-405 [1st Dept 2013]).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5373 Cathy Pichler, Index 651456/15
Plaintiff-Appellant,

-against-

Joan Jackson,
Defendant-Respondent.

_____

Cathy L. Pichler, appellant pro se.

Feder Kaszovitz LLP, New York (David Sack of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered August 18, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on her third and fourth causes of action, seeking an accounting and apportionment, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 1201, respectively, and leave to amend the complaint to add a cause of action for breach of fiduciary duty, unanimously reversed, on the law, plaintiff's motion for partial summary judgment on her third and fourth causes of action and leave to amend the complaint granted, and the matter remanded for further proceedings.

As tenants in common, the parties have a quasi-trust or fiduciary relation with regard to the property they commonly

hold, supporting plaintiff's third cause of action for an accounting (*see Minion v Warner*, 238 NY 413 [1924]; *Thayer v Leggett*, 229 NY 152, 157–158 [1920]). Even absent any such common-law obligation, a statutory duty to account would exist, pursuant to RPAPL 1201, entitling plaintiff to recover under her fourth cause of action (*see Degliuomini v Degliuomini*, 12 AD3d 634, 635 [2d Dept 2004]). Defendant's claim of prematurity is rejected. Defendant shall provide an accounting, including an itemization of the monies received and payments made in operating the property. After providing the accounting, plaintiff will be permitted to interpose her specific objections. The bona fides of the objections will then be resolved by the court. Nor is the accounting premature because there is simultaneously ongoing discovery on the parties' claims.

Leave to amend the pleadings must "be freely given" (CPLR 3025[b]), and should have been granted here given the nature of the parties' relationship (*see Minion v Warner, supra; Thayer v Leggett, supra*).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5374 The People of the State of New York, Ind.2012/15
Respondent,

-against-

Michelle Cuthbertson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 21, 2016, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5375 Victor Manuel Santiago, Index 302298/14
Plaintiff-Respondent,

-against-

Pioneer Transportation Corp., et al.,
Defendants-Appellants.

_____

Silverman Shin & Byrne PLLC, New York (Wayne S. Stanton for counsel), for appellants.

Law Offices of Ariel Aminov, PLLC, Islip (Ariel Aminov of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 4, 2016, which, inter alia, granted plaintiff's motion for summary judgment as to liability, unanimously reversed, on the law, without costs, and the motion denied.

On January 21, 2014, a school bus owned and operated by defendants collided with the rear of a truck plaintiff claimed, by affidavit, that he was driving. In contrast, the defendant bus driver averred that plaintiff was not the truck driver based on his observance of that driver's appearance, which contrasted with photographs of plaintiff, which defendant viewed. Thus, the court erred in granting plaintiff's motion for summary judgment because, "'viewed in the light most favorable to the non-moving party,'" defendants raised an issue of fact as to the identity of the other driver (*Vega v Restani Cost. Corp.*, 18 NY3d 499, 503 [2012]). "[W]hether a particular defendant owes a duty to a particular plaintiff is a question of fact" for the jury (*Kimmell*

v Schaefer, 89 NY2d 257, 263 [1996]). The bus driver's affidavit was not impermissibly self-serving as having contradicted any of his prior testimony (*cf. Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 [1st Dept 2009]). It is for the jury to resolve issues of credibility as between the conflicting affidavits of the parties concerning the identity of the truck driver (*see Ocean v Hossain*, 127 AD3d 402, 403 [1st Dept 2015]; *Agli v Turner Constr. Co.*, 237 AD2d 173, 174 [1st Dept 1997]).

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5376 Fran Lewis, Index 22361/14E
Plaintiff-Appellant,

-against-

Kenneth H. Treitel, DDS, et al.,
Defendants-Respondents.

_____

The Mandel Law Firm, New York (William M. Boyle of counsel), for appellant.

Amabile & Erman, P.C., Staten Island (Alexandra Formica of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 11, 2016, which granted defendants' motion pursuant to CPLR 3211(a)(5) to the extent of dismissing the complaint as time barred as it relates to treatment rendered by them prior to November 23, 2011, unanimously affirmed, without costs.

The record establishes that treatment prior to November 23, 2011, the period beyond the 2 1/2-year statute of limitations (see CPLR 214-a), consisted of isolated and discrete dental procedures, not for the condition complained of, a cyst in plaintiff's jaw. Accordingly, the continuous treatment doctrine does not apply to the treatment of these teeth (*see Galecki v Omnicare Dental*, 121 AD3d 594 [1st Dept 2014]; *Marrone v Klein*, 33 AD3d 546 [1st Dept 2006]). That defendants may have negligently failed to diagnose the condition does not toll the statute, since the failure to establish a course of treatment is not, in and of itself, a course of treatment for the purposes of

tolling the statute (*Nykorchuck v Henriques*, 78 NY2d 255, 259 [1991], *affd* 78 NY2d 255 [1991]; *Trebach v Brown*, 250 AD2d 449 [1st Dept 1998]). While the doctrine would apply if defendants had been treating plaintiff for the underlying symptoms of the cyst, albeit incorrectly, plaintiff failed to adduce evidence that defendants treated her for symptoms ultimately traced to her cyst (*compare Chestnut v Bobb-McKoy*, 94 AD3d 659 [1st Dept 2012]).

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Singh, JJ.

5377-
5377A The People of the State of New York, Respondent,

Ind. 4374/10
3232/11

-against-

Rodney Henderson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Marcy L. Kahn, J.), rendered June 7, 2013, convicting defendant, after a jury trial, of burglary in the second degree, and upon his plea of guilty, of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 16 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The People's expert testimony warranted the conclusion, under the reasonable doubt standard, that defendant was the source of a partial latent fingerprint recovered from a burglarized apartment (*see People v Walker*, 106 AD3d 432 [1st Dept 2013], *lv denied* 23 NY3d 1044 [2014]). We find no basis for disturbing the jury's evaluation of conflicting expert testimony introduced by the People and defendant.

The People's expert testimony sufficiently complied with the

court's in limine ruling on the permissible scope of that testimony, and the court did not materially change its ruling during trial. In particular, the court never precluded the fingerprint experts from testifying that defendant's exemplar print matched the latent print. Instead, the court precluded the experts from using the word "match" in conjunction with certain other language, such as "100% certain," which the experts ultimately avoided. Accordingly, defendant was not unfairly surprised by the testimony.

We also reject defendant's challenges to the admissibility of the expert testimony. The fingerprint experts explained in great detail the process by which they reached their opinions, and these opinions were supported by an adequate factual basis. Accordingly, the court providently exercised its discretion in admitting this testimony (*see generally People v Cronin*, 60 NY2d 430, 434 [1983]).

Because we are affirming the trial conviction, there is no basis for disturbing the plea conviction.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5378 The People of the State of New York, Ind. 3716N/14
Respondent,

-against-

Yhovanny Peguero,
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 (Alan Gadlin 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 (Bruce Allen, J.), rendered October 28, 2015,

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: JANUARY 4, 2018

CLERK

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

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5379 The People of the State of New York, Ind. 4982/13
Respondent,

-against-

Stuart Newman,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 7, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5380N Yessenia Damas, Index 303874/07
Plaintiff-Respondent,

-against-

William J. Biggs,
Defendant-Appellant.

Netherland Gardens Corp.,
Defendant-Respondent,

HSBC Mortgage Corporation (USA),
Defendant.

_____

William J. Biggs, appellant pro se.

Smith & Nesoff, PLLC, New York (David L. Smith of counsel), for Yessenia Damas, respondent.

Tane, Waterman & Wurtzel, P.C., New York (Andrew D. Stern of counsel), for Netherland Gardens Corp., respondent.

_____

Order and interlocutory judgment (one paper), Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about August 2, 2016, among other things, appointing a referee to conduct a sale of property and distribute the proceeds, unanimously affirmed, without costs.

Given that the parties could not reach a settlement agreement, and physical partition would cause great prejudice to both owners, the motion court correctly directed that the cooperative unit be sold and the proceeds divided (RPAPL 915; *see Estate of Steingart v Hoffman*, 33 AD3d 465, 466 [1st Dept 2006]). Shares to a cooperative unit may be partitioned under RPAPL article 9 (*Chiang v Chang*, 137 AD2d 371 [1st Dept 1988]). Further, it is undisputed that plaintiff signed the proprietary

lease and was a co-owner of shares to the unit; thus, she had a right to seek partition of the unit (*see id.*; *see also* RPAPL 901[1]).

To the extent defendant co-owner of the unit raises any arguments concerning the proper division of the sales proceeds, such arguments are premature.

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5381N In re Help Me See, Inc., Index 655667/16
Petitioner-Respondent,

-against-

Wonderwork, Inc. formerly known as
Surgery for the Poor, Inc.,
Respondent-Appellant.

- - - -

Clark Kokich, et al.,
Non-Party Intervenors

_____

Carter Ledyard & Milburn LLP, New York (Judith M. Wallace of counsel), for appellant.

Arnold & Porter Kaye Scholer LLP, New York (Vincent A. Sama of counsel), respondent.

Kalib & Kalib, New York (Susan B. Kalib of counsel), for non-party Intervenors.

_____

Order and judgment (one paper), Supreme Court, New York County (Barry R. Ostrager, J.), entered December 2, 2016, which granted petitioner's application to confirm an arbitration award and denied respondent's cross motion to vacate the award, unanimously affirmed, with costs.

The arbitration award was properly confirmed. Contrary to respondent's contention, the award did not improperly redirect specific charitable donations based on a determination of donor intent. Rather, it awarded expectation damages sufficient to restore petitioner to the position it would have been in had respondent performed as promised under the parties' agreement (*see Emposimato v CIFC Acquisition Corp.*, 89 AD3d 418, 421 [1st Dept 2011]). As such, New York's public policy protecting donor

intent was not implicated (*see* Not-For-Profit Corporation Law §§ 513[b]; 555[b], [e]; *Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 467-468 [1985]; *Matter of Friends for Long Island's Heritage*, 80 AD3d 223, 230-231, 235 [2d Dept 2010]).

Since the damages awarded were compensatory in nature, the award also did not violate New York law holding that arbitrators do not have authority to award punitive damages (*see Garrity v Lyle Stuart, Inc.*, 40 NY2d 354, 356 [1976]), assuming that the arbitration was governed by New York law.

Whether or not respondent will be able to pay the award without resort to restricted-purpose funds is irrelevant (*see Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers*, 46 NY2d 727, 729 [1978]). The award did not designate any particular source from which the damages had to be paid. The issue of what funds may be used may be raised in the bankruptcy court (*Matter of Wonderwork, Inc.*, Index No. 16-13607 [Bankr SD NY]).

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

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

ENTERED: JANUARY 4, 2018

CLERK

Renwick, J.P., Manzanet-Daniels, Gische, Kahn, Singh, JJ.

5382 In re Manuel Asensio, Ind 130/17
[M-5856] Petitioner,

-against-

Hon. Lawrence J. Marks, etc.,
Respondent.

_____

Manuel P. Asensio, petitioner pro se.

John W. McConnell, New York (Lee A. Alderstein of counsel), for respondent.

_____

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: JANUARY 4, 2018

CLERK

Acosta, P.J., Manzanet-Daniels, Gische, Kapnick, Kahn, JJ.

4859 CB by His Mother and Natural Guardian Lateaqua Suarez, et al., Plaintiffs-Respondents-Appellants, Index 350345/12

-against-

Howard Security, et al., Defendants-Appellants-Respondents.

_____

Carroll, McNulty & Kull LLC, New York (Frank J. Wenick of counsel), for Howard Security, appellant-respondent.

Mauro Lilling Naparty, LLP, Woodbury (Matthew W. Naparty of counsel), for Sammon-Build Center Housing Development Fund Corporation and Tolentine Zeiser Community Life Center, appellants-respondents.

Philip Newman, P.C., Bronx (Paul Bibuld of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about November 29, 2016, modified, on the facts and in the exercise of discretion, to grant plaintiffs' motion for a spoliation charge to the extent of permitting an adverse inference charge at trial for defendants' failure to produce the log book in question, and otherwise affirmed, without costs.

Opinion by Acosta, P.J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Judith J. Gische
Barbara R. Kapnick
Marcy L. Kahn, JJ.

4859
Index 350345/12

_____x

CB by His Mother and Natural
Guardian Lateaqua Suarez, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Howard Security, et al.,
Defendants-Appellants-Respondents.

_____x

Cross appeals from the order of the Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about November 29, 2016, which denied defendants' motions for summary judgment dismissing the complaint as against them and plaintiffs' motion for summary judgment on the issue of liability and for a spoliation charge.

Carroll, McNulty & Kull LLC, New York (Frank J. Wenick of counsel), for Howard Security, appellant-respondent.

Mauro Lilling Naparty, LLP, Woodbury (Matthew W. Naparty and Kathryn M. Beer of counsel), for Sammon-Build Center Housing Development Fund Corporation and Tolentine Zeiser Community Life Center, appellants-respondents.

Philip Newman, P.C., Bronx (Paul Bibuld and Michael Karnes of counsel), for respondents-appellants.

ACOSTA, P.J.

Plaintiff and his mother, plaintiff Lateaqua Suarez, were living in a domestic violence shelter owned and operated by defendants Sammon-Build Center Housing Development Fund Corporation and Tolentine Zeiser Community Life Center (collectively, Sammon). Defendant Howard Security had been hired to provide, among other things, security for the residents of the shelter. On November 8, 2011, CB was being returned to the shelter by his father, Bobby B., when a man later identified as Mauricio Acosta approached Bobby B. for his jacket. Acosta pulled a gun, and in the ensuing struggle, the gun discharged, striking CB and leaving the four-year-old boy paralyzed from the waist down.

CB and his mother commenced this action against Sammon and Howard Security, alleging that defendants breached their duty of care to CB by failing to bring him into the premises to safety. The motion court denied both plaintiffs' and defendants' motions for summary judgment. We agree that material issues of fact exist. We modify solely to grant plaintiffs an adverse inference charge for defendants' failure to produce the security guards' log book.

Facts and Procedural Background

Sammon's "Statement of Client Rights and Client Code of

Conduct" require that all children be in their units with a reasonable responsible adult by 9:00 p.m. This requirement was reiterated in the "Operating Rules," which stated that residents were responsible for the safety of their children and that children must have adult supervision at all times. Residents who knew their children would be outside the premises following curfew were required to obtain permission from Sammon's director.

"Security Post Orders" provided for two "fixed stations of surveillance," the guard booth and the indoor surveillance area. Two guards were to be on duty at all times, one stationed in each location. The guards rotated positions every hour. The guard in the booth in front of the premises was not permitted to leave the booth while on post. Clients were required to sign in and out of the premises. Children were not allowed to exit the site alone, even to see an adult whom they claimed was waiting for them, without the head of household (HOH) escorting them out of the gate. When entering, children were required to stop at the security gate to find out if their parent was at home. If the parent was there, the child could proceed to the unit, except that children under 10 were required to wait to be picked up by their parent. If the parent of a child under 10 was out, the child was permitted to wait in the recreation room. After office hours, guards were required to telephone on-call staff for

instructions. The Security Post Orders also provided that if a child was in close proximity to a fight, the guard could "make a judgment call and attempt to move the child out of harm[']s way."

CB's mother (Suarez) testified that on the date of the incident, CB had been visiting with his father, Bobby B. for the evening. Bobby B. brought CB back to the shelter around 9:30 p.m., after curfew. Suarez received a call from the security guard asking her to pick up CB at the gate. Suarez responded that she was taking care of the baby and would be "down in a few." Suarez looked out the window and saw Bobby B. and CB standing outside the gate.

The security guard called Suarez again to remind her that CB was waiting downstairs. She repeated that she was caring for the crying baby and would be down later. Approximately five minutes later she went downstairs to retrieve her son.

When she arrived downstairs, Suarez saw Bobby B. and Acosta grappling with each other up against the gate, next to the guard booth. CB's hand was pressed against the locked gate; one guard "was walking out of the booth and the other [guard] was just in the booth." Acosta's gun discharged, and the bullet struck CB.[1]

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[1]Acosta was convicted, upon his plea of guilty, of assault in the first degree and sentenced to a prison term of 15 years.

Acosta testified that he approached Bobby B. with his gun drawn and told Bobby B. to give him the jacket. Bobby B. refused, reached for the gun, and began wrestling with Acosta. During the struggle, the gun discharged, and CB was struck by the bullet.

Crystal Standish, the shelter's director, testified that Sammon had entered into a contract with Howard Security to provide security for the premises. The guards were unarmed and were not to intervene in any altercations outside of the building. Standish described Howard Security's responsibilities as generating incident reports; signing clients into and out of the site; giving them their keys when they entered and taking back their keys when they exited; noting the number of children the client returned with, particularly if any were missing; responding to clients' calls for assistance, and doing rounds: vertical and inner and outer perimeter. Standish noted that these rounds were especially important overnight since there was no maintenance staff on duty from 12:00 a.m. to 8:00 a.m. The guards might have to correct a hazardous condition such as liquid on the steps.

Standish testified that she told the guards that in the event of an altercation they were not to get physically involved. There were no written guidelines or rules in effect requiring the

guards to open the gate for children if they appeared to be in harm's way outside the gate; Standish described it as a "judgment call."

Standish further testified that the day after the incident she reviewed the footage taken by the security cameras outside the gate. The video showed four men following Bobby B. and CB along the street around the corner from the shelter; one of the men went across the street to act as the point man, two others hung back, and the fourth, later identified as Acosta, walked past Bobby B. and CB and went to the corner. It seemed to Standish that about five minutes passed from the time the video depicted CB and his father being followed to the time when Acosta stopped at the corner. She could not see what happened after that.

Howard Security's principal, Cheryl Howard-Tyler, testified that her company was responsible for securing the premises itself, but not the public sidewalk outside the premises or beyond pursuant to a contract. Indeed, the guards were not supposed to look for any kind of criminal activity outside the building, and were not required to go outside the premises to confront a crime that was occurring on a public thoroughfare, nor were they required to let a minor resident through the gate after 9:00 p.m. without his or her parent or another responsible adult

even if they perceived the child to be in danger. Howard-Tyler stated that no City or State entity had ever told her that the security she had in place was insufficient.

Esumail Konneh, one of the security guards on duty the night of the incident, testified that during their shifts, the guards at Sammon generally remained in a security booth just beyond the gate; from the booth, guards were able to see people outside. The guards were the only individuals with access to the electronic control within the security booth that opened the gate and they determined who would be permitted through.

Konneh testified that the guards were responsible for regularly patrolling the premises, both inside and outside. External patrols were performed solely to ensure that the interior of the premises was safe; a guard would circle the outside to make sure the that fire escapes and windows were secure and that nonresidents were not trying to gain access to the shelter. One guard always remained in the booth.

According to Konneh, men were not allowed on the premises. When men brought their children back to Sammon, the mothers would have to come and get the children. The guards would not allow a child through the gate until the child was claimed by the mother or guardian. The guards were not to take responsibility for any child waiting for a parent.

Konneh testified that on the date of the incident, he and his coworker, Joshua Fofie, were in the security booth when Bobby B. approached. Bobby B. asked Fofie to ring Suarez to ask her to come downstairs for CB. Konneh never heard Bobby B. ask Fofie to let CB through the gate. Konneh said that he never discussed the incident with Fofie afterwards.

Konneh did not recall seeing another individual immediately outside the gate other than Bobby B. and CB and did not observe anyone approach Bobby B. or exchange words with him.

Plaintiffs moved for summary judgment, arguing that defendants had failed in their duty to provide minimal protection to shelter residents by not protecting CB from a known risk of harm. They contended that the security guards were acutely aware of the presence of real and immediate danger to CB. Plaintiffs also sought a charge of spoliation of evidence because defendants failed to produce either the surveillance video from that night or the guards' log book.

Plaintiffs submitted an affidavit by Bobby B. saying that on the night of the incident, he and CB were walking along the street on the way to the shelter when he saw that they were being followed. Bobby B. claimed that when they reached the security gate, he asked the guards to let CB in because of the danger, but instead the guards called Suarez to get CB. Bobby B. said that

while he and CB were waiting for Suarez, Acosta tried to involve Bobby B. in a conversation about his jacket, asking if he was from the neighborhood and saying that he had never seen Bobby B. around there before. Bobby B. said that he chose to ignore him, and Acosta walked back across the street to stand with his friends.

Bobby B. claimed that he then asked the guard to let CB inside the gate and call Suarez a second time. He said that he told the guards that he was about to have a problem because of the threatening way the men were acting and the fact that they had followed him and CB. The guards called Suarez a second time but did not open the gate. Bobby B. claims that he then saw Acosta "put his hood up over his head" and walk toward him and CB. Bobby B. asked the guards again to open the gate, but they did not.

Bobby B. said that Acosta then came very close to him and demanded his jacket. He refused and told Acosta to leave him alone. Acosta then pulled out a gun and placed it against Bobby B.'s chest. Bobby B. grabbed for the gun, and as the two struggled, a bullet discharged, striking CB.

Plaintiffs also submitted an affidavit by Konneh, who asserted that "generally" children were let inside the gate after their mothers were called. Konneh further stated that Fofie, his

fellow security guard, saw the altercation between Bobby B. and Acosta as it was happening. Konneh stated that it was unclear to him why Fofie did not allow CB inside, and claimed that he would have let CB in.

Defendants, by separate motions, moved for summary judgment, arguing that they did not owe CB a duty of care to protect him from criminal acts of third parties outside the shelter premises. Defendants further argued that even assuming a duty existed, they did not breach it since they performed their duties in a manner completely consistent with their approved policies and procedures forprotecting against foreseeable criminal acts.

Sammon submitted an affidavit by an expert public safety consultant who concluded, after reviewing the evidence, that not even an armed and trained police officer would have been able to prevent CB from being shot.

The motion court denied all three motions for summary judgment, including plaintiffs'request for a spoliation charge.

Analysis

Summary Judgment

Plaintiffs argue that Sammon owed CB a duty under the common law pertaining to landowners and the regulations pertaining to

domestic violence shelters.[2] "In order to prevail on a negligence claim, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [*quoting Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). "In the absence of a duty, as a matter of law, there can be no liability" (*id.*).

With respect to the common-law duty, landowners have "a duty to exercise reasonable care in maintaining [their] . . . property in a reasonably safe condition under the circumstances" (*Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]), which includes taking minimal safety precautions to protect against reasonably foreseeable criminal acts of third persons (*Jacqueline S. v City of New York*, 81 NY2d 288, 292-295 [1993]).

We reject defendants' contention that they had no common-law duty to CB because the shooting took place outside the building, i.e., because CB was on the street side of the gate. Plaintiffs

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[2]The parties characterize the Security Post Orders respectively as mandatory governmental rules and internal guidelines. To the extent they are internal rules that set a standard higher than the common-law duty of care, their violation cannot be a basis for imposing liability (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]). To the extent they are governmental regulations, issues of fact exists as to what they require or permit.

raised issues of fact as to whether the security booth, gate, and recessed area that CB was standing in were part of the shelter property and not the public sidewalk. However, even if CB was not standing on shelter property, it cannot be said that under any circumstance Sammon owed no duty to him.

Indeed, none of the cases relied on by Sammon for this proposition involved the circumstances of plaintiffs' version of events: security guards declined/refused to let a child resident who was in obvious physical danger enter the premises. In *Vega v Ramirez* (57 AD3d 299 [1st Dept 2008]), a fight spontaneously erupted outside a nightclub and the plaintiff's "own testimony established that he could have remained within the safety of the nightclub . . ., yet he elected to go outside and join the fight" (*id.* at 300). CB, on the other hand, was trying to enter the safety of the building to get away from the danger he faced outside. *Matter of Bailey v City of NY Hous. Auth.* (55 AD3d 443 [1st Dept 2008]) is distinguishable because the decedent was shot while walking between buildings in the complex, not while standing at the gate in front of the manned security booth. In *Ward v New York City Hous. Auth.* (18 AD3d 391 [1st Dept 2005]), the plaintiff was shot in open and public space outside his building. As noted above, CB was at the security gate and his father asked several times for the security guard to let CB in.

In *Evans v 141 Condominium Corp.* (258 AD2d 293 [1st Dept 1999]), the plaintiff was attacked just as she was about to open the door to the building, where she knew there might be no doorman stationed at that time. In *Martinez v New York City Hous. Auth.* (238 AD2d 167 [1st Dept 1997]), a shot fired from a vacant lot across the street entered through a bedroom window and struck the plaintiff. The fight that resulted in CB's injury occurred immediately in front of the building while security guards were on duty and in contact with CB's father. In *Levya v Riverbay Corp.* (206 AD2d 150, 153 [1st Dept 1994]), the plaintiff was assaulted on an obscure secondary outdoor walkway of a sprawling residential complex of more than two square miles, not standing in front of a security gate in the presence of guards.

There are also issues of fact as to Howard Security's duty of care. Howard argues that its contractual agreement with Sammon did not create any duty to CB. Howard contends that it was retained by Sammon to perform specific, limited tasks on the premises, namely patrolling and generating reports, and because of those limited duties, CB was not a third-party beneficiary to the contract. Plaintiffs argue that CB was an intended third-party beneficiary of Howard's security contract with Sammon or that Howard launched a force or instrument of harm, i.e., that it triggered an exception the rule against imposing liability on a

third-party contractor (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

"It is well established that contractual obligations impose a duty only in favor of the promisee and intended third-party beneficiaries" (*253 E. 62nd St., LLC v Moluka Enters., LLC*, 151 AD3d 489, 490 [1st Dept 2017]).

> "A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000] [internal quotation marks omitted]).
>
> "[The] identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution, . . . the intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee, . . . and . . . where . . . a genuine issue exists as to the parties' intention to benefit another, a triable issue of fact is presented which is not appropriate for summary disposition" (*MK W. St. Co. v Meridien Hotels,* 184 AD2d 312, 313 [1st Dept 1992] [internal citations omitted]).

The contract between Sammon and Howard provides, in relevant part, "Whereas, Owner is . . . *desirous of obtaining the services of the Contractor for the protection of persons* and real and personal property *at the aforementioned Premises*. . . (emphasis added), "7. Contractor shall provide unarmed uniform guards to perform the services set forth in this paragraph and Schedule A

hereto." Schedule A identifies "Patrol Area" as "Sammon Build Center[,] 2294-96 Grand Avenue[,] Bronx, New York 10468," and lists the "PROFESSIONAL SERVICES TO BE RENDERED [as] Patrol site on a routine basis[,] Generate tour reports[,] Generate incident reports[,] Generate upgrade reports[,] Generate intelligence reports, Generate monthly reports[.]"

Although the contract clearly provides that CB is an intended third-party beneficiary, there are issues of fact as to the benefits that CB is entitled to under the contract. It should be noted, however, that allowing a child in danger to enter the shelter does not appear to be in derogation of any rules prohibiting unarmed guards from intervening in an altercation. Indeed, as the Post Security Orders indicate, the guards are vested with discretion in certain situations. For example, the rules state, as indicated above, that if a security guard sees a child in harm's way during a fight, the guard may make a judgment call and attempt to move the child out of harm's way. In fact, Standish herself testified that she had told the guards that if they saw a child in harm's way, "[Y]ou take that child and move that child to a safe distance and have your partner come stand with that child, call the police." Defendants make much of the fact that the guards were unarmed. However, a guard does not have to be armed to press a button that opens a

gate.

There are also issues of fact as to whether any defendant breached its duty and whether the breach was a proximate cause of CB's injuries. As the motion court noted, the facts surrounding the incident are not clear. The duration of the incident must be determined to establish whether there was an opportunity to permit CB to enter the premises safely before the shooting. The question whether the security guards perceived any potential danger to CB, and if so, why they did not alert plaintiff mother, must be determined. In the absence of electronic surveillance capturing the incident, the case hinges on the credibility of the witnesses and participants and their testimony. This determination must be one for the factfinder.

Spoliation

Although the court providently exercised its discretion in denying the part of plaintiffs' motion that sought a spoliation charge with respect to surveillance video, plaintiffs should be granted an adverse inference charge if the case proceeds to trial for defendants' failure to produce Howard's log book or for the failure to create a log book in the first instance as requried by the parties contract (*see e.g. Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607 [1st Dept 2016]; *see also Strong v City of New York*, 112 AD3d 15, 24 [1st Dept 2013]). We

leave it to the trial court to fashion the language in conformity with the evidence adduced at trial.

Accordingly, the order of the Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about November 29, 2016, which denied defendants' motions for summary judgment dismissing the complaint as against them and plaintiffs' motion for summary judgment on the issue of liability and for a spoliation charge, should be modified, on the facts and in the exercise of discretion, to grant plaintiffs' motion for a spoliation charge to the extent of permitting an adverse inference charge at trial for defendants' failure to produce the log book in question, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 4, 2018

CLERK