SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 16, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Kapnick, Gesmer, Oing, JJ.

8438 The People of the State of New York, Respondent, Ind. 2239/15

-against-

Fabian Soto,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

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Order, Supreme Court, New York County (Thomas Farber, J.), entered on or about September 21, 2017, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to reduce the adjudication to level one, and otherwise affirmed, without costs.

We previously held this appeal in abeyance and remanded for further proceedings concerning defendant's application for a downward departure (169 AD3d 534 [1st Dept 2019]). Upon remand,

Supreme Court granted defendant's downward departure application and adjudicated him as a level one sex offender. The People do not challenge this determination. As such, we modify accordingly.

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

ENTERED: JULY 16, 2019

CLERK

Friedman, J.P., Richter, Kapnick, Singh, JJ.

2905- Ind. 3810/09
2906 The People of the State of New York,
Respondent,

-against-

Andy Mercado,
Defendant-Appellant.

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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 (Daniel P. Fitzgerald, J.), rendered May 18, 2012,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and a decision and order of this Court having been entered on February 23, 2017, holding the appeal in abeyance (147 AD3d 613 [1st Dept 2017]), and upon the stipulation of the parties hereto dated May 18, 2018,

It is unanimously ordered that the said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 16, 2019

CLERK

Renwick, J.P., Richter, Tom, Kahn, Moulton, JJ.

8520 Daisy Castro, Index 303415/14
Plaintiff-Appellant,

-against-

Fazil Hatim, et al.,
Defendants-Respondents.

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Sacco & Fillas, LLP, Astoria (Nazareth Markarian of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 26, 2017, which, in this action for personal injuries sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

The photographic evidence shows that plaintiff's SUV struck the rear of defendants' tractor-trailer as plaintiff was attempting to merge into defendants' truck's lane of traffic. Thus, plaintiff violated her "duty not to enter a lane of moving traffic until it was safe to do so" (*Davis v Turner*, 132 AD3d 603, 603 [1st Dept 2015]; *see* Vehicle and Traffic Law § 1128[a]; *Steigelman v Transervice Lease Corp.*, 145 AD3d 439 [1st Dept 2016]), "and [her] failure to heed this duty constitutes

negligence per se" (*Sanchez v Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]).

During her testimony, plaintiff acknowledged that at the time of the accident she was attempting to cross six lanes of traffic on Bruckner Boulevard, and was moving from the fifth lane from the curb (lane five) into the fourth lane from the curb (lane four).

The testimony of the driver of defendants' truck was that defendants' truck was wholly within lane four proceeding straight at the moment of the collision. Plaintiff's testimony, however, was that shortly before the collision, she had observed, through her right side view mirror, defendants' truck and other vehicles approaching on her right while her SUV was standing still between lanes five and four as she was trying to enter lane four. She further testified that she saw the truck move from the third lane from the curb (lane three) into lane four and that, at the moment of the collision, the truck passed her SUV, hitting the front passenger side of her SUV with the rear driver side portion of the truck as she tried to enter lane four.

At the outset, it is completely implausible that plaintiff would maintain her vehicle at a standstill on Bruckner Boulevard, with the front passenger side of her vehicle projecting into lane

four and the rear driver side of her SUV in lane five, in the midst of steadily moving traffic in both lanes, which plaintiff admits to having seen to her right. Moreover, even if plaintiff's testimony were treated as plausible, by her own account she could not have first ascertained that her movement from lane five to lane four could be made with safety, given the approaching traffic she observed in her right side view mirror in lane four as she was moving into that lane of traffic. Accordingly, plaintiff violated Vehicle and Traffic Law § 1128(a).

Although our dissenting colleague expresses disbelief at our finding that plaintiff maintained her vehicle at a standstill while straddling two lanes on Bruckner Boulevard at the time of the accident, that finding is derived directly from plaintiff's own testimony. When plaintiff was asked whether, at the time of the accident, her vehicle was "physically moving," she answered, "No." In response to the next question, whether she was "standing still[,]", she responded, "Yes." When asked which lane the accident occurred in, she responded that it happened between lanes five and four, while she was attempting to move from one lane to the other. Thus, a reading of plaintiff's testimony makes it obvious that this Court's findings are not based upon a

misinterpretation of that testimony.

And although our dissenting colleague finds plaintiff's testimony to be plausible, it is refuted by the positions of the two vehicles as depicted in the photographs, which, as plaintiff has conceded, were taken immediately following the accident and after the truck had moved "not far" from the location of the impact before coming to a stop. The photographs depict the truck as wholly within lane four with its wheels aligned within the lane markers and plaintiff's SUV as positioned behind the truck, straddling lanes four and five with its damaged front passenger side aligned with the driver's side of the rear bumper of the truck. In order for the vehicles to be positioned in this manner, plaintiff's SUV would have to have been moving into lane four after the truck had already moved forward within that lane, nearly entirely passing plaintiff's vehicle. Thus, these photographs clearly demonstrate that the front passenger side of plaintiff's SUV struck the driver's side rear bumper of defendants' truck while plaintiff was moving her SUV into lane four, and that plaintiff moved her SUV into the truck's lane at a time when she could not do so with safety, namely, after the truck had already started to pass her SUV. By the foregoing, defendants have made out a prima facie showing of entitlement to

summary judgment based upon plaintiff's violation of Vehicle and Traffic Law § 1128(a) (*see Carthen v Sherman*, 169 AD3d 416, 417 [1st Dept 2019]).

Furthermore, in summary judgment analysis, we must discount the plaintiff's testimony where the plaintiff has "relied solely on [her] own testimony, uncorroborated by any other witnesses or evidence," and her testimony belied "common sense" (*Moorhouse v Standard, New York*, 124 AD3d 1, 9 [1st Dept 2014], citing *Loughlin v City of New York*, 186 AD2d 176, 177 [2d Dept 1992], *lv denied* 81 NY2d 704 [1993]). As these circumstances are presented in this case, plaintiff's testimony was properly "disregarded as being without evidentiary value" (*Loughlin*, 186 AD2d at 177). Thus, plaintiff's testimony raised no triable issues of fact.

Neither plaintiff's testimony nor any other record evidence supports the scenario, posited by our dissenting colleague, that the accident occurred while both vehicles were simultaneously attempting to enter lane four from opposite directions. Rather, as previously stated, the record evidence clearly shows that the sole proximate cause of the accident was plaintiff's driving of her SUV into the rear of defendants' truck while attempting to change lanes at a time when defendant's truck was entirely within lane four, with its axles already past plaintiff's vehicle, when

plaintiff moved the front of her vehicle into lane four, before allowing the large tanker truck to fully move past her own vehicle. Moreover, our dissenting colleague's inference that the two vehicles entered lane four simultaneously is contradicted by the evidence, including plaintiff's own testimony. Had both vehicles entered lane four at the same time, the point of contact would have been at the front of both of the vehicles, rather than "with the end of the truck," as plaintiff testified. Therefore, even had the truck also been changing lanes, as plaintiff contended, the entry of the two vehicles into lane four was not simultaneous: rather, plaintiff entered lane four without first ascertaining that it was safe for her to do so, and at a time when defendants' truck was proceeding past her, making it unquestionably unsafe for plaintiff to change lanes. Thus, defendants have not only made out a prima facie showing of entitlement to summary judgment without establishment of any triable issue of fact by plaintiff, but also have demonstrated their own freedom from comparative negligence (*see Carthen v Sherman*, 169 AD3d at 417).

Furthermore, although our dissenting colleague finds that the plausibility of the truck driver's description of the impact of the two vehicles as light is undermined by the fact that the

SUV's right front headlight was broken and the SUV's front bumper was torn off by the impact, there is neither any expert testimony to this effect nor any evidentiary support for this view.

With respect to plaintiff's testimony that the oil tanker truck was moving faster than her vehicle, which the opposing writing credits, that testimony establishes as a matter of law that plaintiff should not have entered lane four at that time, as she could not have done so with safety (*Davis v Turner*, 132 AD3d at 603; *see* Vehicle and Traffic Law § 1128[a]). In any event, attempting to cross six lanes of traffic on what our dissenting colleague terms "one of the most hectic roadways in New York City" without due care is inherently risky and dangerous, and renders plaintiff solely liable.

All concur except Renwick, J.P. who dissents in a memorandum as follows:

RENWICK, J.P. (dissenting)

Plaintiff Daisy Castro commenced this action seeking damages for personal injuries sustained in a motor vehicle accident. The accident happened after plaintiff, driving a Toyota SUV, exited the Bruckner Expressway into Bruckner Boulevard, heading south. At that location, Bruckner Boulevard contains six lanes going in the same direction. Plaintiff planned to turn right at the next intersection, requiring her to merge across all six lanes of traffic. Defendant Faziz Hatim, a driver for defendant F&S Petroleum Corp., claims that plaintiff caused the accident by moving into his lane and striking the rear bumper of his oil tank truck. Plaintiff, however, claims that the rear bumper of defendants' oil tank truck struck the right side of her SUV's front bumper, when both the truck and the SUV attempted to move into the same lane.

Despite the conflicting accounts of the accident, Supreme Court granted defendants' motion for summary judgment dismissing the action for lack of liability. The majority now affirms upon a finding that plaintiff's testimony was "directly contradicted by the photographs" of the scene of the accident and thus must be "disregarded as being without evidentiary value." I respectfully dissent because, in my view, the question of whether the accident

occurred as defendant described, or whether it occurred as plaintiff described, is a classic factual dispute *(see Huerta-Saucedo v City Bronx Leasing Inc.,* 147 AD3d 695 [1st Dept 2017]; *Beaubrun v Boltachev*, 111 AD3d 494 [1st Dept 2013]). Additionally, there is a genuine dispute as to whether photographs, which do not depict the collision, irrefutably rebut plaintiff's version of events leading up to and including the point of collision, particularly where defendants have proffered no affidavit from an expert accident reconstructionist on this motion for summary judgment on liability. I would therefore reverse the grant of summary judgment to defendants.

The controlling principles are well established. On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant fails to make this showing, the motion must be denied (*Alvarez,* 68 NY2d at 324; *Winegrad,* 64 NY2d at 853). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49

NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*id.*).

Here, in support of their motion for summary judgment, defendants rely primarily upon photographs taken at the scene of the accident and the deposition testimony of defendant-driver Hatim. He testified that he was driving his oil tank truck on Bruckner Boulevard He was traveling in the middle lane with two lanes on his left and two lanes on his right. According to Hatim's version of the accident, at the time of contact, the oil tank truck was moving straight ahead and prior to impact he did not change lanes. The photographs depict the point, several feet from the accident, where defendant brought the truck to a stop. They show defendants' truck in lane four, but the truck is slightly angled to the left, with the rear of the truck closer to the dividing line between lanes four and three than the front of the truck. Plaintiff's SUV is angled to the right with the dividing line between lanes five and four under the middle of her vehicle. The impact damaged the SUV's right front headlight and swiped off part of its bumper.

Based upon defendant driver's version of the accident, both

the majority and the dissent agree that defendants met their burden. Thus, the burden shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320).

I depart from the majority in its conclusion that plaintiff failed to meet her burden. In opposition to defendants' motion, plaintiff relies primarily upon her own deposition testimony. As indicated, plaintiff testified that prior to the collision, she was trying to maneuver her SUV from lane six, on the far left of Bruckner Boulevard, into lane one, on the far right, as she was planning to make a right turn at the next intersection. Through the passenger side view mirror, plaintiff observed that defendants' oil tank truck was behind her, coming from lane three and moving faster than she. Plaintiff's SUV was in lane five. Plaintiff tried to stop and applied her breaks "little by little." Plaintiff then observed that the truck became "even" with the SUV. At that time, plaintiff's SUV was in lane five and defendants' oil tank truck was in lane three. Soon thereafter, the truck, entering lane four, passed by the SUV and the end of the oil tank truck "swiped" the side of plaintiff's SUV, taking

off part of the front bumper of the SUV. Thus, plaintiff's testimony provides a clearly plausible version of the accident that directly contradicts defendant driver's version that his truck was always in lane four, even prior to the impact, raising triable issues of fact (*see Huerta-Saucedo v City Bronx Leasing Inc.*, 147 AD3d 695; *Beaubrun v Boltachev*, 111 AD3d 494).

The majority's finding - that plaintiff's testimony was incredible and thus must be disregarded as being without evidentiary value - is based upon a strained interpretation of plaintiff's testimony and thus not persuasive. Indeed, I am perplexed by the majority's initial finding, which completely overlooks the realities of driving on heavily trafficked major New York City roadways, that "it is completely implausible that plaintiff would maintain her vehicle at a standstill on Bruckner Boulevard, with the front passenger side of her vehicle projecting into lane four and the rear driver side of her SUV in lane five, in the midst of steadily moving traffic in both lanes."

The majority misunderstands the dissent's position. I do not "express[] disbelief at [the majority's] finding that plaintiff maintained her vehicle at a standstill while straddling two lanes." I express dismay at the majority's finding that

plaintiff's testimony was incredible because no careful car driver could momentarily "[remain] at a standstill while straddling two lanes [of traffic]." To find plaintiff's action as lacking exercise of due care and defying common sense is to clearly invade the province of the jury by assuming the testimony of the witness to be untrue.

This rendition of the accident is an obvious misinterpretation of plaintiff's testimony. The majority suggests that plaintiff recklessly stationed her SUV, immobile, straddled between lanes four and five, as if "waiting for Godot," as opposed to stopping in the momentary, quick, fluid manner usually involved in the changing of lanes. Instead, plaintiff testified that she entered lane six on Bruckner Boulevard about five miles an hour. She then applied the brakes "little by little" with the intent to make it all the way to lane one on the right side. Because plaintiff saw no vehicle traversing in lane five, she safely moved into that lane; plaintiff then came to a stop before attempting to move into lane four and observed that defendant's truck was traveling in lane three, closely even to her SUV in lane five. There is nothing reckless or incredible about such testimony. The majority cannot seriously equate plaintiff's testimony to something so contrary to experience and

common sense as to be incredible as a matter of law.

To buttress its position that the accident could not possibly have happened but for plaintiff's sole negligence, the majority misconstrues plaintiff's testimony in another significant respect. The majority argues that "by her own account [plaintiff] could not have . . . ascertained that her movement from lane five to lane four could be made with safety." The majority reaches this conclusion based upon the alleged testimony of plaintiff that from the right-side view mirror of her SUV, she could see "approaching traffic" in lane four, "as she was moving into that lane of traffic." Plaintiff, however, testified that upon safely moving the SUV into lane five, she observed that defendant's truck was traveling in lane three, closely even to her SUV in lane five. At the time, she did not observe any vehicle traveling in lane four, contrary to the majority's findings. Under the circumstances, the conclusion the majority reaches necessarily relies upon unproven factual assumptions, as to the speed, distance, and volume of traffic.

Viewing plaintiff's testimony in the light most favorable to plaintiff and according her, as the nonmovant, the benefit of every reasonable inference (*see Cohen v Hallmarks Cards*, 45 NY2d 483), an inference could be made that defendant's truck and

plaintiff's SUV were simultaneously attempting to move into lane four from opposite lanes. The foregoing inference in favor of plaintiff, while subject to contrary inferences, is supported by plaintiff's testimony. Clearly, the disputed facts regarding the speed, position, and location of the vehicles at the time of the impact raise triable issues of fact as to the parties' comparable fault in the happening of the accident.

Contrary to the majority's conclusions, the photographs do not unequivocally demonstrate plaintiff's version of the accident to be clearly and patently false. First, the condition of the SUV, as shown in the photographs, did not render plaintiff's version of the accident implausible and incredible. To the contrary, the damage to plaintiff's SUV is fully consistent with plaintiff's testimony that the oil tank truck, proceeding faster than she to reach lane four, swiped the front corner of plaintiff's SUV with its rear, breaking the SUV's right front light and ripping off the SUV's bumper on the right. In contrast, it is far less plausible that a partially detached bumper would result from a mild head-on collision, as defendant driver described it.

Second, the photographs fail to conclusively establish the position of the vehicles either immediately before or at the

moment of impact. The majority relies heavily on plaintiff's testimony, on cross examination, that the photographs indicated the "post-accident location," as conclusive evidence that defendant was lawfully operating his vehicle within his own lane of traffic, and that plaintiff's vehicle entered his lane of traffic and collided with his truck. However, plaintiff testified that the photographs were "a fair and accurate representation of the location of the vehicles immediately following the accident," and not the position of the vehicles either immediately before or at the moment of impact, as the majority suggests. At best, the photographs show nothing more than where the oil tank truck chose to stop after the accident, as the truck is several feet away from the SUV and not in the position it was when it connected with the right front of plaintiff's SUV. Thus, contrary to the majority's conclusion, the photographic evidence does not conclusively establish that plaintiff's vehicle struck the rear of defendant's truck as she was merging into its lane of traffic. Nor does it establish that defendant did not switch from lane three to lane four prior to the accident. Instead, the photographic evidence raises a classic dispute as to the exact location of the vehicles at the time of the accident and the cause of the accident.

Although plaintiff's testimony might have inconsistencies, it did not, as the majority asserts, defy "common sense" as to how the accident occurred. Plaintiff's testimony was not riddled with inconsistencies. Nor did defendant's testimony make out plaintiff's testimony to be manifestly untrue or physically impossible. Viewing the evidence in the light most favorable to plaintiff and drawing all inferences in her favor, as the nonmovant (*Cohen v Hallmark Cards*, 45 NY2d 493 [1978]), plaintiff's testimony supports an inference that the accident happened as she described, when both vehicles, the oil tank truck moving faster, were simultaneously intending to enter lane four from opposite directions and that, under the circumstances, defendant driver contributed to the happening of the accident.

Ultimately, in finding that plaintiff's testimony must be "disregarded as being without evidentiary value," the majority overlooks the principle that it is the province of this Court to consider an accident in light of all surrounding circumstances. It is clear from her testimony that plaintiff based her account on an accident that happened very quickly. It is not to be assumed that a witness to an accident that happened in some fleeting moments would articulate and accurately observe all of the details with exactitude.

Indeed, contrary to the majority's suggestion, the rule of law in New York State does not require, as a prerequisite to recovery in a personal injury action, that the injured plaintiff establish every detail of a car accident consistent with all physical facts and common knowledge, particularly where significant physical facts relating to vehicle placement, speed, and distance are contrived based on a post-accident photograph, without benefit of an expert accident reconstructionist. Nor does it require interpreting facts in a way that eliminates the realities of driving on one of the most hectic roadways in New York City. Undoubtedly, where some details of a witness's account conflict with undisputed facts, the witness's entire account may be discredited by the trier of fact. However, on a summary judgment motion, it is not a sufficient ground for an appellate court to dismiss an action simply because the version of the accident as told by a plaintiff may be viewed by the majority as improbable. It is for the trier of fact to weigh and balance probabilities.

Negligence cases can "rarely be decided as a matter of law" because "even when the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances" (*Andre v Pomeroy*, 35 NY2d

361, 364 [1974]). The descriptions of the accident given by plaintiff and defendant, herein, are at odds. Given the circumstances of this case, it is for the jury, as the trier of fact, to weigh, determine, and resolve issues of fact at trial, and not for this Court.

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

ENTERED: JULY 16, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Troy K. Webber
Marcy L. Kahn
Jeffrey K. Oing, JJ.

9120-
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In re Emmanuel B.,
Nonparty Appellant,

A Child Under Eighteen Years of Age, etc.,

Administration for Children's Services,
Petitioner-Respondent,

Lynette J.,
Respondent.

- - - - -

Andrell B.,
Nonparty Respondent,

- - - - -

Lawyers for Children, Inc., and
the National Association of Counsel
for Children,
Amici Curiae.

_____x

Emmanuel B. appeals from the order of the Family Court, Bronx County (Alma M. Gomez, J.), entered on or about March 5, 2018, which remanded his care and custody to the Administration for Children's Services.

Dawne Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (MacKenzie Fillow and Claude S. Platton of counsel), for Administration for Children Services, respondent.

NYU School of Law Family Defense Clinic, Washington Square Legal Services, New York (Christine Gottlieb and Amy Mulzer of counsel), for Andrell B., respondent.

Mayer Brown LLP, New York (Allison Stillman of counsel), and University of South Carolina School of Law, Columbia, SC (Josh Gupta-Kagan of counsel), for amici curiae.

WEBBER, J.

In this appeal, we are asked to determine a matter of first impression for this Court, that is, whether the Interstate Compact for the Placement of Children (ICPC), codified in Social Services Law § 374-a, applies to out-of-state noncustodial parents. For the reasons stated below, we find that the ICPC does not apply to those parents.

On October 2, 2017, the Administration for Children's Services (ACS) filed a petition alleging that Lynette J. (mother) had neglected two-year-old Emmanuel (child), born November 29, 2015, by failing to properly feed, bathe, and care for him, causing the child to become underweight and malnourished. The petition further alleged that the mother slapped and bit the child, and left him unsupervised for long periods of time.

The child, who had been residing with the mother at a New York City Department of Social Services facility, was subsequently removed from the mother's care and placed in the custody of ACS. ACS directly placed the child in the home of his paternal aunt. On or about January 10, 2018, nonparty Andrell B. (father), who resided in New Jersey, filed a petition for custody of the child. The Family Court denied custody, due to the father's residence in New Jersey, but ordered that the father have liberal visitation with the child.

On January 26, 2018, the father filed an order to show cause, seeking an order to have the child immediately released into his care. According to the father, he had resided with the mother and the child for the first six months of the child's life, and had visited the child every weekend after he and the mother separated.

On February 7, 2018, the parties appeared in Family Court. ACS conceded that it did not have any concern about the child residing with the father in that it had no reason to believe that the father was unfit or abusive or that he posed any imminent harm to the child. However, ACS stated that it believed that as the father resided in New Jersey, compliance with the ICPC was mandatory and any placement was predicated on ICPC approval.[1] The Family Court denied the father's application and issued an order remanding the care and custody of the child to the Commissioner of Social Services.

The court found that the ICPC process had to be completed and the placement approved. In its written decision, dated February 26, 2018, the court concluded that the ICPC process had to be completed and the placement approved prior to granting the

[1]The mother also opposed the father's application, stating that she feared not having visitation with the child and wanted to work toward reunification.

father custody as the child was in the legal custody of the Commissioner of Social Services, and subject to the continuing jurisdiction of Family Court. According to the court, the father "as a non-custodial, non-resident parent, does not have custody or possession of the child as a matter of parental right" and "requires parental authority to be conferred on him by the state."

By subsequent order, entered March 5, 2018, the court remanded the child to the care and custody of ACS. By a separate order entered the same date, the court allowed the child to be sent to stay with the father on a 29-day ICPC-sanctioned visit, after which time the father was required to return the child to New York to be placed in foster care pending completion of the ICPC. Respondent filed the instant appeal, arguing that the ICPC does not apply to out-of-state noncustodial parents but for "placement in foster care or as a preliminary to a possible adoption" (Social Services Law § 374-a, Article III[a]). The remand order has been stayed by a Justice of this Court pending determination of the appeal.

ACS informs this Court that while the appeal was pending, the New Jersey authorities visited the father's home, interviewed the father and his girlfriend with whom he cohabited, and conducted background checks on both of them. Neither the father

nor his girlfriend had criminal records in New Jersey, nor were they the subject of any child protective complaints. Accordingly, the New Jersey authorities determined that the father's home was safe for the child, and approved the placement. ACS asserts that once it submitted the paperwork, the father was approved within three months.

Preliminarily, ACS argues that since the ICPC has been complied with, and the placement approved, resulting in the child now residing with the father in New Jersey, this Court should dismiss the appeal as it has been rendered moot.

"In general an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). However, an exception to the mootness doctrine permits courts to preserve for review issues that share these three common factors: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on and (*id.* at 714-715).

This appeal meets the above criteria. As ACS concedes, this is an issue that is most likely to recur. Indeed, in *Matter of*

Devin P.(__ AD3d __, 2017 NY Slip Op 91762[U] [1st Dept 2017]), a case similar to the instant matter, this Court dismissed two perfected appeals as academic because, during their pendency, but before they were decided, a final order of custody was granted to the father, and the child was released into his care. The circumstances caused the issue to evade our review.

In addition, ambiguity clearly exists as to the applicability of the ICPC to an out-of-state noncustodial parent, as demonstrated by the decisions rendered by courts in New York and other states. *Matter of Devin P.*, as discussed above, raised issues similar to those raised here, which were not addressed on the merits. A Bronx Family Court decision (*Matter of Jadaquis B. [Sameerah B.]*, 38 Misc 3d 1212(A) [Fam Ct, Bronx County 2012]) found that the ICPC did *not* apply to nonrespondent out-of-state father; two Second Department cases, on the other hand, both concluded that the ICPC *did* apply to nonrespondent out-of-state parents (*see e.g. Matter of Alexus M. v Jenelle F.*, 91 AD3d 648, 650-51 [2d Dept 2012]; *Matter of Tumari W.*, 65 AD3d 1357, 1360 [2d Dept 2009]).[2]

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[2] States across the country are divided on the applicability of the ICPC to out-of-state parents, with numerous jurisdictions finding that parents are exempt from the compact (*see e.g. In the Interest of C.R.-A.A.*, 521 SW 3d 893, 907 [Tex App 2017]; *In re D.B.*, 43 NE 3d 599, 604 [Ind Ct App], *transfer denied* 41 NE 3d 691 [Ind 2015]; *In re S.R.C.-Q.*, 367 P 3d 1276, 1282 [Kan 2016]).

Moreover, this appeal grapples with important issues, such as whether applying the ICPC in such a manner is contrary to the plain meaning and legislative history of the statute, and whether it conflicts with a parent's right to substantive and procedural due process, which warrant review by this Court. Accordingly, we find that the appeal raises issues that falls within an exception to the mootness doctrine.

The ICPC, codified in Social Services Law § 374-a, is a statutory agreement with the express purpose of fostering cooperation and communication between all 50 states so that children requiring placement in another state "shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care" (Social Services Law § 374-a, Article I). The ICPC's provisions are to be "liberally construed to effectuate the purposes thereof" (Social Services Law § 374-a, Article X).

With respect to the conditions of a child's placement in

Others have applied the ICPC to out-of-state parents (*see e.g. Arizona Dept. of Economic Sec. v Stanford*, 234 Ariz 477 [2014]); *Department of Children and Families v C.T.*, 144 So 3d 684 [Fla Dist App 2014]; *Green v Division of Family Servs.*, 864 A2d 921, 927 [Del 2004]).

another state, Article III of the ICPC provides as follows:[3]

> "(a) No sending agency shall send . . . into any other party state any child for placement *in foster care or as a preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this Article . . . .
>
> "(b) Prior to sending . . . any child . . . into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice . . ." (emphasis added).

The ICPC does not apply to "[t]he sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state" (Social Services Law § 374-a, Article VIII).

Prior to its enactment, the legislature had adopted a complete prohibition of all out-of-state placements in an effort to prevent children from being sent out-of-state and into "undesirable labor," with the exception of placements with family members within the second degree of contiguity (*see* former Social Welfare Law § 371[12] and [14]).

There is no dispute that the ICPC was intended to provide

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[3] "Placement" is defined as "the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution . . ." (Social Services Law § 374-a, Article II).

children in need of foster and adoptive families with more possible placements across state lines. The purpose of the statute was twofold: to assure the placement would be in a child's best interests, and to preclude the "sending State from exporting its foster care responsibilities to a receiving State" (*see Matter of Williams v Glass*, 245 AD2d 66, 67 [1st Dept 1997]). Thus the ICPC was enacted to provide children in need of foster and adoptive families with more options, while still paying heed to concerns about the children's welfare.

There is also nothing in the language of the statute or the legislative history to indicate that the ICPC was ever intended to address any individual other than an out-of-state foster or adoptive parent. The language explicitly limits its applicability to out-of-state placements in foster care or as a preliminary to a possible adoption (*see* Social Services Law § 374-a). The limitation reflects the ICPC's purpose which was to provide "a uniform legislative framework for the placement of children across state lines in foster and/or adoptive homes" (Cong. Research Serv., Interstate Compact in the Placement of Children: ICPC [2003], [https://www.everycrsreport.com/reports/RL32070.html (last accessed, June 18, 2019)]).

Based on the plain language of Article III of the ICPC, the

conditions for placement were expressly aimed at placements in foster care or adoptive settings. "[C]ourts are obligated to construe the statute so as to give effect to the plain meaning of the words" (*Cole v Mandell Food Stores*, 93 NY2d 34, 39 [1999]), which, here, would mean excluding parents from these conditions. While the ICPC makes an exception for a parent or relative who takes a child over state lines (*see* Social Services Law § 374-a, Art VIII), by limiting the purview of placement conditions in article III to foster care and adoptive situations, the ICPC clearly did not contemplate the issue before us, where an out-of-state parent is seeking custody.

In 2011, the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC), the official body charged with implementing the ICPC, amended Regulation 3(2)(a) to extend the statute's reach to include placements with out-of-state noncustodial parents.

Regulation 3, as amended effective October 1, 2011, states in pertinent part:

> "2. Placement categories requiring compliance with ICPC: Placement of a child requires compliance with the [ICPC] if such placement is made under one of the following four types of placement categories:
>
> "(a) Four types of placement categories . . .
>
> 3. Placements with *parents* and relatives when a parent or relative is not making the placement . . . (*see*

https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx [last accessed, June 18, 2019] [emphasis added])."

The stated intent of the amendments to Regulation 3(2)(a) is to provide guidance in navigating the ICPC regulations and to assist its users in understanding which interstate placements are governed by, and which are exempt from, the ICPC (*id.*).

Thus the application of the ICPC to out-of-state parents is premised not on the statutory language of the ICPC, but on amendments made to Regulation 3, which were promulgated by the AAICPC in 2011. While there is no argument that the AAICPC had the authority to amend its regulations, "in exercising its rule-making authority an administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute" (*Matter of Society N.Y. Hosp. v Axelrod,* 70 NY2d 467, 474 [1987] [internal quotation marks omitted]). Provided the adopted regulation is "consistent with the enabling legislation," it has "the force and effect of law" (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]).

We find that in amending Regulation 3 to specifically subject out-of-state parents to ICPC procedures, the AAICPC expanded the statute's reach in a way that was not only outside the statute's scope, but contravened the will of the legislature to provide more

opportunities for children in need of placements. Thus, we find that Regulation 3 does not carry the force of law (*see Weiss v City of New York*, 95 NY2d 1, 4-5 [2000]). Regulation 3 is inconsistent with the stated purpose of the ICPC and improperly expands the statutory language to apply to situations not within the intended scope of the statute.

While this Court is mindful that the Second Department has held that the ICPC applies to a nonrespondent parent living outside of New York[4], we decline to follow its interpretation, because in our opinion it conflicts with the plain meaning of the statute and is in contravention of its legislative history. As a threshold matter, this line of cases relies on a fundamental misreading of the Court of Appeals decision in *Matter of Shaida W.* (85 NY2d 453 [1995]), where the Court applied the ICPC to a kinship foster care placement. There, the subject children had been removed from the custody of their mother following a finding of neglect. The New York City Commissioner of Social Services obtained custody and placed the children with their grandmother, who was a certified foster care parent and was subject to the governing regulations of a foster parent, including the receipt of subsidies. The grandmother ultimately moved to California, and the New York City Commissioner

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[4] *Matter of Alexus M. v Jenelle F.*, 91 AD3d at 650-51; *Matter of Tumari W.*, 65 AD3d at 1360.

of Social Services authorized the children to remain with her; the San Diego Department of Social Services undertook local supervision of the children. The Court of Appeals extended the Commissioner's petitions to extend the children's placement, finding that the ICPC applied because the Commissioner retained legal custody of the children even after their move to California. Although the children resided in California, the placement was still seen as a foster care placement for which the commissioner had continuing responsibilities.

The Court in concluding that the ICPC was applicable, specifically observed that a purpose of the ICPC was to "prevent states from unilaterally 'dumping' their foster care responsibilities on other jurisdictions" (*id.* at 459). Here, the child's living situation with his father in New Jersey would not involve foster care or adoption.

Interpreting the statute as applying to a parent who happens to live outside of New York State also flies in the face of New York's policy of keeping "biological families together" (*Nicholson v Scoppetta*, 3 NY3d 357, 374 [2004] quoting *Matter of Marino S.*, 100 NY2d 361, 372 [2003]). It is somewhat ironic that a statute with a stated purpose of providing more opportunities for children in need of placement would be construed to effectively prohibit the placement of a child with a natural parent.

We also reject ACS's argument that Family Court Act § 1017(1)(a) provides an independent statutory basis for implementing ICPC procedures with respect to a parent. After a child is removed from the home during an article 10 proceeding, this provision directs ACS to determine whether a nonrespondent parent is someone with whom the "child may appropriately reside" by performing background checks (Family Ct Act § 1017[1][a],[c][i]). However, the two are not necessarily related. There are other means to ensure a child's safety, such as directing a hearing or requesting courtesy background checks from the state where the nonrespondent parent resides. Furthermore, under Family Ct Act § 1017(3), once a child is temporarily released into a nonrespondent parent's care, the parent is required to submit to the Family Court's jurisdiction, and thus required to comply with the court's orders, whether to bring the child to court or to court-ordered visitation. In that vein, we reject ACS's argument that the ICPC comports with constitutional principles by protecting or prioritizing the rights of custodial parents, given that the Family Court still exercises control over the matter and can, among other things, make determinations regarding the child's best interests.

In recognizing fundamental constitutional principles of due process and protected privacy, New York courts have consistently held that the State "may not deprive a natural parent of the right

to the care and custody of a child absent a demonstration of abandonment, surrender, persisting neglect, unfitness or other like behavior evincing utter indifference and irresponsibility to the child's well-being" (*Matter of Marie B.*, 62 NY2d 352, 358 [1984]; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]).

The burden of establishing a parent's fitness or other like extraordinary circumstances rests with "the party seeking to deprive the natural parent of custody" (*Matter of Alfredo S. v Nassau County Dept. of Social Servs.*, 172 AD2d 528, 530 [2d Dept 1991], *lv denied* 78 NY2d 852 [1991]). Unless the Family Court has cause to believe a nonrespondent parent in another state might not be fit, or some other extraordinary circumstances exist, presupposing a parent is unfit pending completion of the ICPC infringes upon that parent's constitutional rights (*Matter of Marie B.*, 62 NY2d at 358; *Matter of Bennett v Jeffreys*, 40 NY2d at 545).

Here, the father represented that he was gainfully employed in Manhattan, had suitable living arrangements, and had visited the child regularly since his birth. ACS did not offer any evidence to the contrary, and, in fact, stated on the record that it had no concerns about the child's placement with the father. But for the ICPC protocol, which reportedly can take months, or even years to complete, ACS suggested that the child would have been released to the father. Under these circumstances, we find that there was no

evidence to warrant the delay in releasing the child to his custody. We further find that the delegation of the Family Court's parens patriae role to an ICPC administrator, who is empowered to decide the father's suitability as a placement without providing supporting evidence or the possibility of judicial review, also violates the father's right to procedural due process. Essentially, the ICPC permits a child to be denied placement or even later removed from a parent's home, at the sole discretion of an administrator, without offering any recourse to the parent. This bureaucratic barrier between the father and child infringes upon the father's substantive and procedural due process rights as a parent (*see Matter of Marie B.*, 62 NY2d at 358-359; *Matter of Bennett v Jeffreys*, 40 NY2d at 544-545; *Matter of Alfredo S.*, 172 AD2d at 529-530).

Finally, we acknowledge the arguments of the amici curiae, Lawyers for Children, Inc., and The National Association of Counsel for Children, who convincingly assert that, based on social science, medical research, and their "on the ground" experience, applying the ICPC to out-of-state parents - given the possibility that the process could keep a child in foster care, and apart from a loving, competent parent - harms children. There is no basis in the law to countenance this potential outcome.

Accordingly, the order of the Family Court, Bronx County (Alma M. Gomez, J.), entered on or about March 5, 2018, which remanded the

care and custody of the subject child to the Administration for Children's Services, should be reversed, on the law and the facts, without costs, and the order vacated.

All concur.

Order, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about March 5, 2018, reversed, on the law and the facts, without costs, and the order vacated.

Opinion by Webber, J. All concur.

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

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

ENTERED: JULY 16, 2019

CLERK