SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 9, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13314 The People of the State of New York, Respondent, Ind. 6788N/05

-against-

Cesar Fermin,
Defendant-Appellant.

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Lucas E. Andino, New York, for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 21, 2006, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree, and sentencing him to a term of 60 days, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

For the reasons stated in *People v Brazil* (__AD3d__, Appeal No. 12461 [decided herewith]), we find that *People v Peque* (22 NY3d 168 [2013], *cert denied* __US__, 135 S Ct 90 [2014]) applies retroactively to cases pending on direct appeal.

When defendant pleaded guilty, the court did not warn him that if he was not a citizen, he could be deported as a result of

his plea. Therefore, under *Peque*, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*Peque*, 22 NY3d at 198).

Accordingly, we remit for the remedy set forth in *Peque* (22 NY3d at 200-201), and we hold the appeal in abeyance for that purpose (*see People v Charles*, 117 AD3d 1073 [2d Dept 2014]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., Renwick, Saxe, Richter, JJ.

12461 The People of the State of New York, Respondent, Ind. 2159N/09

-against-

Robert Brazil, etc., Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stoltz, J.), rendered March 9, 2011, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 2½ years, unanimously affirmed.

Defendant claims that his plea was involuntary because the court did not advise him that if he was not a United States citizen, he could be deported as a result of his plea, as required under *People v Peque* (22 NY3d 168 [2013], *cert denied* __ US __, 135 S Ct 90 [2014]). The People argue that *Peque* is a new rule within the meaning of *People v Pepper* (53 NY2d 213 [1981], *cert denied* 454 US 967 [1981]), and therefore should apply prospectively only, and not to cases that were on direct appeal

when *Peque* was decided. Contrary to the People's contention, we find that *Peque* is a rule of federal constitutional law. *Peque* was primarily based on federal constitutional principles. Indeed, *Peque* relied mainly on federal case law and state authorities grounded in federal constitutional principles (*see People v Harnett*, 16 NY3d 200, 206 [2011]; *People v Gravino*, 14 NY3d 546, 553-554 [2010]). Any new rule of criminal procedure mandated by the federal constitution must apply to the cases still on direct appeal (*People v Martello*, 93 NY2d 645, 650 [1999] citing *Griffith v Kentucky*, 479 US 314 [1987]). Accordingly, *Peque* is applicable to this case, since it is on direct appeal (*Griffith v Kentucky*, 479 US 314 [1987]).

Although the plea court did not advise defendant of potential deportation consequences, we see no reason to extend relief under *People v Peque*, in light of the fact that defendant affirmatively misrepresented to the court that he was a United States citizen. We have considered and rejected defendant's arguments to the contrary. Given the prior bail proceeding at

which defendant's immigration status was discussed, it is highly unlikely that defendant mistakenly believed he was an American citizen. In any event, if that was his belief, he would not have had any reason to be concerned about deportation.

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13242 The People of the State of New York, Respondent, Ind. 4092/07

-against-

Marcos Manon, etc., Defendant-Appellant.

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

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

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Appeal from judgment, Supreme Court, New York County (Renee A. White, J. at plea; Ronald A. Zweibel, J. at sentencing), rendered July 23, 2009, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, held in abeyance, and the matter remitted for a reconstruction hearing and further proceedings in accordance herewith.

For the reasons stated in *People v Brazil* (__AD3d__, Appeal No. 12461 [2014] [decided herewith]), we find that *People v Peque* (22 NY3d 168 [2013], *cert denied* ___ US ___, 135 S Ct 90 [2014]) applies retroactively to cases, such as this one, pending on direct appeal.

When defendant pleaded guilty, the court did not warn him that if he was not a citizen, he could be deported as a result of his plea. However, the sentencing minutes are missing. A reconstruction hearing is therefore required, so that the court can determine whether defendant was aware of the immigration consequences and thus required to preserve his claim that his plea was unknowing and involuntary, and whether, if so, he did preserve his claim, or, whether his claim falls within the narrow exception to the preservation doctrine where a defendant has no practical ability to object to an error in a plea allocution because he cannot "be expected to move to withdraw his plea on a ground of which he has no knowledge" (*Peque*, 22 NY3d at 182 [internal quotation marks omitted]). If the claim is preserved, or falls into the narrow exception to the preservation doctrine, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (*Peque,* 22 NY3d at 198).

Accordingly, we remit for purposes of a reconstruction hearing as well as the remedy set forth in *Peque* (22 NY3d at 200-201) if such remedy is available. We hold the appeal in abeyance for those purposes (*see People v Charles*, 117 AD3d 1073 [2d Dept 2014]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Richter, Feinman, JJ.

13479-
13480 The People of the State of New York,
Respondent,

-against-

Kevin Blackwood,
Defendant-Appellant.

Ind. 2681/09

- - - - -

The People of the State of New York,
Respondent,

-against-

Kemar Gayle,
Defendant-Appellant.

_____

The Law Offices of Audrey A. Thomas, PC, Rosedale (Audrey A. Thomas of counsel), for Kevin Blackwood, appellant.

Steven Banks, The Legal Aid Society, New York (Cheryl P. Williams of counsel), for Kemar Gayle, appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered December 2, 2010, convicting defendant Kevin Blackwood, after a jury trial, of attempted gang assault in the first degree, and sentencing him to a term of 4 years, and judgment, same court and Justice, rendered December 16, 2010, convicting defendant Kemar Gayle, after a jury trial, of attempted gang assault in the first degree and two counts of robbery in the second degree, and sentencing him to concurrent

terms of 3½ years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings, as to both defendants, pursuant to CPL 460.50(5).

As to each defendant, 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]). There is no basis for disturbing the jury's determinations concerning identification and credibility, including its resolution of inconsistencies in testimony. Reasonable inferences establish that defendants and a third codefendant attacked the victim with a community of purpose and a shared intent to cause him serious physical injury, and that all three men actively participated in the attack (*see People v Bishop*, 117 AD3d 430 [1st Dept 2014], *lv denied* 23 NY3d 1034 [2014]). The evidence also supports reasonable inferences that defendant Gayle took part in the forcible taking of the victim's gold chain, and that Gayle did so with the requisite intent.

The court meaningfully responded to a note from the deliberating jury (*see People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]). The note requested a readback of "testimony relating to the identification" of defendants by certain witnesses. The note clearly did not call for a readback of the

full narrative of events as related by these witnesses. We find that the court's interpretation of the note was reasonable, and that the court properly exercised its discretion when it declined to direct a readback of the additional passages requested by defendants (*see People v Wilson*, 39 AD3d 264 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]). In any event, Gayle has not demonstrated that the omission of these passages from the readback "seriously prejudiced" him (*see People v Louridо,* 70 NY2d 428, 435 [1987]). We also note that the jury never indicated that the readback was inadequate. Gayle did not preserve his claim that the court should have ordered the readback to include further testimony, not requested by defendants, and we decline to review it in the interest of justice. The record does not support Gayle's assertion that the court prevented him from making further readback requests. As an alternative holding, we similarly find no basis for reversal.

Defendants did not preserve their claim that the court placed excessively restrictive time limits on their voir dire of prospective jurors. Only the third codefendant objected to the time limits (*see People v Buckley*, 75 NY2d 843, 846 [1990]), and requested "leeway." In response, the court agreed to be flexible and to permit all counsel more time if necessary. Accordingly, we decline to review this unpreserved claim in the interest of

justice. As an alternative holding, we find no error warranting reversal. Neither defendant requested more time, and any claim of prejudice is therefore purely speculative.

To the extent defendant Blackwood is challenging a pretrial suppression ruling, we find that challenge to be without merit. Defendants' remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13698 The People of the State of New York, Ind. 3090/12
Respondent,

-against-

Anonymous,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Edward J. McLaughlin, J.), rendered on or about October 12, 2012,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13699 Sansonia Womble, Index 307471/11
Plaintiff-Respondent,

-against-

NYU Hospitals Center,
Defendant-Appellant.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Jacqueline Hattar of counsel), for appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 23, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of dismissing so much of plaintiff's claim as is predicated upon sections of the Administrative Code of the City of New York, and otherwise affirmed, without costs.

Defendant failed to establish entitlement to judgment as a matter of law where the certified climatological data report it relied upon to support its defense of a storm-in-progress lacked a key explaining the data codes used in the report. Defendant also failed to offer evidence as to its last pre-accident inspection of the sidewalk condition, predicated upon personal knowledge, to address the deposition testimony given by plaintiff and defendant's own security guard that indicated that at least

one to two inches of grey slushy snow and ice existed on the sidewalk at the time of plaintiff's fall. Accordingly, defendant failed to show that it had a basis for claiming a lack of notice of the alleged snow/ice condition (*see e.g. DeCanio v Principal Bldg. Servs. Inc.*, 115 AD3d 579 [1st Dept 2014]; *Mike v 91 Payson Owners Corp.*, 114 AD3d 420 [1st Dept 2014]). Defendant's lone witness testified that he did not arrive at the building for work until after plaintiff's accident, and had not been at work for a week prior to the accident.

Even assuming that defendant met its burden on the motion, plaintiff's opposition raised triable issues of fact. Such issues include whether a storm was in progress at the time of plaintiff's fall; whether old snow and ice from prior, recent snowfalls had contributed to the subject hazardous condition; whether defendant had notice of an alleged preexisting hazardous condition in time to remedy it; and whether a preexisting condition was merely exacerbated by the most recent freezing rain which measured only three-one hundredths of an inch in the 90 minutes prior to plaintiff's fall (*see Mike v 91 Payson Owners Corp.*, 114 AD3d at 420; *Penn v 57-63 Wadsworth Terrace Holding, LLC*, 112 AD3d 426 [1st Dept 2013]; *Vosper v Fives 160th, LLC*, 110 AD3d 544 [1st Dept 2013]).

The order is modified to the extent indicated because the sections of the Administrative Code that plaintiff refers to have either been repealed (§§ 27-127, 27-128), or are inapplicable (§§ 27-104, 28-301.1).

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13701 The People of the State of New York, Ind. 2468/12
Respondent,

-against-

Alexi Chico,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee 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 (Bonnie G. Whittner, J.), rendered on or about February 7, 2013,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Sweeny, J.P., DeGrasse, Feinman, Gische, JJ.

13702 Reinaldo Vargas, Index 304018/09
Plaintiff-Respondent,

-against-

Juan Marte,
Defendant,

Goodo Beverage Corp.,
Defendant-appellant.

_____

The Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for appellant.

Mitchell Dranow, Sea Cliff, for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 6, 2014, which denied defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d) and to demonstrate property damage, and granted plaintiff's cross motion for summary judgment on the issue of liability, unanimously modified, on the law, to grant defendants' motion to the extent it seeks dismissal of plaintiff's claim for property damage and to deny plaintiff's cross motion, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a permanent consequential or significant limitations in his left knee as a result of the accident by offering the

affirmed reports of their orthopedist, who found normal ranges of motion in plaintiff's left knee, and of their radiologist, who found that plaintiff's left knee symptoms were preexisting degenerative symptoms consistent with injuries he sustained four years earlier (*see Henchy v VAS Express Corp.*, 115 AD3d 478 [1st Dept 2014]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]).

In opposition, plaintiff raised a triable issue of fact with his medical expert's finding of range of motion deficits, in addition to the nonconclusory opinions rendered in the affirmed reports of his surgeon and his orthopedic expert. In particular, plaintiff's surgeon, recognizing that plaintiff had sustained a prior left knee injury and some age-related degeneration, opined, following his review of plaintiff's MRIs from before and after the accident, that the lack of left knee pain prior to the accident, coupled with the acute onset of pain after the accident, showed that plaintiff's left knee meniscal tears were causally related to the subject accident (*see Vargas v Moses Taxi, Inc.*, 117 AD3d 560 [1st Dept 2014]; *McSweeney v Cho*, 115 AD3d 572 [1st Dept 2014]).

Defendants met their initial burden on the 90/180-day category of serious injury by showing lack of causation, but failed to establish prima facie that plaintiff worked for more than 90 days out of the 180 days following the accident. In

opposition, plaintiff raised an issue of fact as to causation, and also presented evidence that he was terminated from employment 45 days after his accident due to his injuries, thus raising a triable issue of fact as to whether he reached the threshold for this category (*see Swift v New York Tr. Auth.*, 115 AD3d 507, 508-509 [1st Dept 2014]).

Defendants demonstrated entitlement to summary judgment dismissal of plaintiff's claim for property damage (*see Owens v State of New York*, 96 AD2d 630 [3rd Dept 1983]), and plaintiff offered no opposition to that branch of the motion.

The competing accounts of how the accident occurred, as presented by plaintiff's testimony, his affidavit, the testimony of plaintiff's passenger, and the reports submitted, preclude plaintiff's request for partial summary judgment on the issue of liability (*see Calcano v Rodriguez*, 91 AD3d 468, 468-469 [1st Dept 2012]).

We have considered the other arguments and find them unavailing.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13703 Justin Samuels, Index 402932/11
Plaintiff-Appellant,

-against-

William Morris Agency, et al.,
Defendants-Respondents.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Daniel Dugan of counsel), for appellant.

Proskauer Rose LLP, New York (Lawrence R. Sandak of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Lucy Billings, J.), entered February 4, 2013, which granted defendants' motion to dismiss the complaint alleging discrimination under the New York State and City Human Rights Laws, unanimously affirmed, without costs.

Plaintiff failed to establish a prima facie case of discrimination under the State or City Human Rights Laws because he failed to allege that defendants, leading talent agencies in the movie industry that rejected plaintiff's screenplay submissions, were actually aware of his race (*Matter of Fuentes v New York City Commn. on Human Rights*, 26 AD3d 198 [1st Dept 2006]; *see also Priore v New York Yankees*, 307 AD2d 67, 72 [1st Dept 2003], *lv denied* 1 NY3d 504 [2003]). The complaint merely alleges that plaintiff sent defendants a link to a social

networking site that contained his photograph, which would show that he is black, and that his photo was also available on the internet. In fact, the complaint itself suggests that defendants did not reject his screenplay submissions on account of his race, but because defendants reviewed such submissions only when they were referred by a movie industry insider, and plaintiff did not know such an insider (*see Stallings v U.S. Elecs.*, 270 AD2d 188 [1st Dept 2000]).

The complaint also fails to allege discrimination under a disparate impact theory because it fails to allege any facts showing that defendants' insider-referral policy falls more harshly on black screenwriter applicants than other groups (*see e.g. Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 296-297 [1st Dept 2005]; *see also Byrnie v Town of Cromwell, Bd. of Educ.*, 243 F3d 93, 111 [2d Cir 2001]).

Instead, the complaint merely alleges that 5% or less of the movie industry is black, whereas 12.92% of the United States population in 2009 was black. Even assuming that the movie industry at large, rather than the screenwriting industry, is the relevant workforce, the complaint merely compares the percentage of black individuals in the movie industry to black individuals in the general population based on the unsupported assumption

that the pool of aspiring black screenwriters tracks the general population. This does not suffice (Administrative Code of City of NY § 8-107[17][b]; *see also Trezza v Hartford, Inc.*, 1998 WL 912101, *7, 1998 US Dist LEXIS 20206, *22-23 [SD NY 1998]). Moreover, even assuming that plaintiff was entitled to discovery to acquire the relevant statistical data, discovery would not cure the other deficiencies in the complaint. The complaint further fails to adequately allege that Samuels sought "employment" with defendants, as required to support his State and City claims for unlawful discriminatory practices in "employment" by employers, and discrimination in referring him to an employer by an employment agency (*see* Executive Law §§ 296[1][a], [b]; Administrative Code §§ 8-107[1][a], [b]). It contains only speculative allegations that defendants might "contract" on a screenwriter's behalf with other corporations and individuals in connection with a screenplay. A mere contract for payment does not in itself establish an employment relationship. The complaint does not allege that defendants personally hire screenwriters or otherwise find them opportunities for work, as opposed to merely selling their screenplays.

Finally, the motion court correctly concluded that the complaint is devoid of any factual allegations to support plaintiff's claims of unlawful boycott (Executive Law § 296[13]; Administrative Code § 8-107[18]; *see Scott v Massachusetts Mut. Life Ins. Co.*, 86 NY2d 429, 436-437 [1995]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13704 Pramer S.C.A., Index 603336/04
Plaintiff-Counterclaim Defendant-
Respondent-Appellant,

-against-

Abaplus International Corporation,
Defendant-Counterclaim Plaintiff-
Appellant-Respondent.

_____

Haynes and Boone, LLP, New York (Kenneth J. Rubinstein of counsel), for appellant-respondent.

Backer Botts LLP, New York (Richard B. Harper of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (Ira Gammerman, JHO), entered May 9, 2013, after a jury verdict, finding against defendant on plaintiff's breach of contract claim, and dismissing plaintiff's claims of fraud, unanimously affirmed, without costs.

In answering "yes" to the yes or no question sent out by the jury during deliberations, the trial court responded meaningfully to the jury question (*see People v Malloy*, 55 NY2d 296, 301 [1982], *cert denied* 459 US 847 [1982]). The court's charges on breach of contract and interested witness as to plaintiff's principal were not prejudicial, nor was the language of the jury verdict sheet "suggestive" (*compare Leonard v Davenport & Sons*, 44 AD2d 781 [1st Dept 1974]). Further, since none of the defendant's employees were actors in the transactions at issue,

or had a motive to shield themselves from blame, the court's charge, which generally followed that of PJI 1:92, was appropriate. It was also proper for the trial court to find plaintiff's explanation concerning missing documents insufficient to avoid that charge as a matter of law, and instead put the question to the jury (*see e.g. Gogos v Modells*, 87 AD3d 248, 254-255 [1st Dept 2011]).

Finally, "a trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1995]), and the record contains no evidence of bias, or any other action on the part of the court that deprived plaintiff of a fair trial.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13705 The People of the State of New York, Ind. 3385/10
Respondent,

-against-

Carlos Melo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee 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 (Carol Berkman, J.), rendered on or about August 17, 2011,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13706 The People of the State of New York, Ind. 5260/05
Respondent,

-against-

Eddy Espinal,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Bruce Allen, J. at suppression and CPL article 730 hearings; Ruth Pickholz, J. at jury trial and sentencing), rendered June 16, 2010, convicting defendant, after a trial, of murder in the second degree, attempted murder in the second degree (four counts), assault in the first degree (two counts) and assault in the second degree, and sentencing him to an aggregate term of 105 years, unanimously affirmed.

The court properly exercised its discretion in temporarily deferring defense counsel's request for a fifth CPL article 730 examination of defendant until after the *Wade* hearing had commenced, a procedure expressly approved by defense counsel, because the information available to the court at that time did not call into question defendant's capacity to proceed (*see*

People v Morgan, 87 NY2d 878, 881 [1995]). Although defendant was found incompetent by two psychiatric examiners after his first CPL article 730 examination shortly after his indictment in 2005, he was subsequently found competent, based in part on the opinion of one of the psychiatric examiners who had originally found him unfit to proceed. Thereafter, at the request of his counsel, defendant underwent three additional fitness examinations pursuant to CPL article 730 in July 2007, January 2008 and May 2008, and in each instance, his examiners unanimously concluded that he was fit to proceed. In mid-2008, defense counsel moved to controvert the finding that defendant was competent and, after a competency hearing was held in August 2008 in which defense counsel called his own forensic psychiatry expert and a court-appointed examiner, the hearing court again concluded that defendant was fit to proceed. Viewed in this context, when defense counsel requested yet another CPL article 730 examination at the start of the *Wade* hearing raising the same concerns that he had previously asserted in his prior CPL article 730 requests and at the August 2008 competency hearing, the information available to the court at that time did not call into question defendant's capacity to stand trial (*see People v Morgan*, 87 NY2d 878, 881 [1995]), and the court was not required to suspend the *Wade* hearing until it received the results of

defendant's CPL article 730 examination. Contrary to defendant's contention, the fact that he was found incompetent after the *Wade* hearing does not mean that he was "presumptively incompetent" at the time of the *Wade* hearing, because the court's determination at the commencement of the *Wade* hearing was properly based on the then "available information" (*id.* at 880; *see also People v Armlin*, 37 NY2d 167, 171 [1975]). Moreover, the court was entitled to give weight to the findings and conclusions of competency derived from defendant's three most recent examinations and the court's own recent findings and conclusions made after defendant's competency hearing (*id.*; *see also People v Tortorici*, 92 NY2d 757, 766 [1999]). In addition, the court properly considered its personal observations of defendant and his responses to the court's questions, which evinced his particularized understanding of the nature of the proceedings (*id.*; *see also People v Phillips*, 16 NY3d 510, 518 [2011]).

Subsequently, in August 2010, the court properly exercised its discretion in determining that defendant was competent to stand trial based on the findings and conclusions of competency derived from the reports of defendant's seventh and most recent CPL article 730 examination (*see Morgan*, 87 NY2d at 880). Significantly, defense counsel not only did not move to controvert the report's findings with a request for another

competency hearing, which would have required the court to conduct one (*see* CPL 730.30[2]), he confirmed the report instead and requested that the trial proceed. Thus, the court correctly proceeded.

The court also properly denied defense counsel's request to order a midtrial CPL article 730 competency examination, since defendant's competency had previously been established before the commencement of trial, and there had been no change in circumstances that would have required the court to order yet another examination (*see People v Campos*, 93 AD3d 581, 583 [1st Dept 2012], *lv denied* 19 NY3d 971 [2012]).

Defense counsel's request to submit the affirmative defense of extreme emotional disturbance to the jury over defendant's objection was properly denied because, as between defendant and his counsel, the decision as to whether to submit the affirmative defense fell to defendant (*see People v Petrovich*, 87 NY2d 961, 963 [1996]). There is no merit to the argument that counsel should have been able to pursue the defense because defendant's purported psychiatric conditions affected his ability to decide for himself whether to proceed with the defense, since the court had already determined that defendant was competent to proceed. To the extent that it was required to conduct any inquiry of defendant with respect to his decision not to submit the

affirmative defense to the jury against his counsel's advice, the record demonstrates that the court conducted inquiries on several different occasions that revealed that defendant understood the practical and legal ramifications of his decision.

The court properly declined to submit the first- or second-degree manslaughter to the jury as lesser included offenses of murder, as there was no reasonable view of the evidence that defendant merely intended to cause serious physical injury or acted recklessly. After making homicidal threats, arising out of a dispute over money, defendant fired multiple gunshots from close range directly at specific individuals inside a barbershop.

The determinations on evidentiary matters and related jury instructions that defendant challenges on appeal were proper exercises of the court's discretion. In any event, any errors in these determinations were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13707 TOV Manufacturing, Inc., Index 653443/11
Plaintiff, 590389/12

-against-

Jaco Import Corporation, et al.,
Defendants.

- - - - -

Abraham Jacobovits,
Third-Party Plaintiff-Respondent,

-against-

Shlomo Gross also known as Samuel Gross, et al.,
Third-Party Defendants,

Universal Gemological Laboratory, Inc.,
Third-Party Defendant-Appellant.

_____

Moritt Hock & Hamroff LLP, Garden City (Michael S. Re of counsel), for appellant.

Samuel A. Ehrenfeld, New York, for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered August 6, 2013, which, insofar as appealed from, denied third-party defendant Universal Gemological Laboratory, Inc.'s (UGL) motion to dismiss the indemnification and General Business Law claims asserted against it in the amended third-party complaint, and granted third-party plaintiff Abraham Jacobovits's cross motion to file a second amended complaint asserting an aiding and abetting fraud claim as against UGL and proposed third-party defendants Robert Lejman (UGL's president)

and Kate Wexler (UGL's former employee), unanimously modified, on the law, to the extent of granting UGL's motion to dismiss, and denying so much of Jacobovits's cross motion as sought to assert an aiding and abetting fraud claim as against Lejman, and otherwise affirmed, without costs.

Jacobovits failed to state a valid cause of action for indemnification against UGL, because his claim is predicated upon a finding that he failed to pay plaintiff TOV Manufacturing Inc. for a TOV diamond. "A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common[-]law indemnification" (*GAP, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 212 [1st Dept 2006][internal quotation marks omitted]).

Jacobovits's General Business Law claim, alleging that UGL's appraisal report for an "emerald" was misleading, deceptive or fraudulent, fails as a matter of law. Section 239-c of the General Business Law, upon which Jacobovits relies and which provides that a person or entity may bring a civil action for damages arising from a misleading, deceptive or fraudulent appraisal, does not apply to appraisals of emeralds or other loose precious stones. Indeed, section 239 defines "appraiser," as used in section 239-c, as a person or entity that "purports to ascertain and state the true value of property" (General Business

Law § 239[1]), and "property" is defined as, in pertinent part, "jewelry, watches, and objects made from or containing precious stones," including emeralds (§ 239[2]). Accordingly, section 239-c applies to jewelry, watches or objects made from precious stones, but not to loose stones such as emeralds. "[L]egislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed" (*Vucetovic v Epsom Downs, Inc*. 10 NY3d 517, 521).

The proposed second amended third-party complaint validly states a cause of action for aiding and abetting fraud against UGL. However, it fails to state a valid cause of action against Lejman, because there is no allegation that Lejman had any knowledge of the alleged fraud (*see National Westminster Bank v Weksel*, 124 AD2d 144, 147 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]).

We have considered UGL's remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13708 In re Aronda Vereen, etc., Index 402284/12
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Aronda Vereen, appellant pro se.

David I. Farber, New York (Kimberly W. Wong of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated November 21, 2012, which, after a hearing, denied petitioner succession rights as a remaining family member to the tenancy of her late mother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered June 25, 2013), dismissed, without costs.

Petitioner does not qualify as a remaining family member under the Housing Authority's policies because she did not occupy the apartment with management's written consent (*see Matter of Mallay v New York City Hous. Auth.*, 117 AD3d 597, 597 [1st Dept 2014]). The written consent requirement applies to individuals who, like petitioner, were once authorized household members but

left the household and subsequently returned (*see Ponton v Rhea*, 104 AD3d 476, 477 [1st Dept 2013]). In any event, any alleged errors made by management would not entitle petitioner to the lease because estoppel may not be invoked to create a right where none exists (*Matter of Scheurer v New York City Employees' Retirement Sys.*, 223 AD2d 379, 379 [1st Dept 1996]). Under Housing Authority policy, an individual must comply with the one-year requirement by residing with the tenant for at least one year after lawfully entering the apartment until the tenant either dies or moves out (*see Matter of Saad v New York City Hous. Auth.*, 105 AD3d 672, 672 [1st Dept 2013]). Even assuming management had granted permission for petitioner to reside in her mother's apartment during the same month petitioner asserted that she moved into the apartment (March 2011) or immediately upon submission of the permanent permission request form (May 2011), she could not have occupied the apartment for the minimum one-year period because her mother died on August 16, 2011.

Petitioner's payment of use and occupancy cannot change an unauthorized occupant's status and cannot be deemed a substitute for written permission (*see Matter of Perez v New York City Hous. Auth.*, 99 AD3d 624, 625 [1st Dept 2012]). To the extent petitioner relies on mitigating factor such as her age or the fact that she gave up her own apartment to take care of her

mother, they do not provide a basis to annul respondent's determination (*see Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514, 514 [1st Dept 2011]; *Matter of Rodriguez v New York City Hous. Auth.*, 103 AD3d 538, 539 [1st Dept 2013]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13709 The People of the State of New York, Ind. 5630/12
Respondent,

-against-

Terry Carpenter,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Desiree Sheridan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Dana Poole 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 (Renee A. White, J.), rendered on or about March 12, 2013,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Gische, JJ.

13710 In Re Nazaray McK.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about May 8, 2013, which adjudicated appellant a juvenile delinquent, upon her admission that she committed an act that, if committed by an adult, would constitute the crime of unauthorized use of a vehicle in the third degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's motion to convert the juvenile delinquency petition into a person in need of supervision petition *(see e.g. Matter of Diana P.*, 49 AD3d 390 [1st Dept 2008]). Appellant's pattern of misconduct went far beyond disobedience to her parents.

Appellant drove her parents' car without permission, thereby endangering other persons including her passenger. In addition, defendant used alcohol and marijuana, and her behavior at school and at home was generally poor, notwithstanding some degree of improvement.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13712 The People of the State of New York, Ind. 3765/10
Respondent,

-against-

Mustapha Ouanes,
Defendant-Appellant.

_____

Law Offices of Eric Franz, PLLC, New York (Eric Franz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at initial records disclosure application; Daniel McCullough, J. at subsequent application, jury trial and sentencing), rendered June 7, 2012, convicting defendant of rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, assault in the second degree and attempted criminal sexual abuse in the first degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The court's rulings concerning cross-examination, and the examination or disclosure of psychiatric records, did not deprive defendant of his right to present a defense and to confront witnesses (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). The court permitted defendant to inquire into all appropriate subject matter, and only precluded exploration of

matters that were speculative and of questionable relevance.

Defendant's inquiry into the victims' past drug and alcohol use was sufficient under the circumstances of the case. Defendant was not prejudiced by the preclusion of inquiry into past use of Xanax and cocaine, which had little or no probative value, could well have confused and misled the jury (*see People v Corby*, 6 NY3d 231, 234 [2005]), and had no relevance to defendant's theory of defense.

The court properly denied defendant's application for an in camera review of one of the victims' psychiatric records. Defendant failed to make an adequate showing that the psychiatric records from when this victim was a teenager would be relevant to an incident that occurred six years later, and his argument that the records might provide an alternative explanation for the victim's hysterical behavior after her encounter with defendant was conjectural (*see People v Kozlowski*, 11 NY3d 223, 241 [2008], *cert denied* 556 US 1282 [2009]; *People v Gissendanner*, 48 NY2d 543, 550 [1979]). To the extent this victim's anxiety disorder and use of Xanax was relevant, defendant was able to elicit these matters on cross-examination.

The court permitted ample inquiry into matters relating to certain civil litigation, which was generally irrelevant or collateral, and the court's limitations on this inquiry were proper exercises of discretion.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13713 The People of the State of New York, Ind. 5937/11
Respondent,

-against-

Terrence Nichols,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

_____

Appeal from judgment, Supreme Court, New York County (Jill Konviser, J.), rendered May 8, 2012, 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, with three years' postrelease supervision, unanimously dismissed, as moot.

Since defendant does not challenge his conviction, and seeks no relief other than a reduction of the postrelease supervision

component of his sentence, which he has already satisfied, this appeal is moot.

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13714 Great Northern Insurance Company Index 114453/10
as subrogee of George D. Bednar, et al.,
Plaintiffs-Respondents,

-against-

Milo Real Estate Corp.,
Defendant-Appellant,

Joseph Rossi, etc.,
Defendant.

_____

Gannon, Rosenfarb, & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 8, 2014, which denied defendant owner Milo Real Estate Corp.'s (defendant) motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

There are triable issues of fact as to whether the sanding and refinishing of wooden floors in one of defendant's residential buildings constituted an inherently dangerous activity, and whether defendant knew or should have known that sawdust, if improperly stored or disposed of during the refinishing process, may spontaneously combust (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]; *Montano v O'Connell*, 186 AD2d 461 [1st Dept 1992]). In addition,

there is a question of fact as to whether defendant, who had a nondelegable duty to keep the subject brownstone in a safe condition, had notice that defendant independent contractor was not properly disposing the sawdust that allegedly caused the fire (*see Laecca v New York Univ.*, 7 AD3d 415, 416 [1st Dept 2004], *lv denied* 3 NY3d 608 [2004]). It is undisputed that the day before the brownstone caught fire, a concerned neighbor noticed that a closed plastic garbage bag containing sawdust had been left on the curb and told defendant's employee that it might spontaneously combust. Thereafter, the employee told defendant independent contractor not to leave bags of sawdust in the building or on the curb (*see Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145, 152 [1943]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13715 The People of the State of New York, Ind. 6084/07
Respondent,

-against-

Richard Sanders,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Marcy L. Kahn, J.), rendered on or about December 9, 2011,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13718N Helen Dardzinska, Index 159313/13
Petitioner-Respondent,

-against-

City of New York, et al.,
Respondents-Appellants.

_____

Rafter & Associates PLLC, New York (Howard K. Fishman of counsel), for appellants.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Robert E. Burke of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn Freed, J.), entered February 14, 2014, which granted petitioner's application for leave to file a late notice of claim upon respondents, unanimously reversed, on the law and the facts, without costs, the application denied, and the petition dismissed.

While no one factor is controlling, here petitioner failed to establish any of the relevant statutory factors that would warrant leave to serve a late notice of claim (General Municipal § 50-e[5]; *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824 [2010]). Petitioner failed to make an adequate showing, via medical or other evidence, that her claimed injuries prevented her from timely filing a notice of claim (*see Matter of Rivera v New York City Hous. Auth.*, 25 AD3d 450 [1st Dept 2006]). That this is true is underscored by the fact that

she was able to file a report with her employer within 90 days of her accident (*see Matter of Casale v City of New York*, 95 AD3d 744 [1st Dept 2012]).

It is undisputed that respondents did not acquire actual knowledge of the facts and circumstances constituting the claim within the statutory 90-day service period, or a reasonable time thereafter, and there has been no showing that a defense on the merits would not be prejudiced by the late service (*id.*; *Matter of Rivera*, 25 AD3d at 451).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13719 The People of the State of New York, Ind. 1746/12
Respondent,

-against-

Gilberto G.,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Frank Glaser 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 (Carol Berkman, J.), rendered on or about August 1, 2012,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13721-
13722-
13723-
13724 In re David R., and Others,

Child Under the Age of
Eighteen Years, etc.,

Carmen R., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for Carmen R., appellant.

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

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about May 28, 2013, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 5, 2011, which found that respondent Jose R., a person legally responsible for the subject children, sexually abused Silvette V., inflicted excessive corporal punishment on Silvette V. and Yaniel V., and derivatively neglected the other three children, and that respondent Carmen R.

neglected the subject children, unanimously affirmed, without costs. Appeals from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The findings of abuse and neglect against Jose R. were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). At the fact-finding hearing, the children's grandmother and an agency caseworker testified that then five-year-old Silvette had consistently reported that Jose had touched her private parts and kissed her inappropriately. The Family Court properly determined that the child's out-of-court statements were sufficiently corroborated by the testimony of her uncle, who witnessed one incident in which Jose inappropriately placed the child's head in his crotch area (*see Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987]). The court found the uncle to be a credible witness, and there exists no basis to disturb the court's credibility determinations (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). Although repetition by the child of the same allegations does not provide corroboration for the out-of-court statements, the consistency of her reported statements enhances their credibility (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490-1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]). Further, Jose's

decision not to testify warrants a negative inference against him (*see Matter of Eugene L. [Julianna H.]*, 83 AD3d 490 [1st Dept 2011]).

The finding of excessive corporal punishment against Jose was supported by testimony that Silvette reported that Jose had punched her in the head, and that the oldest child reported that Jose had struck four-year-old Yaniel with a hanger, leaving a red line on his arm. These out-of-court statements by the siblings provide cross-corroboration of excessive use of force by Jose against Silvette and Yaniel, and the statements were further corroborated by the grandmother's testimony that she saw Silvette crying and rubbing her head after the incident, and saw the mark on Yaniel's arm (*see Matter of Nicole V.*, 71 NY2d at 117-119; *Matter of Devante S.*, 51 AD3d 482 [1st Dept 2008]; *Matter of Joshua B.*, 28 AD3d 759, 761 [2d Dept 2006]). Under the circumstances, Jose's conduct constituted excessive corporal punishment (*see* Family Ct Act § 1012[f][i][B]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478, 479 [1st Dept 2011]).

The findings of derivative neglect against Jose as to the other children were appropriate, since his behavior evinced such an impaired level of judgment as to create a substantial risk of harm to the other children (*see Matter of Joshua R.*, 47 AD3d 465, 466 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

The findings of neglect against the mother were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). The record shows that the mother knew of Jose's treatment of the children, but dismissed the allegations of sexual and physical abuse, and continued to show loyalty to Jose, without concern for the children (*see e.g. Matter of Rayshawn R.*, 309 AD2d 681, 682 [1st Dept 2003]; *Matter of Eric J.*, 223 AD2d 412, 413 [1st Dept 1996]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13725 Jacqueline Matias, Index 20948/11
Plaintiff-Respondent,

-against-

Ewan W. Grose, et al.,
Defendants-Appellants.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for appellants.

Block O'Toole & Murphy, LLP, New York (David L. Scher of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered April 4, 2014, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff was driving in the left lane of a three-lane interstate highway when her car was struck by defendants' tractor trailer, which had been driving in the middle lane. Defendant driver testified that the accident occurred when a tractor trailer driving in front of him suddenly stopped, causing him to apply his brakes to try to avoid a rear-end collision. Defendants' tractor trailer jack-knifed, causing its rear portion to enter plaintiff's adjoining left lane and crush her car against the concrete divider.

In the absence of a showing of willful non-disclosure or

prejudice to defendants, the court properly considered plaintiff's expert affidavit opining that defendant driver violated Vehicle and Traffic Law § 1129(a) by failing to maintain a safe distance from the tractor trailer in front of him (*see Herman v Moore*, 106 AD3d 666 [1st Dept 2013]; *Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 555 [1st Dept 2011]; CPLR 3101[d][1]).

In opposition to this prima facie showing that defendant driver was negligent, defendants failed to offer a non-negligent explanation for the collision (*see Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). The emergency doctrine is inapplicable, since in requiring drivers to maintain a safe distance between their vehicles and the ones in front of them, Vehicle and Traffic Law § 1129(a) imposes the duty to be aware of traffic conditions, including other vehicles suddenly stopping or slowing down (*see Johnson*, 261 AD2d at 271-272; *Williams v Kadri*, 112 AD3d 442 [1st Dept 2013]; *Rodriguez v Budget Rent-A-Car Sys., Inc.*, 44 AD3d 216, 224 [1st Dept 2007]).

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

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13727 The People of the State of New York, Ind. 5641/11
Respondent,

-against-

Sterling Glass,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Carol Berkman, J.), rendered on or about May 2, 2012,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13728 The People of the State of New York, Ind. 1845/11
Respondent,

-against-

Ruben Rios,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Carol Berkman, J.), rendered on or about March 7, 2012,

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.

ENTERED: DECEMBER 9, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13729 Marlene Gonzalez, Index 302549/10
Plaintiff-Respondent,

-against-

EVG, Inc., et al.,
Defendants-Appellants.

_____

Kraus & Zuchlewski LLP, New York (Geoffrey A. Mort of counsel), for appellants.

Law Offices of Karim H. Kamal, New York (Karim H. Kamal of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 10, 2014, which denied defendants' motion for summary judgment dismissing plaintiff's claims under the New York State Human Rights Law (State HRL) and the New York City Human Rights Law (City HRL) for discrimination, retaliatory termination, and hostile environment, unanimously modified, on the law, to the extent of dismissing the discrimination and retaliation claims under the State and City HRLs, and the hostile environment claim under the State HRLs, and otherwise affirmed, without costs.

Plaintiff's retaliation claims under the State and City HRLs must be dismissed because she never complained to defendants that she was discriminated against because of her sex (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Pezhman v*

City of New York, 47 AD3d 493, 494 [1st Dept 2008]). Her email to defendants' corporate superior consisted of complaints about generalized harassment and was too ambiguous to constitute protected activity (*see Turner v NYU Hospitals Ctr.*, 784 F Supp 2d 266, 284 [SD NY 2011]; *Intl. Healthcare Exch., Inc. v Global Healthcare Exch., LLC*, 470 F Supp 2d 345, 357 [SD NY 2007]).

The discriminatory termination claims under the State and City HRLs also must be dismissed. Defendants articulated legitimate nondiscriminatory reasons for terminating plaintiff (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 112-114 [1st Dept 2012]). In particular, they pointed to her chronic lateness, her difficulty working with others, and her questionable use of company accounts. Although the evidence showed that plaintiff received positive annual performance reviews and annual raises and bonuses, plaintiff failed to raise a triable issue of fact that the legitimate reasons proffered by defendants were merely a pretext for discrimination (*Melman*, 98 AD3d at 113-114, 120). Indeed, even under the mixed-motive analysis applicable to the City HRL claim, there was insufficient evidence to support a finding that sex was a motivating factor, even in part, for the decision to terminate plaintiff (*see Melman*, 98 AD3d at 122-128; *Forrest*, 3 NY3d at 308).

Although the complained-of behavior does not rise to the level of "severe and pervasive" for purposes of a hostile environment claim under the State HRL, plaintiff's claim under the City HRL is viable (*see Hernandez v Kaisman*, 103 AD3d 106, 114-115 [1st Dept 2012]). Indeed, "[c]onsidering the totality of the circumstances, this is not a truly insubstantial case" (*id.* at 115 [internal quotation marks omitted]). Defendants' alleged constant use of language degrading women, telling of sexually explicit jokes, and overt viewing of pornography in the workplace can be characterized as having subjected plaintiff to "differential treatment" (*id.*). Accordingly, "the broad remedial purposes of the City HRL would be countermanded by dismissal of the claim" (*id.*).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13730 KBL, LLP, Index 600597/08
Plaintiff-Respondent,

-against-

Community Counseling & Mediation Services,
Defendant-Appellant.

_____

Loanzon LLP, New York (Tristan C. Loanzon of counsel), for appellant.

Alan E. Kahn, New York, for respondent.

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Order, Supreme Court, New York County (Carol E. Huff, J.), entered October 22, 2013, which, following a jury trial, denied defendant's posttrial motion to set aside the jury's verdict as to proximate cause, unanimously affirmed, without costs.

Defendant is a not-for-profit organization that provides services funded in large part through government agencies. In 2005 and 2006, defendant applied for and obtained funding from the Administration for Children's Services (ACS).

For 2007, defendant sought approximately $2.7 million in funding from ACS and hired plaintiff to perform an audit and prepare the audited financial statements for its fiscal year ending June 30, 2006, which were required for the application. In May 2007, plaintiff prepared the statements, which indicated twelve deficiencies in defendant's financial reporting and

practices. Defendant forwarded the statements to ACS, which denied the application five days later.

Plaintiff commenced this action to collect $52,000 in accounting fees which defendant refused to pay. Defendant asserted a counterclaim for malpractice.

A party alleging a claim of accountant malpractice must show that there was a departure from the accepted standards of practice and that the departure was a proximate cause of the injury (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223 [1st Dept 1996]). Thus, "a plaintiff must establish, beyond the point of speculation and conjecture, a causal connection between its losses and the [accountant's] actions" (*id.* at 224).

The jury found that plaintiff departed from good and accepted accounting standards and practice in the preparation of the audit report. However, it found that plaintiff's malpractice was not a substantial factor in causing defendant money damages.

Defendant moved pursuant to CPLR 4404(a) to set aside the verdict and for a new trial solely on the issue of its damages from the malpractice. Defendant argued that, even on the view of the evidence most favorable to plaintiff, the jury's failure to find that the malpractice was a substantial factor in the loss of the ACS funding was not based on any plausible interpretation of

the evidence. Supreme Court denied the motion.

"The question of whether a verdict is against the weight of the evidence is discretion-laden, and the critical inquiry is whether the verdict rested on a fair interpretation of the evidence" (*Gartech Elec. Contr. Corp. v Coastal Elec. Constr. Corp.*, 66 AD3d 463, 480 [1st Dept 2009], *appeal dismissed* 14 NY3d 748 [2010]). "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Exarhouleas v Green 317 Madison, LLC*, 46 AD3d 854, 855 [2d Dept 2007]). In determining the motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Thus, if "it can be said that the evidence is such that it would not be utterly irrational for a jury to reach the result it has determined upon, and thus a valid question of fact does exist, the court may not conclude that the verdict is as a matter of law not supported by the evidence" (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493 499 [1978]).

"A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent

and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" *(Garrett v Manaser*, 8 AD3d 616, 617 [2d Dept 2004]). Moreover, "[a] contention that a verdict is inconsistent and irreconcilable must be reviewed in the context of the court's charge, and where it can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Rivera v MTA Long Is. Bus*, 45 AD3d 557, 558, 845 NYS2d 394 [2d Dept 2007]).

The court charged the jury:

> "An act or omission is regarded as a cause of an injury if it is a substantial factor in bringing about the injury, that is, if it had such an affect in producing the injury that reasonable people would regard it as a cause of the injury.
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> ****
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> "[I]f you find that the accountant was negligent that negligence must be the cause of the damages that [defendant] claims, and [defendant] must establish beyond the point of speculation and conjecture that there was a causal connection between its losses and [plaintiff's] actions."

Viewed in this light, it can not be said the jury verdict was either contrary to the weight of the evidence or inconsistent. The sole question with regard to causation was why ACS declined to fund defendant for 2007. However, among other things, neither side called anyone from ACS to provide evidence

of the reason for ACS' s decision and testimony from defendant's CEO downplayed the significance that ACS placed on the audit findings, with the CEO stating:

> "So there were 12 [audit] findings. They were very insignificant, petty and in a way outrageous that even the refunders, even the funders saw it that way. They could have really beaten us up on those 12. They didn't."

Thus, it was not utterly irrational for the jury to find that defendant did not establish "beyond the point of speculation and conjecture that there was a causal connection between its losses and [plaintiff's] actions." The jury could find that defendant failed to establish that but for plaintiff's negligence, ACS would have provided the funding *(see Cannonball Fund, Ltd. v. Marcum & Kliegman, LLP*, 110 AD3d 417 [1st Dept 2013]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13731 The People of the State of New York, Respondent, Ind. 6000/88

-against-

Willie Winbush, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

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

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Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about May 28, 2008, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points under the risk factor for the victim's physical helplessness. The record establishes that the victim was unconscious, and hence physically unable to communicate her lack of consent, at the time police officers observed defendant sexually assaulting her (*see* Penal Law § 130.00[7]). Contrary to defendant's argument, in order to assess points under this risk factor, it was not necessary to establish that the victim was physically helpless at the commencement of the sexual assault, because physical helplessness

contemplates unconsciousness or a physical inability to communicate unwillingness to an act at any time during a sexual assault. In any event, the record also supports the inference that the victim was unconscious from the outset of the attack.

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13732 The People of the State of New York, Ind. 2703/10
Respondent,

-against-

Erika Moore,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.,) rendered April 15, 2011, as amended December 14, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing her, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 7½ years, unanimously affirmed.

Defendant's claims pursuant to *Batson v Kentucky* (476 US 79 [1986]) are unpreserved, and we decline to review them in the interest of justice. In the first round of jury selection, defense counsel commented on the prosecutor's pattern of peremptory challenges. However, upon careful inquiry by the

court, defense counsel made it clear that he was not making a *Batson* application, or, to the extent he could be viewed as doing so, he was withdrawing the application. In the second round, defense counsel made a *Batson* application generally claiming a prima facie case of discrimination, but addressed only to a particular panelist whom the People had unsuccessfully challenged for cause, and then challenged peremptorily. When the court ruled that the People's reasons for their unsuccessful cause challenge clearly constituted nonpretextual reasons for a peremptory challenge as well, defense counsel remained silent, thereby failing to preserve the issue (*see People v Allen*, 86 NY2d 101, 111 [1995]). Moreover, he never alerted the court to his present claim that the court should have also directed the People to provide explanations for the peremptory challenges they had exercised on the first round, and that issue is likewise unpreserved (*see People v James*, 99 NY2d 264, 271 [2002]). As an alternative holding, we reject these claims on their merits. The court's ruling as to the panelist from the second round was supported by the record, and with regard to the first round, defendant did not properly develop the record or produce evidence sufficient to permit the court to draw an inference of unlawful discrimination.

The court properly exercised its discretion in receiving, with suitable limiting instructions, evidence of a contemporaneous uncharged sale to complete the narrative of events leading up to defendant's arrest, to explain why the observing officer targeted defendant and focused on her continuing activity, and to establish defendant's intent to sell the additional drugs recovered by the police (*see e.g. People v Toppy*, 68 AD3d 635 [1st Dept 2009], *lv denied* 14 NY3d 806 [2010]; *People v Flores*, 26 AD3d 196 [1st Dept 2006], *lv denied* 7 NY3d 756 [2006]; *People v Pressley*, 216 AD2d 202 [1st Dept 1995], *lv denied* 86 NY2d 800 [1995]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13733 Antonio Sanchez, Index 308214/09
Plaintiff-Appellant,

-against-

Dawn Draper, et al.,
Defendants-Respondents,

Laura Labriana,
Defendant.

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Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for appellant.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for Dawn Draper, respondent.

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Barry L. Manus of counsel), for Rameo Marquez, Jr. and Rosemary Magtibay, respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about July 10, 2013, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motions denied.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that he suffered serious injuries involving "significant" and "permanent consequential" limitation of use of his cervical and lumbar spine

when his car was rear-ended in a four-car motor vehicle accident. Defendants showed that plaintiff's injuries were not significant or permanent by submitting affirmed reports of an orthopedist and neurologist who found full range of motion and no signs of nerve damage. Defendants also submitted a radiologist's affirmed report asserting that the MRI of the 55-year-old plaintiff's cervical spine showed diffuse degenerative changes that preexisted the accident and no herniation.

In opposition, plaintiff raised an issue of fact by submitting the affirmed narrative report of his treating neurologist, who set forth plaintiff's history of progressively worsening symptoms, including limitations in range of motion expressed as a percentage of normal, and described his qualitative impairments. This assessment was supported by objective medical evidence, including the affirmed MRI reports finding herniated discs in the cervical spine and bulging discs in the lumbar spine, observations of muscle spasm and an abnormal EMG and nerve conduction test (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353 [2002]; *Cruz v Rivera*, 94 AD3d 576 [1st Dept 2012]). The neurologist's opinion that plaintiff's cervical and lumbar spine injuries were directly caused by the accident were sufficient to defeat summary judgment, given that defendants did not contest causation of the lumbar injury, and that their

orthopedist conceded the possibility of a cause and effect relationship between the history, as described by plaintiff, and the claimed spinal injuries (*see Mulligan v City of New York*, 120 AD3d 1155 [1st Dept 2014]; *McSweeney v Cho*, 115 AD3d 572 [1st Dept 2014]).

Plaintiff also submitted certified medical records of the physical therapy and chiropractic treatment he started receiving within days of the accident. Such evidence supports a finding of a causal connection between the accident and the injuries (*see Perl v Meher*, 18 NY3d 208 [2011]; *Angeles v American United Transp., Inc.*, 110 AD3d 639 [1st Dept 2013]; CPLR 4518[a]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13734- Ind. 1033/12
13735 The People of the State of New York,
Respondent,

-against-

Roberto Gonzalez,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

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Appeals having been taken to this Court by the above-named appellant from a judgments of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about September 4, 2012,

Said appeals 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 judgments so appealed from be and the same is hereby affirmed.

ENTERED: DECEMBER 9, 2014

CLERK

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

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13736 New York City Health & Hospitals Corporation, et al., Third-Party Plaintiffs-Appellants, Index 591183/09

-against-

Construction Force Services, Inc., et al., Third-Party Defendants-Respondents,

Construction Force Services, LLC, Third-Party Defendant.

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Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for Construction Force Services, Inc., respondent.

Quirk and Bakalor, P.C., Garden City (Debra Seidman of counsel), for C-Force System LLC, respondent.

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Order, Supreme Court, New York County (Kathryn Freed, J.), entered August 19, 2013, which granted third-party defendants' motions for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, and the motions denied.

The testimony provided by the third-party defendants that there was no agreement to procure insurance for third-party plaintiffs New York City Health & Hospitals Corporation (HHC) and/or the City established their prima facie entitlement to summary judgment (*see A & E Stores, Inc. v U.S. Team, Inc.*, 63

AD3d 486, 486 [1st Dept 2009]). The testimony provided by HHC's employee that it was his understanding that CFS Inc. would "provide insurance for the employees working on our sites," as well as the testimony of CFS Inc.'s insurance broker that its issuance of a certificate of insurance listing HHC as an additional insured to CFS Inc. demonstrated that CFS Inc. specifically requested such certificate, standing alone, may not have been sufficient to defeat summary judgment (*see Financial Structures Ltd. v UBS AG and UBS Sec. LLC*, 2014 NY Slip Op 30919[U], **7-9 [Sup Ct, NY County 2014]).

Yet, considering the totality of the circumstances (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]), this testimony, combined with certificates of insurance since 2004 stating that HHC was an additional insured under the third-party defendant's general liability insurance policy, and labor proposals since 1997 with "trade rates" that included an insurance item, raised issues of fact as to the existence of an oral agreement to procure insurance for HHC (*see Travelers Indem. Co. of Am. v Royal Ins. Co. of Am.*, 22 AD3d 252, 253 [1st Dept 2005]).

Although the parties provided conflicting testimony regarding the meaning of the "insurance term" in the labor proposals, "the question of contractual intent is largely one of

fact" (*Martin H. Bauman Assoc. v H & M Intl. Transp.*, 171 AD2d 479, 483 [1st Dept 1991]), and disputes over the terms of an oral contract often turn on issues of credibility (*see U.K. Cable Ventures v Bell Atl. Invs.*, 232 AD2d 294, 294-295 [1st Dept 1996], *lv dismissed* 89 NY2d 981 [1997]), thereby precluding summary judgment.

Sufficient evidence also exists to hold the third-party defendants liable as a single entity (*Shisgal v Brown*, 21 AD3d 845, 847-848 [1st Dept 2005]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13738 The People of the State of New York, Respondent, Ind. 1370/09 2932/12

-against-

Emanuel Zayas, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Bonnie Witner, J.), rendered on or about February 28, 2013, unanimously affirmed.

Application by appellant'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 appellant'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: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13740 The People of the State of New York, Ind. 5355/05
Respondent,
-against-

Carlos Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about June 12, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant's claim that he needed an interpreter at the hearing is unpreserved under the circumstances present (*see People v Ramos*, 26 NY2d 272, 274 [1970]), and we decline to review it in the interest of justice. Although defense counsel requested an interpreter, the court received information that defendant did not believe he needed one. The court offered to verify that information once defendant was produced in court, and expressly left the issue open. However, counsel had no further comment on this issue, and announced her readiness to proceed.

Accordingly, counsel effectively abandoned her request for an interpreter (*see People v Graves*, 85 NY2d 1024, 1027 [1995]). In any event, the record does not indicate that defendant lacked a sufficient understanding of English.

Defendant's argument regarding his request for an adjournment is academic, because it only relates to a possible assessment of points under a risk factor that played no part in the adjudication, and upon which no ruling was necessary (*see People v Pedraja*, 49 AD3d 325 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]).

The court properly applied the presumptive override for a prior felony sex crime conviction. The court did not conflate its determination regarding the presumptive override with its decision to depart upwardly. On the contrary, the court made it clear that these were alternative bases for a level three adjudication. In any event, both bases are supported by the record. Defendant has not established that his age, or any other factor, warrants a downward departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]), given defendant's serious criminal

history. We also note that defendant had already been adjudicated a level three offender based on the prior conviction that formed the basis for the presumptive override.

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13741N Melinda Sims, etc., et al., Index 152309/13
Plaintiffs-Respondents,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Appellants.

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Wallace D. Gossett, Brooklyn, for appellants.

Norman A. Kaplan, Great Neck, for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about June 3, 2013, which, to the extent appealed from as limited by the briefs, granted petitioners' application for pre-action disclosure of records of "mechanical malfunctions with respect to the movement [and/or] stopping of trains" operating on certain subway tracks within a specified thirteen-hour period, unanimously affirmed, without costs.

There is no reason to alter the court's discretionary determination that petitioners have potentially viable causes of action for negligence and mishandling of decedent's body, and that the information sought would materially assist them in

framing their complaint and identifying prospective defendants (*see Walker v Sandberg & Sikorski Corp. Firestone, Inc.*, 102 AD3d 415 [1st Dept 2013]; *Champion v Metropolitan Tr. Auth.*, 70 AD3d 587 [1st Dept 2010]; CPLR 3102[c]).

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

ENTERED: DECEMBER 9, 2014

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13742 In re Jermaine Haywood, Ind. 2605/13
[M-4382] Petitioner,

-against-

Hon. Melissa Jackson, etc.,
Respondent.

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Jermaine Haywood, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for respondent.

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

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

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

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

ENTERED: DECEMBER 9, 2014

CLERK