SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 10, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Freedman, J.P., Richter, Feinman, Gische, JJ.

10562 Old Republic Construction Insurance Agency of New York, Inc., Plaintiff-Respondent, Index 601168/10

-against-

Fairmont Insurance Brokers, Ltd., Defendant-Appellant.

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Babchik & Young LLP, White Plains (Jack Babchik of counsel), for appellant.

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 6, 2012, which granted plaintiff's motion for summary judgment on the issue of liability, and denied defendant's cross motion for summary judgment, deemed appeal from judgment, same court and Justice, entered February 7, 2013, in plaintiff's favor, and, so considered, said judgment unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for proceedings consistent herewith.

Even though defendant appealed from an order and not the ensuing final judgment, under CPLR 5520(c) this Court has the

discretion to address the liability issues (*see Robertson v Greenstein*, 308 AD2d 381 [1st Dept 2003], *appeal dismissed* 2 NY3d 759 [2004]). In any event, the order that was appealed incorrectly concluded that the hearing would be limited to the amounts invoiced pursuant to the agreement between the parties. Therefore this issue is properly before us.

Under the parties' Producer Agreement, pursuant to which defendant procured insurance for its clients through plaintiff, defendant is obligated to pay all insurance premiums, including those that plaintiff retroactively increased upon audit. Section 5.3 of the agreement states that "[defendant] guarantees to pay [plaintiff] *all premium* [*sic*] ... on any insurance placed or arranged for [defendant] by [plaintiff], irrespective of whether [defendant] has collected *such premiums* . . . from any customer or client of [defendant]" (emphasis added). Contrary to defendant's contention, the term "all premium" does not refer to the "initial premium" only. Accordingly, the court properly granted plaintiff summary judgment as to defendant's liability for the retroactive increases.

But it was incorrect for the court to proceed as though the invoices were correct and hold that defendant lacked standing to challenge plaintiff's calculation of the premium amounts due. Given that the Producer Agreement did not provide that defendant

waived any defenses and that the guarantee was unconditional, defendant was entitled to raise the insureds' defense that the audits were inaccurate and the increases were excessive under the policies (*see* Restatement [Third] of Suretyship & Guaranty § 34; *see also Sterling Natl. Bank v Biaggi*, 47 AD3d 436, 436-437 [1st Dept 2008]). Thus under CPLR 3212(f), defendant was entitled to disclosure about the audits that plaintiffs used to calculate the premium increases before damages were determined.

The Decision and Order of this Court entered herein on November 26, 2013 is hereby recalled and vacated.

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Richter, JJ.

10881 Madeline Yvonne Tims, etc., Index 111446/11
Plaintiff-Appellant,

-against-

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

_____

Ricardo E. Oquendo, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia Kern, J.), entered December 21, 2011, which denied plaintiff's motion seeking injunctive relief to bar defendant Office of the Chief Medical Examiner (OCME) from disclosing the cause and manner of death of her son, Pastor Zachery Tims, Jr., to the public, and granted the defendants' cross motion for summary judgment seeking a declaration that OCME may, upon inquiry, release the cause and manner of death, unanimously affirmed, without costs.

The parties agree that this appeal turns on the meaning of City Charter § 557(g), which concerns records kept by OCME for

the City of New York. This statute states that

> "[t]he chief medical examiner shall keep full and complete records in such form as may be provided by law. The chief medical examiner shall promptly deliver to the appropriate district attorney copies of all records relating to every death as to which there is, in the judgment of the medical examiner in charge, any indication of criminality. Such records shall not be open to public inspection."

Plaintiff, in seeking to prevent the OCME from releasing the cause and manner of death of her late son, contends that the final sentence of the statute, stating that "[s]uch records shall not be open to public inspection," modifies the whole paragraph, meaning that no records of the OCME are open to public inspection.

This argument is unavailing. The motion court correctly held that the final sentence modifies its last antecedent (1 Statutes § 254), providing that records delivered to the Office of the District Attorney due to indicia of criminality are to be kept confidential (*see e.g. Matter of Mitchell v Borakove*, 225 AD2d 435 [1st Dept 1996], *appeal dismissed* 88 NY2d 919 [1996]; *Matter of Assakf v Arden*, 210 AD2d 325 [2d Dept 1994]; *Matter of Mullady v Bogard*, 153 Misc 2d 1018 [Sup Ct, NY County 1992]; *Matter of English v Bohan*, 175 Misc 930 [Sup Ct, NY County 1940]), and that this sentence serves as no bar to the OCME

releasing, upon public inquiry, the cause and manner of death in the cases it investigates.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 10, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10964 In re Doron Zabari, Index 113155/11
Petitioner,

-against-

The New York City Department
of Environmental Protection,
Respondent.

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

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Determination of respondent, dated December 30, 2010 and affirmed on administrative appeal by order dated July 21, 2011, which, after a hearing, sustained a Notice of Violation against petitioner and imposed a fine in the amount of $3,200 against him for violating Administrative Code of City of NY § 24-231(a)(2) for excessive noise, 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 [Alice Schlesinger, J.], entered August 2, 2012), dismissed, without costs.

We find substantial evidence in the record to support respondent's determination that petitioner violated the New York City Noise Control Code (Administrative Code § 24-231[a][2]) by

allowing music from his store to reach an audible level inside the upstairs apartment of 50-51 decibels (dB), exceeding the 45 dB permissible limit in a frequency of 100 hertz (Hz) (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 180-182 [1978]). It is irrelevant that respondent's veteran inspector used the one-third octave noise meter for the first time at this inspection site; he testified he had previously received two days of training in its use and knew how it worked, and that it worked similarly to other noise meters. That the investigator was directed to contact his supervisor after taking the readings, rather than issue a violation immediately, does not, as petitioner suggests, render the measurements inherently suspect.

There is also no merit to petitioner's argument that the inspector deviated from standard procedure by testing the noise level at 100 Hz, a frequency not on the preprinted form; the form notably leaves room for an additional reading at another frequency. Petitioner's contention that the inspector should have taken lengthier readings of the ambient sound level when the music was off because the meter might have recorded a higher decibel level over time, was considered and appropriately rejected by the Administrative Law Judge. The inspector stated that a longer reading "could have" shown a higher level, but that

his three readings taken within one minute were consistent at 43 dB. In any event, a reading of 43 dB is a full two decibels lower than the maximum ambient level allowed of 45 dB.

Because the whole record contains substantial evidence for the Administrative Law Judge's determination that petitioner violated the Noise Code, judicial review is at an end (*see Matter of Acosta v Wollett*, 55 NY2d 761, 762 [1981]; *see also Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390 [1st Dept 2006]). Furthermore, the imposition of a $3,200 fine was well within the parameters of the range of fines mandated for an initial violation of Administrative Code § 24-231(a) (*see* Administrative Code § 24-257), and does not shock the judicial conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

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

ENTERED: DECEMBER 10, 2013

CLERK

Andrias, J.P., Acosta, Saxe, Renwick, Manzanet-Daniels, JJ.

11038 Nina W., an Infant, by Nina Marisol F., Her Mother, Plaintiff-Appellant, Index 350363/08

-against-

NDI King Limited Partnership, et al., Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Callan, Koster, Brady & Brennan LLP, New York (Stuart Bernstein of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 27, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, born April 25, 2002, suffers from mental retardation and cerebral palsy. She is unable to walk and is dependent on others for everything.

On December 22, 2007, plaintiff was sleeping in the bottom bed of a bunk bed in the apartment in which she resided when her face and hand came into contact with a baseboard radiator for an unknown length of time and were severely burned. Plaintiff, by her mother, commenced this action against the landlord and managing agents on the theory that the occurrence was caused by

their negligence.

Defendants moved for summary judgment, arguing that they did not have a duty to provide covers for baseboard radiators. Relying on the Court of Appeals' decision in *Rivera v Nelson Realty, LLC* (7 NY3d 530 [2006]), Supreme Court granted the motion, finding, among other things, that "[t]he fact that defective radiator covers were removed from plaintiff's apartment by the superintendent and not replaced does not create a duty to provide radiator covers when no such duty to provide radiator covers existed at that time." We now reverse.

In *Rivera*, a three-year-old child was injured when he climbed onto an uncovered radiator in his parents' bedroom. Before the accident, the parents had told the defendants that the radiators were dangerous to their young children, but the defendants had refused their requests for radiator covers due to the expense. The Court of Appeals held that "the landlord of a home where children live does *not* have a common-law or other duty to provide or install radiator covers" (7 NY3d at 532). In so ruling, the Court reasoned that "*Basso* [*Basso v Miller*, 40 NY2d 233 (1976)] did not abrogate the common-law rule that, with some exceptions, a landlord is not liable to a tenant for dangerous conditions on the leased premises, unless a duty to repair the premises is imposed by statute, by regulation or by contract" (7

NY3d at 534). The Court found that no duty to repair arose under Multiple Dwelling Law § 78, which requires a landlord to maintain its premises in a safe condition, because the plaintiffs did not claim that the radiator needed repair or was defective in any way. However, there are numerous factors which distinguish this case from *Rivera*.

Unlike *Rivera*, plaintiff was not injured on a freestanding radiator. Rather, she was injured on a baseboard heating unit, comprised of thin strips of metal or fins attached to a pipe, which ran along a length of wall. While there is no indication that the radiator in *Rivera* was ever covered or intended to be covered, in this case, when shown a photograph of the subject baseboard heating unit at his deposition, the building superintendent testified that the exposed elements were supposed to be covered and that the cover snapped into the L-shaped bracket depicted in the photograph.

Further, plaintiff alleges that the dangerous condition was caused by defendants' actions, rather than omissions, and that the radiator was defective and in need of repair. Plaintiff's bill of particulars alleges that "[p]laintiff was burned by an uncovered baseboard heating unit that Defendant removed prior to the accident but never replaced." Plaintiff's supplemental bill of particulars alleges that the uncovered baseboard heating unit

existed for at least six months before the accident "and was created by the Defendants by removing the covers."

In her affidavit in opposition to defendants' motion, plaintiff's mother explained that when she moved into the apartment, the baseboard radiators "came with covers" and that she asked the building superintendent to remove the one from plaintiff's bedroom because it was "rusty, bent and sharp in places, and on a few occasions scratched the legs of [her] children." As a result, the superintendent removed the radiator cover in the spring or summer of 2007 "to make the repair," stating that he would fix and reinstall the cover "within a couple of days."

The mother further stated that after the cover was removed, a hazardous condition continued to exist in that "[t]he exposed radiator element under the cover was itself sharp in places, so [she] told the super that [she] needed the cover back right away so [plaintiff] and [her] other children did not injure themselves." The mother claimed that during the approximately six months between the removal of the cover and the accident, she spoke with the superintendent and the management companies multiple times and that on each occasion they assured her that the covers would be reinstalled within a few days. When they failed to reinstall the covers, she complained to the City of New

York Department of Housing Preservation and Development (HPD). Plaintiff submitted an affidavit by her brother that corroborated her mother's account of the removal of the radiator cover, her complaints to defendants, and defendants' promises to reinstall the cover. At his EBT, the brother testified that the building took the cover off because it was rusty and sharp and there was a leak in the house.

In addition to the foregoing, the lease states that "Owner will provide . . . heat as required by the law [and], repairs to the apartment, as required by law." The landlord also expressly retained the right to re-enter the apartment to make repairs. Unlike the plaintiff in *Rivera,* plaintiff submitted evidence of a violation of Administrative Code of the City of New York § 27-2005, which requires that "[t]he owner of a multiple dwelling shall keep the premises in good repair (subd [a])," based on an inspection of the baseboard heating units that HPD conducted approximately two months before the accident. Plaintiff's bill of particulars alleges that on October 13, 2007, HPD inspected the apartment and sent a notice of violation to defendants stating that the building was in violation for their failure to replace the missing baseboard covers in the entire apartment. A violation summary report prepared by HPD indicates that, on October 16, 2007, a notice of violation was issued to the

building that stated, "§ 27-2005 ADM code replace with new the missing cover to baseboard heaters in the entire apartment located at apt 3C."

By virtue of the foregoing, plaintiff raised issues of fact whether defendants, through a course of conduct, assumed a duty to cover the baseboard heating unit (*see generally Volpe v Hudson View Assoc., LLC*, 109 AD3d 814 [2d Dept 2013]), whether defendants created an unsafe condition by removing the baseboard heating unit's cover and leaving the unit uncovered, and whether the uncovered unit needed repairs or was defective in any way. On the full record before us, the alleged differences between the mother's deposition testimony and her affidavit in opposition to defendants' motion for summary judgment merely serve to raise questions of fact (*see Bosshart v Pryce*, 276 AD2d 314 [1st Dept 2000]).

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11289 The People of the State of New York, Respondent, Ind. 6043/08

-against-

Jason Mercado, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered June 6, 2011, as amended October 4, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 19 years, unanimously affirmed.

The verdict was supported by 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 credibility determinations.

The court properly charged manslaughter in the first degree as a lesser included offense of murder in the second degree since there was a reasonable view of the evidence that defendant

intended to cause serious physical injury as opposed to death (*see People v Butler*, 57 NY2d 664 [1982], *revg on dissenting op of Sandler, J.*, 86 AD2d 811, 814-815 [1982]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, JJ.

11290 Morad Associates, LLC., Index 108911/09
Plaintiff-Respondent,

-against-

Jay Sung Lee,
Defendant-Appellant.

_____

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for appellant.

Baxter, Smith & Shapiro, P.C., Hicksville (Margot Ludlam of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about October 9, 2012, which, in this action alleging legal malpractice, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The evidence submitted by defendant attorney, while showing that he may not be liable for a large measure of the damages assessed against plaintiff, failed to establish as a matter of law that his alleged negligence was not the cause of at least some of those damages. In addition to the damage to the property of plaintiff's tenant, plaintiff was also assessed damages for

wrongful eviction for which defendant may be held liable. We find no basis for holding defendant liable for any damages plaintiff incurred when its agents destroyed the tenant's property.

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11292 Sheri Gellman, et al., Index 109956/11
Plaintiffs-Respondents,

-against-

Eleni Henkel, et al.,
Defendants-Appellants.

_____

Pohl LLP, New York (David M. Pohl of counsel), for appellants.

Ballard Spahr Stillman & Friedman, LLP, New York (Julian W. Friedman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 10, 2012, which granted plaintiffs' motion to dismiss the counterclaims, brought pursuant to CPLR 3211(a)(5), to the extent of dismissing defendants' first, second, third, and fourth counterclaims, unanimously affirmed, without costs.

In this action arising out of defendant's prior employment with plaintiff SGG Partners Inc. (SGG), defendants' first four counterclaims, in which defendant Henkel alleges that plaintiffs failed to compensate her under certain oral agreements, are barred by the doctrine of res judicata since there is a judgment on the merits from a prior action between the same parties involving the same subject matter (*see Henkel v Gellman and SGG Partners, LLC*, Sup Ct, NY County, May 18, 2011, Fried, J., index No. 652411/10). Contrary to defendants' argument, the fact that

some of the theories asserted in this action differ from the theories asserted in the first action is of no moment, since the claims arise out of the same transaction (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). Since defendant Henkel concedes that her performance at SGG was completed during the prior action, and that she resigned from SGG prior to the disposition of that action, she could have raised the issue for breach of the alleged profit-sharing agreement in the prior action.

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 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11293 - 11293A — Index 101637/11

Joseph Silicato, et al.,
Plaintiffs-Appellants,

-against-

Skanska USA Civil Northeast Inc., et al.,
Defendants,

New York City Department of Environmental Protection,
Defendant-Respondent.

_____

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for appellants.

London Fischer, LLP, New York (James Walsh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered October 1, 2012, which, to the extent appealed from as limited by the briefs, granted defendant-respondent New York City Department of Environmental Protection's motion to dismiss the complaint as against it for failure to serve the City of New York with a notice of claim pursuant to General Municipal Law § 50-e, and order, same court and Justice, entered June 6, 2013, which, upon granting plaintiffs' motion to renew, adhered to its afore-mentioned October 1, 2012 determination, unanimously affirmed, without costs.

In this action seeking to recover for personal injuries

suffered by plaintiff Joseph Silicato in the course of a construction project, plaintiffs' service of a notice of claim on the law department of a City agency failed to satisfy the requirements of General Municipal Law § 50-e(3)(a). The statute permits service on the "person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation." The New York City Comptroller and the Corporation Counsel are persons designated to receive service of process (Administrative Code § 7-201[a]; CPLR 311[a][2]), and, as a rule, the Corporation Counsel is the "attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies" (NY City Charter § 394[a]). While we have recognized in particular cases that an attorney who is actually representing a public corporation in the very matter in issue may be an appropriate person to receive service of a notice of claim (*Rosenbaum v City of New York*, 24 AD3d 349, 353-354 [1st Dept 2005], *revd on other grounds* 8 NY3d 1 [2006]; *Losada v Liberty Lines Tr.*, 155 AD2d 337 [1st Dept 1989]), in the instant matter involving Labor Law and negligence causes of action, the Corporation Counsel ordinarily represents the City and service on the agency's legal department was therefore ineffective (*see*

Khela v City of New York, 91 AD3d 912 [2d Dept 2012]; *Acevedo v City of N.Y. Dept. of Transp.*, 227 AD2d 245 [1st Dept 1996]; *Herrera v Duncan*, 13 AD3d 485 [2d Dept 2004]).

There is no basis for finding estoppel (*Acevedo*, 227 AD2d at 245), and plaintiff did not establish a basis for excusing a defect in service under General Municipal Law § 50-e(3)(c).

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11294 The People of the State of New York, Respondent, Ind. 1706/10

-against-

Teofilo Reyes, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at suppression hearing and request for new counsel; Roger S. Hayes, J. at jury trial and sentencing), rendered January 5, 2012, as amended January 18, 2012, convicting defendant of burglary in the second degree (three counts) possession of burglar's tools (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

After sufficient inquiry, the court properly exercised its discretion in denying defendant's request for assignment of new counsel, since defendant did not establish good cause for a substitution (*see People v Linares*, 2 NY3d 507 [2004]; *see also People v Nelson*, 7 NY3d 883 [2006]). Defendant received a full

opportunity to elaborate on his reasons for the request. His nonparticularized lack of confidence in his third assigned attorney did not warrant substitution (*see People v Sawyer*, 57 NY2d 12, 19 [1982], *cert denied* 459 US 1178 [1983]; *People v Medina*, 44 NY2d 199, 208-209 [1978]), and his assertion that his attorney never spoke with him was contradicted by other portions of defendant's colloquy with the court.

The court properly denied defendant's suppression motion. Defendant's generalized argument that the police lacked probable cause for his arrest failed to preserve his present contentions, none of which were raised at the suppression hearing (*see People v Tutt*, 38 NY2d 1011 [1976]), and we decline to review them in the interest of justice. As an alternative holding, we find that the police, who relied on a wanted poster, had reasonable suspicion that justified stopping and frisking defendant, and

that defendant's argument concerning the adequacy of an informant's basis of knowledge is unavailing (*see People v Herold*, 282 AD2d 1, 4-5 [1st Dept 2001], *lv denied* 97 NY2d 682 [2001]).

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11295 The Apparel Corporation (Far East), Index 653361/11
Plaintiff-Respondent,

-against-

H.J.M. Int'l Corp., etc.,
Defendant-Appellant,

Eagle Express Lines, Inc., et al.,
Defendants.

_____

Joel S. Ray, Astoria, for appellant.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 16, 2012, which, insofar as appealed from as limited by the briefs, denied defendant H.J.M. Int'l Corp.'s motion to dismiss the first and second causes of action as against it, unanimously reversed, on the law, with costs, and the motion granted.

The very bills of lading on which the first and second causes of action are based conclusively establish H.J.M.'s defense to those causes of action (*see Goshen v Mutual Life Ins.*

Co. of N.Y., 98 NY2d 314, 326 [2002]). The bills of lading fail to show that H.J.M. had anything to do with the shipments they describe.

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11298 The People of the State of New York, Ind. 4169/11
Respondent,

-against-

Mihaly Kovacsezics,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber 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 (Charles S. Solomon, J.), rendered on or about April 3, 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 10, 2013

CLERK

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

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11301 Daisy Lee, Index 109210/09
Plaintiff-Respondent,

-against-

Cornell University, et al.,
Defendants-Appellants.

_____

Wade Clark Mulcahy, New York (Paul F. Clark of counsel), for appellants.

Gina M. Angelillo, New York, for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered January 29, 2013, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint to the extent it alleged that plaintiff suffered serious injuries under the "significant" and "permanent consequential" limitation of use categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff pedestrian was injured when she was struck by a vehicle owned by defendant Cornell University and operated by defendant Fabrikant. Defendants submitted an affirmation of an orthopedist, who examined plaintiff and reviewed her medical records, and concluded that she had not sustained a serious injury within the meaning of Insurance Law § 5102(d).

In opposition, plaintiff raised an issue of fact as to her

claimed injuries to her cervical and lumbar spines by submitting, inter alia, the affirmation of the orthopedic surgeon who treated her following the accident. The surgeon averred that plaintiff had limitations in range of motion shortly after the accident and upon recent examination, that he had reviewed MRIs taken of the affected areas and found bulging and herniated discs, and that the injuries were caused by the accident. Regarding defendants' reference to the gap in plaintiff's treatment, plaintiff's doctor concluded, after a series of examinations, that any further treatment would be palliative and prescribed exercises, which plaintiff continues to perform at home (*see Pommells v Perez*, 4 NY3d 566, 577 [2005]; *Ayala v Cruz,* 95 AD3d 699 [1st Dept 2012]).

As the motion court determined, since plaintiff raised a triable issue with respect to the injuries to her lumbar and cervical spines, it was not necessary to determine whether her other claimed injuries met the threshold (*see Linton v Nawaz*, 14 NY3d 821 [2010]). "Once a jury determines that plaintiff has met the threshold for serious injury, the jury may award damages for

all of plaintiff's injuries causally related to the accident, even those not meeting the serious injury threshold" (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

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

ENTERED: DECEMBER 10, 2013

CLERK

Corrected Order - December 12, 2013

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11303 The People of the State of New York, Ind. 2094/11
Respondent,

-against-

Peter Sweatman,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed 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 (Curtis Farber, J.), rendered on or about December 20, 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 10, 2013

CLERK

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

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11305 The People of the State of New York, Respondent, Ind. 3450/07

-against-

Felix Velez, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered November 21, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

The court properly denied defendant's request for a missing witness charge, since there was no evidence that the uncalled officer could have provided material, noncumulative testimony. The trial evidence failed to establish that this officer was in a position to see the transaction (*see People v Dianda*, 70 NY2d 894 [1987]; *People v Brunner*, 67 AD3d 464, 465 [2009], *affd* 16 NY3d 820 [2011]; *compare People v Kitching*, 78 NY2d 532, 538 [1991]). The court accorded defendant sufficient scope in which to comment in summation on this officer's absence, and it properly exercised its discretion in limiting defense arguments on this issue. In

any event, we find that any error in the court's denial of a missing witness charge or in its limitations on defendant's summation was harmless (*see People v Thomas*, 21 NY3d 226, 231 [2013]).

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11306 In re Abigail Bridget W.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Janice Antoinette W.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Marion C. Perry , New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Rhoda Cohen, J.), entered on or about September 13, 2012, which, upon a fact-finding determination that respondent mother suffers from a mental illness, terminated her parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Petitioner met its burden of proving by clear and convincing evidence that respondent is mentally ill within the meaning of Social Services Law § 384-b(4)(c) and (6)(a) (*see Matter of Joyce T.*, 65 NY2d 39 [1985]; *Matter of Genesis S. [Irene Elizabeth S.]*, 70 AD3d 570 [1st Dept 2010]). As a result of respondent's illness, she is unable, at present and for the foreseeable

future, to provide proper and adequate care for the subject child. The court properly relied upon the unrebutted court-appointed expert's diagnosis and testimony as to the nature and severity of respondent's mental illness, which was based, among other things, on her evaluation of respondent and her review of the relevant medical and foster care records (*see Matter of Mar De Luz R.*, 95 AD3d 423 [1st Dept 2012]). Further, respondent's testimony demonstrated, among other things, a lack of insight into her mental illness, as well as her compromised ability to care for the child. In addition, respondent was unable to establish compliance with prescribed medication needed to control her illness (*id.*).

The court correctly dispensed with a dispositional hearing, which was not required since this is a case of termination for mental illness (*see Matter of Joyce T.*, 65 NY2d at 46-50; *In re Jeremiah M.*, 109 AD3d 736, 737 [1st Dept 2013]).

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11307N Claudia Jenkins, Index 309361/08
Plaintiff-Respondent,

-against-

Trustees of the Masonic Hall
and Asylum Fund, et al.,
Defendants-Appellants.

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Ryan, Brennan & Donnelly LLP, Floral Park (John O. Brennan of counsel), for appellants.

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered May 24, 2013, which, to the extent appealed from as limited by the briefs, in this action for personal injuries, denied defendants' motion to compel plaintiff to provide additional post-note of issue discovery, unanimously affirmed, without costs.

The court did not abuse its discretion in denying defendants' motion to compel plaintiff to provide additional post-note of issue discovery and to appear for an additional deposition (*see generally 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]). There is no basis for disturbing the court's determination that plaintiff had fully complied with its prior discovery order and defendants' subsequent discovery demands, and defendants fail to identify any specific information that had not yet been made available.

Furthermore, the court did not abuse its discretion in determining that a third deposition of plaintiff was not warranted, since defendants had a sufficient opportunity to inquire into the relevant matters during plaintiff's prior depositions.

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 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11308N GoSMILE, Inc., etc., Index 601148/09
Plaintiff-Appellant,

-against-

Dr. Jonathan B. Levine,
Defendant-Respondent.
- - - - -
[And a Third Party Action]

Rakower Lupkin PLLC, New York (Jonathan D. Lupkin of counsel), for appellant.

Davidoff Hutcher & Citron LLP, New York (Joshua Krakowsky of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered August 1, 2012, which denied plaintiff's motion, pursuant to CPLR 3104(d), to reject the decision and order of the Special Referee, dated April 6, 2012, denying its motion to compel production of documents postdating January 28, 2009, unanimously affirmed, without costs.

Plaintiff's first demand for production of documents was dated May 4, 2009. In his June 2, 2009 response to that demand, defendant objected to the extent the demand had no time limits, and stated that he construed the request to seek documents generated before January 28, 2009, the date on which the action was commenced. When plaintiff subsequently served new discovery demands, seeking documents generated before March 29, 2010, defendant's response incorporated by reference the objections

raised in his June 2, 2009 response to plaintiff's initial demand. Plaintiff subsequently acknowledged that defendant's rolling document production was completed on August 2, 2010. On November 15, 2010, the Special Referee instructed the parties to file letter briefs outlining all discovery disputes. Plaintiff's extensive letter brief, filed on or about December 9, 2010, did not object to defendant's withholding of documents generated after January 28, 2009. By order entered February 28, 2011, the Special Referee resolved the parties' stated discovery disputes. Thereafter, on February 28, 2012 - more than 2½ years after defendant first asserted the temporal objection to plaintiff's document demand, 14½ months after the date by which the Special Referee had instructed plaintiff to file a letter brief addressing all outstanding discovery disputes, and one year after the Special Referee entered an order resolving all such disputes - plaintiff for the first moved to compel defendant to produce documents generated after January 28, 2009. The Special Referee denied the motion, and Supreme Court upheld that determination.

Under the circumstances, and in view of the broad discretion with which the trial court is vested to supervise the discovery process (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223 [1st Dept 2003]), we find that Supreme Court, adopting the view of the Special Referee, providently

denied plaintiff's motion to compel defendant to produce documents generated after January 28, 2009, on the ground that the request for such production came 2½ years too late. The record supports the Special Referee's conclusion, adopted by Supreme Court, that "the delay [in seeking to compel], coupled with the absence of any rational reason or excuse, is nothing less than a constructive waiver to compel compliance of an original demand made in June 2009, and rejected by defendant" (*see Pierson v N. Colonie Cent. School Dist.*, 74 AD3d 1652, 1654 [3d Dept 2010], *lv denied* 15 NY3d 715 [2010]). The record also supports Supreme Court's conclusion that defendant's June 2, 2009 temporal objection had never been withdrawn and, therefore, had been continuously outstanding until plaintiff belatedly challenged it on February 28, 2012.

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

ENTERED: DECEMBER 10, 2013

CLERK

Tom, J.P., Friedman, Acosta, Moskowitz, Gische, JJ.

11309-
11310 &
[M-4547 &
M-4986] In re Kevin Clark,
Petitioner,

-against-

Hon. Martin Rettinger, et al.,
Respondents.

Ind. 5544/87

Kevin Clark, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Garrett Coyle of counsel), for Hon. Martin Rettinger, respondent.

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

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for Robert T. Johnson, respondent.

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

And a cross motion having been made on behalf of respondent Hon. Martin Rettinger to dismiss the petition,

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, the cross motion granted and the petition dismissed, without costs or disbursements.

ENTERED: DECEMBER 10, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Freedman, Clark, JJ.

10529 The People of the State of New York, Dkt. 43587C/10
Respondent,

-against-

Victor Soto,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered March 10, 2011, reversed, on the law, and the matter remanded for a new trial.

Opinion by Acosta, J. All concur except Mazzarelli, J.P. and Clark, J. who dissent in an Opinion by Clark, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman
Darcel D. Clark, JJ.

10529
Dkt. 43587C/10

_____x

The People of the State of New York,
Respondent,

-against-

Victor Soto,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered March 10, 2011, convicting him, after a jury trial, of aggravated driving while intoxicated and driving while intoxicated, and imposing sentence.

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

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen and Stanley R. Kaplan of counsel), for respondent.

ACOSTA, J.

The decision whether to admit a declaration against penal interest as an exception to the hearsay rule requires, among other factors, that the declarant be aware at the time of its making that the statement was contrary to his or her penal interest. The issue in this case is whether a statement in which an individual admits to conduct constituting an offense is a statement against penal interest, where the individual believes that the conduct may be illegal but does not know whether it is or not. It arose in the context of a DWI case where the defense was that defendant, who was intoxicated, was not the driver of the car, but a passenger. Specifically, the driver, a 19-year-old woman with no prior criminal history and only a learner's permit, who met defendant approximately eight hours earlier, made a statement to a defense investigator indicating that she, and not defendant, was driving defendant's car at the time it collided with a parked car, but refused to testify at trial on Fifth Amendment grounds. We find that the statement was a declaration against penal interest notwithstanding that some of the witness's apprehension in making the statement was based on her fear that her parents would learn of her involvement with defendant or that, as the court noted, her exposure to criminal liability was relatively minor. The court therefore erred in

keeping the statement out.

On July 11, 2010, at approximately 12:00 a.m., Peter Batista was sitting on the front porch of his house, when he saw a black Nissan Versa pass by four times. On the second or third pass, with the car traveling at approximately 15 miles per hour, he saw defendant in the driver's seat. According to Batista, there was no one else in the car. The porch was approximately 10 feet from the curb. After the car passed Batista's house a fourth time, it collided with a parked car approximately 50 or 60 feet further down the block.

Batista approached the driver's side of the car, which took him approximately 10 seconds. He testified that during that time, he never lost sight of the car. As he approached, he saw defendant seated in the driver's seat. The radio was turned up, and defendant was "dancing" in his seat. He stated that there was no one else in the car and no one got out of the car during the 10 seconds it took for Batista to get from his porch to the location where the car was stopped. Batista called 911.

The police arrived five to seven minutes after the collision and arrested defendant. Police Officer Orlando Gonzalez detected a strong odor of alcohol on defendant's breath and noticed that defendant's eyes were bloodshot and watery, and his speech was slurred. A breath analysis test as well as a coordination test

were administered at the station during which defendant stated "I started drinking when I got lost. I f...ed up. I couldn't drive for shit." The breath test revealed a blood alcohol level of .22. The administration of this test was memorialized on videotape and that tape was played for the jury.

Defense witness Lamar Larson testified that, like defendant, he was a New York City bus driver, and had known defendant for approximately nine years. He was working the night shift and went to the Pelham Bay Diner at approximately 11:45 p.m. on July 11th to pick up something to eat during his shift. As he pulled into the parking lot, he saw defendant's car. Larson approached the car and saw defendant and a young lady in it. The young lady was in the driver's seat and defendant was in the passenger seat. Defendant got out of the car and he and Larson had a brief conversation. Larson could tell that defendant was drunk. Defendant's speech was slurred and he was unsteady on his feet. After this brief conversation, defendant got back into the passenger seat of the car. Larson leaned into the car and said "make sure he gets home safe." The female responded that she would. Larson saw the car leave the parking lot with the female driving it.

On July 22, 2010, approximately two weeks after the accident and seven months before the trial, Janny Hunt told defendant's

investigator that she was the driver of the car at the time of the crash. The investigator wrote out a statement based on what Hunt had told her and Hunt signed it. In her written statement, Hunt described meeting defendant on the bus he drove; agreeing to meet him that evening; getting picked up in his car; and going to a diner, where, after Hunt agreed to drive so that defendant could drink, defendant consumed four mixed drinks and two beers. After leaving the diner, the two met defendant's friend Lamar in the parking lot and Lamar asked Hunt to drive defendant home safely. She agreed, but a short time later, took a turn "too fast" and hit the parked Impala. Hunt further stated that after she and defendant got out of the car, defendant yelled and cursed at her.

> "I got scared. I was like, 'oh shit.' It was late. My parents didn't know I was out with [defendant]. I was scared of the whole situation. I said to [defendant] 'I have to go I'm sorry. I can't talk to you now. I can't talk to someone who's been drinking.' [Defendant] was busy looking at his car and he waved me to leave."

Hunt took a cab home. About a week later, Hunt saw defendant on a public bus. He told her he had been arrested probably because they thought he was driving. He asked her to help him out and she agreed.

Defense counsel had indicated in his opening statement that

he would call Hunt as a witness. During the trial, the prosecutor suggested that the court appoint an attorney for Hunt because her anticipated testimony would be an admission to "[l]eaving the scene of an accident and also a traffic infraction." The court agreed and appointed an attorney.

Anticipating that Hunt would invoke her right to remain silent, defense counsel asked the People to grant Hunt immunity and indicated that if the People refused, he would move to dismiss the charges. Counsel argued that since the witness was the sole source of material, exculpatory information, granting Hunt immunity was necessary to protect defendant's right to a fair trial. The court stated that defendant was free to call Hunt as a witness, and that she was free to invoke the Fifth Amendment right against self-incrimination. The court further stated that it did not "see that the People are going to . . . give her immunity if she, in fact, committed this crime instead of your client." After indicating that it was not inclined to grant defendant the remedy he was seeking should the People refuse to grant immunity, the court stated that the issue could be revisited.

After the close of the People's case, and after Larson had testified, Hunt's attorney invoked the Fifth Amendment on her behalf. Defense counsel then asked the prosecutor to grant Hunt

transactional immunity, but the People refused to do so.

Defense counsel asked the court to dismiss the case against defendant. Counsel argued that in light of Hunt's invocation of her Fifth Amendment rights and the refusal of the prosecutor to grant immunity, proceeding with the trial would violate defendant's rights to due process and to put on a defense. The court declined to grant the application to dismiss.

Defense counsel then requested that Hunt's statement be admitted as a declaration against penal interest. Focusing on whether Hunt's statement satisfied the requirement that the declarant be aware that her statement was against her penal interest at the time she made it, the court ordered a hearing outside the presence of the jury, at which the investigator who took Hunt's statement, would testify.

The investigator testified that Hunt met with her on July 22, 2010. Hunt first gave a verbal account of her actions on the evening of the accident, after which the investigator asked her if she could take some notes, and if Hunt would sign the notes "as her words." Before the statement was prepared, Hunt expressed concern that "she would potentially get in trouble for the things she was saying." The investigator testified that Hunt asked her "again and again" if she was a lawyer, and "asked if I could put her in touch with a lawyer." "She told me she wanted

to ask a lawyer the questions that I couldn't answer for her."

The investigator did not tell Hunt "anything about the specific trouble she might get into," but told her that she would give her defense counsel's telephone number. The investigator did not mention Vehicle and Traffic Law § 600 – which prohibits leaving the scene of an accident – or driving without a license. Despite her concerns, Hunt agreed to let the investigator record her account in a written statement. After the statement was written down, Hunt reviewed it and signed it.

The following exchange occurred on redirect examination:

"Q. When Ms. Hunt first came into the office and sat down with you before anything was ever written to you at this point, did she have any concerns that she expressed to you?

. . . .

"A. . . . [A]t the beginning of the statement, no she did not express any concerns. They came out at the end.

"Q. Then at the point where she expressed those concerns to you, what specifically did she say that she was concerned about?

"A She asked if she could get in trouble for the accident. She asked she was concerned about her parents kind of finding out about the accident because she was in the car. She wasn't driving her own car. And just generally like how much trouble [s]he can get into.

"And – I said that I was unaware of that and I could advise her to go to another attorney."

After discussion with counsel, the court expressed the view

that the statement did not meet the requirement that the declarant be aware, at the time of the declaration, that the statement was against her penal interest:

> "I think the whole hearsay question depends upon the assurance of reliability that comes from the person's awareness that what they are saying could get them in trouble of the law. You don't have that counsel.
>
> "[With] your own witness's testimony, you don't have any expression of that awareness until after the statement is given."

The court found that under these circumstances the "reliability assurance that you have in a statement against penal interest" was not present.

After considering further argument, the court ruled that Hunt's statement was not admissible under the hearsay exception, relying on *People v Maerling* (46 NY2d 289 [1978]), for the proposition that "the interest which the declaration compromises must be one of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify" (*id.* at 298). The court noted that the court itself had to look up the Vehicle and Traffic Law provision regarding leaving the scene of an accident where there is only property damage. The court observed that "[t]he cases where declarations against penal interest come in . . . are of a[n] enormous magnitude, admissions to murder, admissions to being an accomplice, admissions to

possessing dynamite." Further, the court concluded, "I do not believe that she, either at the time she made it or even immediately following, assuming that that's considered contemporaneous, was aware that her declarations could expose her to prosecution for a traffic offense."

Defendant was ultimately convicted of aggravated driving while intoxicated and driving while intoxicated after several days of deliberations.

The rationale for the admission of declarations against penal interest "is that such assurance flows from the fact that a person ordinarily does not reveal facts that are contrary to his own interest" (*People v Maerling*, 46 NY2d at 295).

> "[B]efore statements of a nontestifying third party are admissible as a declaration against penal interest, the proponent must satisfy the court that four prerequisites are met: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction, or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability"

(*People v Brensic*, 70 NY2d 9, 15 [1987]; *see People v Ennis*, 11 NY3d 403, 412-413 [2008], *cert denied* 556 US 1240 [2009]). Third-party statements used against the accused are subject to a stricter standard (*Bresnic* at 15; *see People v Deacon*, 96 AD3d 965, 968 [2d Dept 2012], *appeal dismissed* 20 NY3d 1046 [2013],

and "testimonial" declarations against penal interest, such as a plea allocution of nontestifying codefendant used to implicate defendant are *Crawford v Washington* (541 US 36 [2004]) violations and therefore inadmissible (see People v Hardy, 4 NY3d 192, 194 [2005]). "[D]eclarations which exculpate a defendant [however] . . . are subject to a more lenient standard, and will be found 'sufficient if [they] establish[ ] a reasonable possibility that the statement might be true" (*People v Deacon*, 96 AD3d at 968, quoting *People v Settles*, 46 NY2d 154, 169–170 [1979]; *see also People v McFarland*, 108 AD3d 1121 [2013]). "Depriving a defendant of the opportunity to offer into evidence another person's admission to the crime with which he or she has been charged, even though that admission may only be offered as a hearsay statement, may deny a defendant his or her fundamental right to present a defense" (*People v Deacon*, 96 AD3d at 968 [internal quotations omitted]).

Here, we find that all four factors were satisfied. The first and third factors are straightforward. Hunt, exercising her Fifth Amendment right, refused to testify at trial and was therefore unavailable. With respect to the third factor, Hunt stated that she was present and therefore had competent knowledge of the underlying facts.

Contrary to the dissent, the second factor, although more

problematic, was also satisfied. In this regard, we hold that regardless of whether Hunt was specifically aware that the conduct she admitted constituted a violation of Vehicle and Traffic Law § 600, which prohibits an operator of a motor vehicle who causes property damage from leaving the scene, or whether she was specifically aware that she faced a penalty of up to 15 days' imprisonment and a fine for that offense, the evidence established that her statement satisfied this hearsay exception. Her expressions, at the time of or immediately after her statement, of apprehension that she could get in trouble for her conduct, including repeated inquiries about consulting with a lawyer, sufficed to satisfy the requirement that "the declarant must be aware at the time of its making that the statement was contrary to his [or her] penal interest" (*People v Brensic*, 70 NY2d at 15).

The court thus improperly placed too much weight on the fact that Hunt did not express concerns about the consequences of her statement until she made it to the investigator. Not only is it unreasonable to conclude – based on exactly when they were expressed – that the concerns that prompted Hunt to repeatedly inquire about consulting a lawyer materialized after she told the investigator her story but were absent minutes before, the court's understanding that Hunt did not express any concerns

until after she signed the statement is not accurate. The investigator's testimony indicates that Hunt first expressed concerns after giving her verbal account but before the preparation and signing of the statement. In any event, the timing of Hunt's expressions of concern do little to undermine the inference that she had the apprehensions when she arrived for the interview.

The court also erred with respect to the final factor. This "determination involves a delicate balance of diverse factors and is entrusted to the sound judgment of the trial court, which is aptly suited to weigh the circumstances surrounding the declaration and the evidence used to bolster its reliability" (*Settles*, 46 NY2d at 169). Had the trial court applied the more lenient standard for declarations that exculpate a defendant, our task would have been limited to whether the court abused its discretion in finding the declaration unreliable. The court, however, stating that "the interest which the declaration compromises must be one of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify," applied the stricter standard for declarations against penal interest used to implicate the defendant (*see People v Bresnic*, 70 NY2d at 15). We thus review this factor de novo. Applying the more lenient standard, there was competent evidence

independent of the declaration to assure its trustworthiness inasmuch as defense witness Larson testified to seeing defendant with a young lady on the night of the accident who had agreed to drive because defendant was intoxicated, and testified that he saw her drive off with defendant as the passenger. Under the more lenient standard, there was a reasonable possibility that her statement might be true.

Quoting *Settles*, the dissent notes that with respect to this factor, "[t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself" (*Settles* at 169), but then ignores Larson's independent evidence that he saw a female driving the car because defendant was too intoxicated to drive. Instead, the dissent focuses on the fact that the penal interest to which Hunt exposed herself was a minor traffic infraction rather than a violent crime. Although Hunt did not know the specific criminal charges she was exposing herself to, the record is clear that she was in fact very concerned about *any* exposure. In any event, declarations against penal interest are not limited to statements that declarants make about a violent crime. Defendant satisfied all four elements and was therefore entitled to have the statement admitted into evidence.

Furthermore, contrary to the dissent, this statement went

to the core of defendant's defense and its exclusion was not harmless. Hunt's statement would have rendered Larson's testimony that a woman was driving more credible, especially since that woman was willing to clear defendant at her own expense.

In light of the foregoing, we find it unnecessary to reach defendant's remaining contentions.

Accordingly, the judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered March 10, 2011, convicting defendant, after a jury trial, of aggravated driving while intoxicated and driving while intoxicated, and sentencing him to concurrent terms of three years' probation, and a $1000 fine, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Mazzarelli, J.P. and Clark, J. who dissent in an Opinion by Clark, J.

CLARK, J. (dissenting)

The trial court properly excluded the witness' written statement, where, as here, evidence at the hearing established that the declarant was not aware that the statement was adverse to her penal interest at the time it was made, and the statement was not sufficiently reliable. Therefore, I would affirm the decision of the trial court excluding the witness' statement because it does not qualify as a declaration against penal interest.

The admission of a declaration against penal interest requires the following: (1) the declarant must be unavailable; (2) the declarant must be aware when making a statement that it is adverse to penal interest; (3) the declarant must have competent knowledge of the facts; and (4) there must be independent proof indicating that the statement is trustworthy and reliable (see *People v Brensic*, 70 NY2d 9, 15 [1987]).

This appeal turns primarily on the determination of the second factor. As to the second factor, the primary issue is whether Janny Hunt was aware at the time of making her statement that it was contrary to her penal interest. The majority finds that Hunt's expressions of apprehension, at the time of or immediately after her statement, along with an inquiry about consulting a lawyer sufficed to satisfy the hearsay requirement.

I disagree with this line of reasoning because it does not comport with the record, or the law on this issue.

The record established that Hunt did not articulate any apprehension about her statement at the time she made it. The investigator, Chelsea Amelkan, testified that Hunt made an appointment to meet at her office, and "at the beginning of the statement, . . . she did not express any concerns." Hunt's concerns were made known to the investigator after their conversation was complete. Then, Amelkan asked if she could write down her statement and have Hunt sign it. Subsequently, Hunt asked "if she could get in trouble for the accident . . . . [S]he was concerned about her parents finding out about the accident because she was in the car . . . . And just generally like how much trouble [s]he can get into." Amelkan responded that she could speak to a lawyer. Given the succession of events leading to the Hunt's expressions of concern and the paucity of her understanding about the consequences of her statement, it was well within the trial court's discretion to find that the witness was not aware at the time of its making that the statement was against her penal interest.

Again, Hunt expressed general concerns showing that "she did not know if she could get in trouble" and inquiring whether her parents would find out about the accident. Hunt's concern about

her parents finding out was so pressing that her statement to the investigator about the accident declares, "I got scared. . . . It was late. My parents did not know I was with [defendant]." At no point in her statement to the investigator did Hunt ask if she committed a crime or if she could be subject to arrest. This casts significant doubt as to Hunt's awareness of penal consequences attached to her statement since the focus of her concern is parental disappointment rather than the exposure to criminal liability. Further, it is unclear what kind of "trouble" concerns Hunt in light of her explicit concern about whether her parents would find out about the accident. Thus, considering Hunt's vague expression of concern and the concern about her parents, the trial court properly determined that Hunt was not aware of the penal consequences at the time the statement was expressed or written down.

The majority argues that regardless of the timing, Hunt was aware of her apprehensions when she arrived for the interview with the investigator. Nevertheless, it is equally probable that Hunt only became concerned about any possible consequences once it became known that the statement would be recorded and required a signature. To this point, timing is at the heart of the issue. Contemporaneous indications of concern preceding or during a statement would ensure reliability and satisfy the second factor

which requires awareness at the time the statement is made. However, in this matter, the indications of apprehension are expressed after the statement is recorded, which does not ensure reliability.

In evaluating the fourth factor, which places trustworthiness and reliability at issue, I agree with the majority that the trial court erred in applying a stricter standard as part of its analysis. However, even under the more lenient standard where the proponent must "establish[ ] a reasonable possibility that the statement might be true," the record does not contain sufficient competent evidence to assure trustworthiness and reliability of Hunt's statement (*People v Deacon*, 96 AD3d 965, 968 [2d Dept 2012], *appeal dismissed* 20 NY3d 1046 [2013], quoting *People v Settles*, 46 NY2d 154, 169-170 [1978] [internal quotation marks omitted]).

"The crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself" (*People v Settles*, 46 NY2d at 169). Here, the intrinsic trustworthiness of Hunt's statement is questionable as it involves the potential exposure to a minor traffic infraction and, unlike the situation where a defendant confesses to a violent crime, the penal consequences resulting from the statement are not obvious,

especially to a 19 year old with no criminal history. The record shows surrounding circumstances where Hunt did not know if her conduct constitutes an illegal offense. Hunt's statements of apprehension primarily concerned whether her parents would find out about this matter and if she could get in trouble. Further, her apprehension was not contemporaneous with the statement, but rather, a product of the request to provide a signature on a transcription of her statement. Moreover, Hunt's motive for coming forward was admittedly to "help out" defendant. Notwithstanding Lamar Larson's testimony that a female was seen with defendant during the evening of the incident, based on the facts and surrounding circumstances detailed above, the statement was properly excluded because there is no assurance of trustworthiness or reliability in Hunt's statement.

Additionally, even if the failure to admit the statement was error, the exclusion was harmless as it did not violate due process. Defendant was able to present his defense through the testimonial observations of his witness, Lamar Larson, who testified that he saw a female in the driver's seat leaving the Pelham Bay Diner parking lot with defendant in the passenger seat. Defense counsel's summation quoted at length Larson's statement at the parking lot and the response: "Make sure he gets home safe." "I will." The record also indicated that Hunt

exercised her Fifth Amendment rights. As such, defendant was able to present the jury with facts supporting his defense that someone else was driving the vehicle.

Accordingly, I would affirm the conviction because the statement does not qualify as a declaration against penal interest, it was not trustworthy or reliable, and even if the failure to admit it was error, the exclusion was harmless.

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

ENTERED: DECEMBER 10, 2013

CLERK