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To be argued by: **Dean L. Pillarella**
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Appellate Division Docket No.: 2020-00380

New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSITCORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

APPELLANTS' BRIEF

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QUESTIONS PRESENTED

Q1: Must the action be dismissed for lack of subject-matter jurisdiction pursuant to the doctrine of interstate sovereign immunity?

A1: Yes. Because the New Jersey Transit Corporation is an arm of the State of New Jersey, and because New Jersey has not consented to suit herein, either via the New Jersey Tort Claims Act or affirmative invocation/litigation conduct, the action must be dismissed pursuant to the doctrine of interstate sovereign immunity, which deprives the courts of the State of New York of subject-matter jurisdiction.

Q2: Did the trial court abuse its discretion in declining to afford Defendants-Appellants a new trial on the issue of damages or *remittitur* thereof or, alternatively, a new trial in the interest of justice?

A2: Yes. Defendants-Appellants must be afforded a new trial on the issue of damages or *remittitur* thereof, as the jury's award of $800,000 for past and future pain and suffering deviated materially from reasonable compensation, given the progress of Respondent's recovery and the extent of her limitations at the time of trial, limited medical treatment post-surgery, and lack of any claim for lost wages. Alternatively, a new trial is warranted in the interest of justice, as counsel's statements in summation that Respondent's shoulder would totally fail over time distorted the testimony of Respondent's physician, amounting to unfair surprise and prejudice to Appellants.

PRELIMINARY STATEMENT

In deciding this appeal, this Court need look no further than *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (hereinafter *Hyatt III*). *Hyatt III* concerned a tort suit brought in Nevada against the Franchise Tax Board of California, an arm of the State of California, for torts committed in the course of a multiyear tax audit of the plaintiff in both California and Nevada. The Supreme Court held that the action could not be maintained in Nevada's courts without California's consent pursuant to the doctrine of interstate sovereign immunity. As California had not consented, dismissal was required. Here, as Defendant-Appellant New Jersey Transit Corporation (hereinafter "Transit") is an arm of the State of New Jersey and Defendant-Appellant Pierrelouis (hereinafter "Pierrelouis") was a Transit employee acting in his official capacity at the time of accident, the action must be dismissed in its entirety because the State of New Jersey has not consented to suit herein, either via the New Jersey Tort Claims Act ("NJTCA") or affirmative invocation/litigation conduct.

Hyatt III expressly overturned *Nevada v. Hall*, 440 U.S. 410 (1979), which was the law at the time of commencement in 2015. *Nevada* involved identical facts as the instant action, concerning a motor vehicle accident involving a bus owned and operated by an arm of the State of Nevada on California's highways. It held the opposite of *Hyatt III*: That states were subject to private suits in sister states'

courts irrespective of their consent. The Supreme Court considered the matter one of comity, rather than autonomy, holding that, while state courts could decline to exercise jurisdiction over such suits via principles of comity, they were not strictly required to as a matter of constitutional law.

Forty years later, the Supreme Court reversed, holding that *Nevada* was historically flawed in that it ignored principles of state sovereign immunity embedded in the Constitution at the time of its framing and as amplified by the Eleventh Amendment. Such a deep-seated flaw rendered *stare decisis* of no effect: Writing for the Court, Justice Thomas reasoned, "[I]n virtually every case that overrules a controlling precedent, the party relying on that precedent will incur the loss of litigation expenses and a favorable decision below. Those case-specific costs are not among the reliance interests that would persuade us to adhere to an incorrect resolution of an important constitutional question." So, too, here.

Like the State of California in *Hyatt III*, the State of New Jersey has not consented to suit herein, requiring that the action be dismissed outright for lack of subject-matter jurisdiction pursuant to the doctrine of interstate sovereign immunity.

Alternatively, should the Court decline to find that New York's courts lack subject-matter jurisdiction, Respondent is entitled to a new trial on the issue of damages or *remittitur* thereof, as the jury's award of $800,000 for past and future

pain and suffering deviated materially from reasonable compensation, given the evidence adduced at trial as to Respondent's active recovery and the extent of her limitations, lack of treatment post-surgery, and, notwithstanding her active employment, lack of any claim for lost wages. Alternatively, Appellants are entitled to a new trial in the interest of justice, given resultant surprise and prejudice to them from the summation of Respondent's counsel, which mischaracterized the extent of Respondent's injuries.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The Accident & Commencement

On October 05, 2014, Plaintiff-Respondent Henry was involved in a motor vehicle collision in the Lincoln Tunnel while riding as a passenger on a Transit bus being operated by Pierrelouis within the scope of his employment. R. 36, ¶4; 485, ¶14; 486, ¶29; 487. Respondent commenced suit in the Supreme Court, New York County, on June 29, 2015, seeking recovery for injuries allegedly sustained as a result of the accident.[1] At the time of commencement, *Nevada* remained the law, permitting the action to be commenced and maintained in this state irrespective of New Jersey's consent.

[1] The action was dismissed as against Mr. Nakar, the driver of the front vehicle involved in the accident, by the trial court's June 04, 2018, Decision and Order awarding him summary judgment. No appeal from the Decision and Order followed.

Hyatt III Overturns *Nevada* After Trial

Because the Supreme Court did not issue its opinion in *Hyatt III* until May 13, 2019,[2] Appellants had no basis in law to raise a sovereign-immunity defense until after trial had already been completed in this action. Indeed, the Motion from which the Order appealed arises was fully briefed by April 25, 2019, the date on which Appellants' reply papers were filed with the New York County Clerk via NYSCEF. R. 478. As such, Appellants object to the Court's subject-matter jurisdiction for the first time on appeal herein.[3]

The Underlying Trial and Motion

A five-day trial of the underlying action occurred from December 04 through December 07, 2018, and on December 10 and 11, 2018. R. 505-1107. After deliberation, the jury found for Respondent, returning a verdict awarding her

[2] Prior to *Hyatt III*, the case, a tort suit brought in Nevada against the Franchise Tax Board of California, a California agency, for torts committed in the course of a multiyear tax audit, had been before the Supreme Court twice. In *Hyatt I*, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003), the Court held that the Full Faith and Credit Clause did not forbid Nevada from applying its own immunity law to the case, where California law provided immunity for all injuries committed in the tax collection context, while Nevada law provided immunity for negligence but not intentional torts committed therein. In *Hyatt II*, *Franchise Tax Bd. of Cal. v. Hyatt*, 578 U.S. ___, 136 S.Ct. 1277 (2016), the Supreme Court held that the Full Faith and Credit Clause required Nevada to apply a $50,000 liability cap applicable to its own agencies to the defendant. The Court split on the question of whether to overturn *Nevada*, answering in the affirmative three years later in *Hyatt III*.

[3] Because sovereign immunity speaks to the Court's subject-matter jurisdiction, it may be raised at any time, including for the first time on appeal. *See*, *e.g.*, *Morrison v. Budget Rent a Car Sys.*, 230 A.D.2d 253 (2d Dep't 1997) (holding same); and *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104, fn. 8 (1984). Notably, in *Goffredo v. City of New York*, 2007 N.Y. App. Div. LEXIS 5975 (1st Dep't 2007), this Court permitted subject-matter jurisdiction to be raised for the first time in the appellant's motion to reargue his unsuccessful appeal.

$400,000 for past pain and suffering and $400,000 for future pain and suffering.[4] R. 1189.

The evidence adduced revealed that, as a result of the accident, Respondent suffered a three-part proximal humerus impact fracture requiring surgery from which she was making an active recovery. To this end, Respondent received no treatment for her proximal humerus fracture subsequent to surgery in 2015. R. 670:4-25. She also testified that, subsequent to surgery, her greatest difficulties were in sitting and performing quotidian tasks, such as folding, sweeping, and cleaning. R. 115:23-25; 116:1-4. Respondent was also able to make an active recovery from an unrelated stroke and revealed that, as a result, she would be required to take over-the-counter medicine daily. R. 168:2-4. Further, although she did not claim lost wages, Respondent testified that she remained actively employed and that she was seeking further employment as a "companion," a job involving caring for the elderly. R. 114-115. At one point, Respondent was working five days per week. R. 619:1-6.

On the stand, Respondent's physician, Dr. Sen, testified that the extent of Respondent's recovery would likely plateau within two years. R. 791:24-25. He also testified that regression and arthritis were a possibility for Respondent. R.

[4] The jury also awarded Respondent $179,579.50 as recoupment for medical expenses. R. 1189. Respondent did not oppose Appellants' request for a collateral-source offset in that amount pursuant to CPLR 4545, and, accordingly, the trial court granted the request, reducing the total amount of disputed damages to $800,000.00. R. 19; 47, ¶39.

793:2-11. From this, in summation, Respondent's counsel erroneously equated Dr. Sen's testimony to amount to an eventual total failure of Respondent's shoulder. R. 994:9-11. Appellants' counsel promptly objected. R. 994:12.

In light of Respondent's active recovery and counsel's distortion of Dr. Sen's testimony, on February 15, 2020, Appellants filed a motion seeking a new trial on damages or *remittitur* thereof, or, alternatively, new trial in the interest of justice. In the interim, the Supreme Court issued its opinion in *Hyatt III* on May 13, 2019, after briefing of the Motion had been completed. Thereafter, Respondent's Motion was denied in its entirety by the trial court's June 27, 2019, Decision and Order, from which this appeal follows. R. 8-20; 2.

ARGUMENT

I. THE ARM-OF-STATE AND WAIVER DOCTRINES REQUIRE DISMISSAL.

The Supreme Court has long held that Eleventh Amendment protections extend not only to states *qua* states but also to "arms" or instrumentalities of states. *See*, *e.g.*, *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (finding Regents of the University of California an arm of the State of California). Similarly, pursuant to the Court's waiver doctrine, a state's abrogation of its Eleventh Amendment immunity can be accomplished only by an express, unequivocal waiver rooted in state law or an affirmative invocation of jurisdiction/litigation conduct. *See*, *e.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ.*

Expense Bd., 527 U.S. 666, 680 (1999) (abrogating constructive-waiver doctrine); and *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002) (holding removal to federal court constitutes waiver). Because the Eleventh Amendment is but one way in which the Constitution protects states' sovereign-immunity rights, *see*, *e.g.*, *Alden v. Me.*, 527 U.S. 706 (1999), the Court's arm-of-state and waiver jurisprudence must also be applied herein. For sovereign immunity "neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden*, 527 U.S. at 713.

The Supreme Court has continually identified additional "anomalous and unheard of" suits since the Amendment's ratification. In *Hans v. Louisiana*, 134 U.S. 1 (1890), for example, the Supreme Court held that the doctrine of sovereign immunity forbids private suits against states in federal courts irrespective of a plaintiff's state of citizenship; in *Smith v. Reeves*, 178 U.S. 436 (1900), suits by federal corporations in federal courts; in *Ex parte New York*, 256 U.S. 490 (1921), admiralty suits by private parties in federal courts; in *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002), private suits before federal administrative agencies; and in *Alden*, 527 U.S. 706, *supra*, Congress from subjecting states to private suits in their own courts. In *Hyatt III*, the Supreme Court identified private suits against states in other states' courts as yet another example. In the same way, then, that the doctrine of sovereign immunity is not

limited to the Eleventh Amendment context, neither is the arm-of-state or waiver doctrine.

This Court has correctly recognized as much. In *Trepel v. Hodgins*, 183 A.D.3d 429 (1st Dep't 2020), this Court recently affirmed an order of the Supreme Court, New York County, dismissing the action as against the Arizona Board of Regents ("the Board") and its employee pursuant to *Hyatt III*. The Court held that, because the Board is an arm of the State of Arizona, and because Arizona had not consented to suits in New York's courts, the action was properly dismissed for lack of subject-matter jurisdiction per *Hyatt III*. Accordingly, like the Board in *Trepel*, Transit, an arm of the State of New Jersey, is immune from suit in New York's courts absent its express consent; because Transit is an arm of the State of New Jersey, and because New Jersey has not consented to suit herein, the action must be dismissed for lack of subject-matter jurisdiction pursuant to the doctrine of interstate sovereign immunity per *Hyatt III*.

II. BECAUSE TRANSIT IS AN ARM OF THE STATE OF NEW JERSEY, IT IS NOT SUBJECT TO SUIT IN NEW YORK'S COURTS ABSENT NEW JERSEY'S CONSENT.

A) Arm-of-the-State Jurisprudence

The Supreme Court's arm-of-the-state jurisprudence reveals Transit's status as an arm of the State of New Jersey. In determining whether an entity is an arm-of-state, the Supreme Court requires courts to consider, at least, the "relationship

between the sovereignty and the entity in question" and the "essential nature and effect of the proceeding." *Regents*, 519 U.S. at 429. The Court has also given varying weight to the degree of state control over the entity and its classification under state law. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (considering status of school district under Ohio law). The likelihood that a judgment will be paid from a state's treasury has been called a "central" factor, *see Hess v. PATH*, 513 U.S. 30 (1994), though it cannot be dispositive, as the inquiry is not "a formalistic question of ultimate financial responsibility." *Regents*, 519 U.S. at 431. Similarly, the Court considers preservation of states' integrity a central aim of sovereign immunity. *Hess* at 47-48. Precedent already establishes that these factors balance in Transit's favor.

i) *Karns v. Shanahan*

Applying the factors, the United States Court of Appeals for the Third Circuit recently confirmed that Transit is an arm of the State of New Jersey in *Karns v. Shanahan*, 879 F.3d 504 (3d Cir. 2018). *Karns* concerned a civil-rights action brought by the plaintiff pursuant to 42 U.S.C. §1983 against Transit and its police officers stemming from an arrest on a Transit train platform. The Third Circuit affirmed the district court's order dismissing the action as against Transit and its officers on Eleventh Amendment grounds, reasoning that, because Transit is an arm of the State of New Jersey, and because states and arms-of-state are not

"persons" pursuant to 42 U.S.C. §1983, dismissal was required as against it and its officers.[5] In so holding, the Third Circuit confirmed that Transit's status and limited autonomy apart from the state under New Jersey law solidify its status as an arm-of-state.

The court found that Transit's status as an arm-of-state is supported by a gamut of statutory law. Of note, it found that, per NJ Stat. Ann. §27:25-4, Transit is allocated within the New Jersey Department of Transportation, which, in turn, is a principal department within New Jersey's executive branch per NJ Stat. Ann. §27:1A-2; per N.J. Stat. Ann. §27:25-5, Transit is statutorily "constituted as an instrumentality of the State, exercising public and essential governmental functions[,] *Karns*, F.3d at 517;[6] per N.J. Stat. Ann. §27:25-16, Transit is considered state property for tax purposes and exempt from state taxation

[5] The Transit police officers were sued in both their official and individual capacities. Because "Defendants sued in their official capacities are entitled to claim the same Eleventh Amendment immunity that the 'entity *qua* entity may possess,'" *Karns*, 879 F.3d at 519, fn. 5 (*citing Kentucky v. Graham*, 473 U.S. 159, 167 (1985)), the court held that the action was also properly dismissed as against them via the Eleventh Amendment. The court affirmed dismissal as against the officers in their individual capacities on qualified-immunity grounds.

[6] The New Jersey Legislature created Transit via the Public Transportation Act of 1979 ("PTA"), NJ. Stat. Ann. §§27:25-1 through 25-24, for the "essential public purpose" of "establish[ing] and provid[ing] for the operation and improvement of a coherent public transportation system." *Id.* at 27:25-2(a)-(b). The legislature expressly deemed establishment of a public transportation system "an essential public purpose which promotes mobility, serves the needs of the transit-dependent, fosters commerce, conserves limited energy resources, protects the environment and promotes sound land use and the revitalization of our urban centers." *Id.* at 27:25-2(a). For this reason, Transit was directly established within New Jersey's executive branch of government as "an instrumentality of the State exercising public and essential governmental functions." *Id.* at 27:25-4.

altogether; per NJ Stat. Ann. §27:25-13(a), (c)(1), Transit wields the power of eminent domain; and per N.J. Stat. Ann. §27:25-15.1(a), Transit's police officer exercise jurisdiction throughout the State of New Jersey.

The court's analysis of New Jersey case law regarding Transit's status as an arm-of-state was also telling. The Third Circuit found that Transit has been held to be both a "public entity within the ambit of the NJTCA," *Muhammad v. New Jersey Transit*, 176 N.J. 185 (N.J. 2003), and entitled to immunity by the New Jersey Supreme Court. *See Weiss v. N.J. Transit*, 128 N.J. 376 (N.J. 1992). The court also found that New Jersey's intermediate appellate courts have regularly held as much. *See*, *e.g.*, *Lopez v. N.J. Transit*, 295 N.J. Super. 196, 684 A.2d 986, 988 (N.J. Super. Ct. App. Div. 1996) (reading "Plaintiffs' claim [is] against New Jersey Transit, a public entity.") Accordingly, the court held that Transit's classification and status as an arm-of-state under state law is apparent.

The court again looked to New Jersey statutory law to gauge Transit's degree of autonomy. Of note, it found that, per N.J. Stat. Ann. §27:25-4(b), Transit is subject to the control of the New Jersey legislature and governor; per the same, the governor is "responsible for appointing the entire NJ Transit board, which is composed of several members of the Executive Branch," *Karns*, 879 F.3d at 518; per N.J. Stat. Ann. §27:25-20(a), "The Commissioner of Transportation, an Executive branch official who is chairman of the NJ Transit governing board, has

the power and duty to review NJ Transit's expenditures and budget[,]" *Karns,* 879 F.3d at 518; per N.J. Stat. Ann. §27:25-20, Transit is obligated to annually report its budget and condition to the governor and New Jersey Legislature and is subject to audit at their whim; per, N.J. Stat. Ann. §27:25-4(f), the governor has the authority to veto any and all actions taken by NJ Transit's governing board; and, per N.J. Stat. Ann. §27:25-13(h), the New Jersey Legislature retains the authority to legislatively veto the governing board's actions as well. The court thus concluded that, "All of these facts suggest that NJ Transit is an instrumentality of the state, exercising limited autonomy apart from it." *Karns*, 879 F.3d at 518.

In light of the overwhelming authority supporting Transit's status as an arm-of-state, the Third Circuit correctly held that Transit was "entitled to the protections of Eleventh Amendment immunity, which in turn functions as an absolute bar to any claims…." *Id.* at 519.

ii) *Robinson v. N.J. Transit Rail Operations, Inc.*

Building on *Karns*, the Third Circuit re-affirmed Transit's status as an arm-of-state in *Robinson v. N.J. Transit Rail Operations, Inc.*, No. 17-3397, 2019 U.S. App. LEXIS 3386 (3d Cir. January 31, 2019). There, the plaintiff, a Transit employee, brought suit pursuant to the Federal Employee Liability Act, 45 U.S.C. §51, *et seq.*, after sustaining injuries while on the job. After trial, *Karns* was decided, which resulted in Transit's filing of its motion to vacate the judgment.

Transit argued that, in light of *Karns*, vacatur was warranted on Eleventh Amendment grounds. The Third Circuit agreed, vacating the district court's judgment and remanding with instructions to dismiss the case.

Karns and *Robinson* establish that Transit is an arm-of-state on the basis of its status under New Jersey law and limited autonomy. Accordingly, *Transit* is immune from suit in New York's courts absent its explicit consent per *Hyatt III*.

III. BECAUSE TRANSIT HAS NOT CONSENTED TO SUIT HEREIN, THE ACTION MUST BE DISMISSED PURSUANT TO THE DOCTRINE OF INTERSTATE SOVEREIGN IMMUNITY.

New Jersey has not consented to suits in New York's courts by operating Transit vehicles in New York. In *Nevada*, the plaintiff was injured in a motor vehicle collision involving a University of Nevada bus on California highways. The plaintiff brought suit in California despite Nevada's having consented to suit solely in its own courts. On appeal, the Supreme Court held that the Constitution did not deprive California's courts of jurisdiction over Nevada. Forty years later, the Supreme Court expressly reversed itself in *Hyatt III*, holding that *Nevada* rested on a historically flawed understanding of the sovereign-immunity doctrine. Had the Supreme Court held as much in *Nevada* in 1979, the plaintiff's action would have been dismissed irrespective of the fact that Nevada's torts were committed on California's highways. Moreover, *Hyatt III* itself concerned torts committed by a California agency in Nevada. And *Nevada Dep't of Wildlife v.*

Smith, 139 S. Ct. 2613 (2019), decided a week after *Hyatt III*, concerned torts allegedly committed by a Nevada official in California. As the suit was pending in California's courts without Nevada's consent, the Supreme Court unanimously vacated the plaintiff's judgment on the basis of *Hyatt III*, paying no mind to where the alleged torts had been committed. As the Court has held time and again, its waiver jurisprudence makes no room for "constructive" or "implied" waivers of sovereign immunity. *See*, *e.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, *supra*.

Rather, the Court has identified but three ways in which a state's sovereign immunity can be waived: (1) abrogation by Congress pursuant to Section Five of the Fourteenth Amendment;[7] (2) express consent to suit; or (3) affirmative invocation/litigation conduct. *See*, *e.g.*, *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, *supra.* Because (1) is clearly not applicable, Transit's consent must be found through express consent to suit or affirmative invocation/litigation conduct. Neither applies.

A) Express Consent

Transit has not expressly consented to suit. The Supreme Court requires that a finding of express consent be rooted in an "unequivocal expression" of consent as found in state law. *See*, *e.g.*, *Pennhurst State School and Hospital v. Halderman*,

[7] *See*, *e.g.*, 42 U.S.C. §1983.

465 U.S. 89 (1984). A state must "make a 'clear declaration' that it intends to submit itself to [a court's] jurisdiction." *College Sav. Bank*, 527 U.S. at 616. To this end, express consent cannot be found from a mere statement of intention to "sue and be sued." *Florida Dep't of Health & Rehabilitative Servs v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981). Nor will a statement of intent to be sued "in any court of competent jurisdiction" suffice. *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, (1946). Neither will a statement of intent to be sued in the courts of a state's own creation. *See*, *e.g.*, *Smith v. Reeves*, 178 U.S. 436 (1900). Rather, waiver will be found "only … by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 653 (1974) (alteration in original and internal citations and quotation marks omitted). Examination of the text of the NJTCA and the historical and legislative context of its adoption overwhelmingly reveals the absence of any express waiver. To the contrary, both reveal that New Jersey's courts are the sole proper forum for the litigation of NJTCA suits.

i) NJTCA Provisions

The NJTCA lacks any unequivocal expression of consent to be sued in foreign courts. The NJTCA contains the entirety of the State of New Jersey's abrogation of its sovereign immunity to contract and tort suits. It is "dispositive …

of the nature, extent, and scope of state and local liability and the procedural requisites for prosecuting tort claims against governmental agencies." *Wright v. State*, 169 N.J. 422, 435 (N.J. 2001). As the New Jersey Supreme Court has already settled Transit's status as a protected entity under the NJTCA, *see*, *e.g.*, *Muhammad, v. N.J. Transit*, 176 N.J. 185, *supra*, §§59:8-8 and 59:9-1 of the NJTCA act in tandem to provide the sole manner and method by which tort claims against Transit may be pursued. The former constitutes the presentation, or notice of claim, requirement and concerns any "claim relating to a cause of action for death or injury or damage to person or to property." NJ Rev Stat §59:8-8. Such claims are to be "presented as provided in this chapter not later than the ninetieth day after accrual of the cause of action." *Id.* Thereafter, "after the expiration of six months from the date notice of claim is received, the claimant may file suit in an *appropriate* court of law." *Id.* (emphasis added). As the Supreme Court has analogously held that consent to suit in "any court of competent jurisdiction" cannot constitute an express waiver, *see Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, (1946), *supra*, §59:8-8 provides none; "appropriate" cannot be interpreted to extend to out-of-state (or federal) courts. Rather, §59:9-1, titled "Manner of trial," must be looked to.

Section 59:9-1 reveals that New Jersey's courts are the sole "appropriate" forum for litigation of claims against Transit. It reads, "Tort claims under this act

shall be heard by a judge sitting without a jury or a judge and a jury where appropriate demand therefor is made *in accordance with the rules governing the courts of the State of New Jersey*."[8] NJ Rev Stat §59:9-1 (emphasis added). This plainly refers to New Jersey's rules of civil procedure, the Rules Governing the Courts of the State of New Jersey ("Rules"),[9] which can only apply in New Jersey's courts. *See*, *e.g.*, *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372 (1969) (procedural and evidentiary law of forum must apply). Thus, read together, §§59:8-8 and 59:9-1 provide for suits solely in appropriate courts within the State of New Jersey. In addition to lacking any express consent to suits in foreign courts, the NJTCA expressly designates New Jersey's courts as the sole forum for suits brought thereunder.[10]

The NJTCA contains no express waiver to suits in foreign courts. Instead, it provides that tort suits against the State of New Jersey are to be prosecuted solely within New Jersey's courts.

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[8] The current version of Section 59:9-1, above, became law in 1975. It replaced the original version, which only provided for bench trials, reading "Tort claims against a public entity or public employee acting within the scope of his employment shall be heard by a judge sitting without a jury in accordance with the rules governing the courts of the State of New Jersey."

[9] Sections 1:8-1, 4:35-1, and 6:5-3 of the Rules provide the mechanism by which parties to suits in New Jersey courts may demand a jury trial.

[10] Federal courts have long settled that the NJTCA lacks any express consent to suits in federal courts as well. *See*, *e.g.*, *NJSR Surgical Ctr., LLC v. Horizon Blue Cross Blue Shield of N.J.*, 979 F. Supp.2d 513 (D.N.J. 2013).

ii) Historical and Legislative Context of the NJTCA

The unambiguous wording of the NJTCA forbids examination of the historical or legislative context of its adoption, since "[a]bsent ambiguity, the courts may not resort to rules of construction to alter the scope and application of a statute." *Muzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 91 (2019) (internal citation and quotation marks omitted). Should the Court disagree as to the NJTCA's unambiguousness, however, the historical and legislative context of the NJTCA's adoption further evince the absence of an express waiver.

The historical context of *Nevada v. Hall* itself precludes an express waiver. When *Nevada* was decided in 1979, it represented the denial of an "assumption that [the Supreme Court] and other courts ha[d] entertained for almost 200 years," *Nevada*, 440 U.S. at 433: That states, as sovereigns, were immune from suits in other states' courts absent their consent. To this end, in dissent, Justice Rehnquist, joined by Chief Justice Burger, traced judicial recognition of interstate sovereign immunity to as early as 1781, in *Nathan v. Virginia*, 1 Dall. 77 (1781), where the Pennsylvania Court of Common Pleas held that the State of Virginia, by virtue of its sovereign immunity, was immune from suit in Pennsylvania courts absent its consent.[11] He continued through 1961, when the Supreme Court explicitly held that

[11] This Court observed as much in *DeSimone v. Transportes Maritimos Do Estado*, 200 A.D. 82, 84-85 (1st Dep't 1922), writing "[R]elations with other States of the Union are … governed by a private international law," which "is evident when we consider that the citizen of a state cannot

Pennsylvania was powerless to hail another state before its courts in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 80 (1961).[12] In light of this extensive history, he concluded that the Eleventh Amendment cannot represent the entirety of sovereign immunity:

> *Behind the words of the constitutional provisions are postulates which limit and control.* There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent…. *Nevada*, 440 U.S. at 437-438 (emphasis in original).

He was proven correct forty years later in *Hyatt III*, with Justice Thomas writing that "The Constitution does not merely allow States to afford each other immunity as a matter of comity; it embeds interstate sovereign immunity within the constitutional design." *Hyatt III*, 139 S. Ct. at 1497.

As the historical accounts of Justices Rehnquist and Thomas illustrate, that states were not amenable to suits in other states' courts without their consent was a "postulate or assumption[] … draw[n] on shared experience and common understanding[,]" *Nevada*, 440 U.S. at 433, and had thus gone unchallenged until

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sue that state *in any court* without its consent, because, as to the citizen the State is a sovereign…." (emphasis added.)

[12] In a separate dissent, Justice Blackmun, joined by Chief Justice Burger and Justice Rehnquist, observed that the Supreme Court of North Dakota, in *Paulus v. South Dakota*, 52 N.D. 84 (1924), and *Paulus v. South Dakota*, 58 N.D. 643 (1929), explicitly held that the State of South Dakota was immune from suit in North Dakota courts absent its consent. The plaintiff had been injured while working in a coal mine run and operated by the State of North Dakota in South Dakota.

Nevada. As such, at the time of the NJTCA's enactment in 1972—some seven years prior to *Nevada*—the notion that the State of New Jersey could be compelled to submit to the jurisdiction of another state's judiciary without its consent would have been anathema to the legislature of any state, let alone the New Jersey Legislature.[13] The notion of a pre-*Nevada* waiver is historically incongruous.

Nor can waiver be discerned from the NJTCA's legislative history. The NJTCA was a reclamation of sovereign immunity; its "overall purpose … was to reestablish the immunity of public entities[,]" *Beauchamp v. Amedio*, 164 N.J. 111, 115 (N.J. 2000), and establish that "[g]enerally, immunity for public entities is the rule and liability is the exception." *Fleuhr v. City of Cape May*, 159 N.J. 532, 539 (N.J. 1999). The Act was a direct abrogation of two decisions of the New Jersey Supreme Court largely considered to be examples of judicial overreach: *P, T&L Constr. Co. v. Comm'r, Dep't of Transp.*, 55 N.J. 341 (N.J. 1970); and *Willis v. Dept. of Conservation & Economic Development*, 55 N.J. 534 (N.J. 1970). *See*, *e.g.*, *Fuchilla v. Layman*, 109 N.J. 319, 335 (1988) ("As a historical matter, the Act is a legislative response to this Court's decision in *Willis* …, which abrogated total governmental immunity from tort liability.") *P, T&L Constr. Co.* concerned

[13] To this end, it is telling that the attorneys-general of forty-five states submitted a brief *amici curiae* for consideration in *Hyatt III,* observing that *Nevada* enabled widespread "judicial interference with the sovereign functions of other states." Brief of Indiana and 44 Other States as *Amici Curiae*, p. 7, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019). The Attorney General of Ohio specifically listed Ohio's subjection to "an Indiana state court case arising out of a motor vehicle collision," *id.* at 10, as an example. The Attorney General of New Jersey was also a signatory to the brief.

whether New Jersey was subject to suit for breach-of-contract. The Court reasoned that, although the New Jersey Legislature had not expressly abrogated sovereign immunity to this extent nor provided for a court of claims, the New Jersey courts remained a viable forum:

> Obviously, there should be an established forum in which all such claims may be presented as of right and upon known principles. The judiciary of course is able to meet that need. That is not to say that another tribunal would be unsuitable. The point is that a court of claims has not been created, and, until one is established, if it should be, the judiciary ought not to withhold its hand on a mere assumption that its coordinate branches would want it that way. *P, T&L Constr. Co.*, 55 N.J. at 346.

In so holding, the Court bypassed the legislature. The Court expressly noted that "other jurisdictions have held, on one theme or another, that a State may be sued *in its own courts* on contracts it authorized." *Id.* at 346 (emphasis added). No mention was made of suits in other states' courts.

In *Willis*, the New Jersey Supreme Court again expanded the judiciary's authority to adjudicate suits against the state, this time in the tort context. The plaintiff, a three-year-old, brought suit against the New Jersey Department of Conservation & Economic Development ("NJDCED") for injuries sustained on NJDCED property. At the trial level, the action was dismissed on sovereign-immunity grounds. The intermediate appellate court reversed. The New Jersey Supreme Court affirmed, reasoning, "It is time for the judiciary to accept a like responsibility and *adjudicate the tort liability of the State itself*." *Wills*, 55 N.J. at

541 (emphasis added). The Court refused to wait for "a comprehensive legislative solution…." *Id.* at 539. With the state now susceptible to tort liability, the only remaining question was whether the decision would apply retroactively. To allow time for legislative intervention, the court declined to make its decision retroactive: "[E]xcept for the immediate case, the courts will not accept any tort claim arising before January 1, 1971. If the Legislature establishes an earlier date, we will of course abide by that decision." As with *P, T&L Constr. Co.*, no mention was made of suits in other states' courts. Such suits were simply not contemplated.

The May 1972 *Report of the [New Jersey] Attorney General's Task Force on Sovereign Immunity* ("the Report"), which was released a month before the NJTCA's adoption on June 01, 1972, and heavily relied upon by the New Jersey Legislature in drafting the NJTCA, explicitly recommend that suits under the NJTCA be litigated solely in the New Jersey court system. In interpreting the NJTCA, New Jersey courts regularly look to the Report for guidance. *See*, *e.g.*, *Brooks v. Odom*, 150 N.J. 395 (N.J. 1997) (turning to Report to interpret "permanent," "loss," "bodily," and "function" as used in NJ Stat. Ann. §59:9-2(d)). Indeed, the New Jersey Supreme Court has written, "A task force selected by the Attorney General drafted the New Jersey Tort Claims Act. Its Report on Sovereign Immunity, published in May 1972, contained substantial explanatory comment. It is fitting therefore that we look to that comment in searching for [] legislative

intent…." *Costa v. Jones*, 83 N.J. 49, 55 (N.J. 1980) (turning to Report for guidance on whether NJTCA provides immunity for defects in road design). Because the Report specifically recommended that suits under the NJTCA be brought in New Jersey courts, it definitively establishes the absence of an express waiver.

The Report repeatedly provided as such on multiple occasions. For example, at p. 7, the Report specifically read, "[I]t is the central thesis of this report that the liability of the State of New Jersey in contract and tort be adjudicated through *the regular court system without a jury* and pursuant to a comprehensive statutory scheme." *Report of the Attorney General's Task Force on Sovereign Immunity* 7 (1972) (emphasis added). At p. 12 of the Report, the Task Force specifically rejected adjudication of NJTCA claims in a court of claims akin to this state's Court of Claims, with the Report reading, "Suits against all public entities in tort or contract should be processed *through the regular court system*—without a jury trial." *Id.* at 12. (emphasis added). The Report noted that a court of claims would have been of no benefit to New Jersey "since there is a centrally located and centrally administered Office of the Courts[,]" *id.* at 12, and that "whatever skill might be developed by judges sitting on a special court would also be obtained by the effective use of special calendars *within our existing court system*." *Id.* at 13 (emphasis added). At p. 14, the Report specifically looked to the experience of

California in reasoning as such: "It is significant that after nine years of experience in California, the officials contacted there were virtually unanimous in their belief that the appropriate forum for the adjudication of claims against the state—the regular court system—had been chosen." *Id.* at 14. The Report thus concluded that claims pursuant to the NJTCA were to be brought within the "ordinary court system" of the State of New Jersey. As such, the Report unquestionably evinces the lack of any express waiver.

Because the NJTCA contains no express waiver to suit in New York or out-of-state courts and the historical and legislative context are also bereft of such a waiver, New Jersey has not expressly waived its immunity from suit herein.

B) Affirmative Invocation/Litigation Conduct

The Supreme Court has long held that "a State's voluntary appearance in federal court amount[s] to a waiver in its Eleventh Amendment immunity." *Lapides*, 535 U.S. at 619 (internal citation and quotation marks omitted). Similarly, where a state "voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the protections of the Eleventh Amendment." *Id.* at 619 (internal citation and quotation marks omitted). A state must voluntarily submit to the forum's jurisdiction for the affirmative invocation/litigation conduct exception to apply, such as by filing suit in the forum or removal. *See*, *e.g.*, *Gunter*

v. Atlantic C.L.R. Co., 200 U.S. 273 (1906) (Eleventh Amendment immunity waived by state's intervenor status); and *Lapides*, 535 U.S. 613, *supra*. Neither applies here.

Appellants have not made a voluntary appearance herein or otherwise invoked New York's jurisdiction. In *Lapides*, 535 U.S. 613, *supra*, the Supreme Court held that the State of Georgia waived its right to Eleventh Amendment immunity by its attorney general's voluntary removal of the action from Georgia's courts to federal court. While Georgia was "brought involuntarily into the case as a defendant in the original state-court proceedings," its removal of the action to federal court constituted a voluntarily "invo[cation] [of] the federal court's jurisdiction." *Id.* at 620. In contrast to the State of Georgia in *Lapides*, Transit is represented by private counsel, not an entity directly imbued with statutory authority to represent Transit or the State of New Jersey, and has been throughout the entirety of this litigation. Further, Appellants have been in a defensive posture from the inception of this action, since they had no legitimate basis in law to object to New York's jurisdiction until almost four years after the action was commenced, when *Hyatt III* was decided in 2019. Prior to that time, *Nevada* precluded Transit from legitimately raising a sovereign-immunity defense in prior actions. Accordingly, the affirmative-invocation/litigation-conduct exception is inapplicable, precluding waiver.

As the State of New Jersey has not consented to suit herein, either by express waiver or affirmative invocation/litigation conduct, dismissal is required pursuant to the doctrine of interstate sovereign immunity as set forth in *Hyatt III*.

IV. APPELLANTS ARE ENTITLED TO A NEW TRIAL ON THE ISSUE OF DAMAGES OR *REMITTITUR* THEREOF, AS THE JURY'S AWARD OF $800,000 FOR PAST AND FUTURE PAIN AND SUFFERING DEVIATED MATERIALLY FROM REASONABLE COMPENSATION, OR, ALTERNATIVELY, A NEW TRIAL IN THE INTEREST OF JUSTICE.

Should the Court decline to find that the action must be dismissed outright for lack of subject-matter jurisdiction, Appellants are nonetheless entitled to a new trial on the issue of damages or *remittitur* thereof because the jury's award of $800,000 for past and future pain and suffering was unreasonable, given the evidence adduced at trial as to the progress of Respondent's recovery and the extent of her limitations, limited medical treatment post-surgery, and lack of any claim for lost wages.[14] Alternatively, a new trial is warranted in the interest of justice, given the inflammatory summation of Respondent's counsel, which amounted to unfair surprise and prejudice to Appellants in misstating the extent of Dr. Sen's testimony and Respondent's injuries.

[14] While, generally, "the setting of damages is strictly a jury function, … the court can grant a new trial 'unless' the … plaintiff stipulates to a lower one …[,] a step not infrequently taken at either trial or [the] appellate level." Patrick M. Connors and David D. Siegel, *New York Practice*, §407, p. 787 (6th ed., Practitioner Treatise Series, 2018).

A) New Trial on Damages and *Remittitur*

The trial court abused its discretion in declining to afford Appellants a new trial on the issue of damages or a reduction thereof. Pursuant to CPLR 5501(c), a variance of damages awarded at trial is appropriate where, as here, the award "deviates materially from what would be reasonable compensation." Whether a material deviation exists is an exercise of discretion and solely "committed to the trial court and the Appellate Division[,]" Patrick M. Connors and David D. Siegel, *New York Practice*, §407, p. 788 (6th ed., Practitioner Treatise Series, 2018) (internal citations and quotation marks omitted), and an abuse of discretion will be found where the trial court's "exercise of its discretion is not reasonably grounded." *Kielman v. Enterprise Stores, Inc.*, 38 A.D.2d 629 (3d Dep't 1971). Here, the trial court's exercise of discretion could not have been reasonably grounded, given the existence of material deviations with respect to the extent of Respondent's past and future pain and suffering and its misconstruction of pertinent precedent involving similar injuries and awards. Notwithstanding this abuse of discretion, such relief is further warranted pursuant to this Court's inherent power to review awards in the interest of justice and in its discretion. *See* CPLR 5501(c).

The jury's award of $800,000 for past and future pain and suffering was unreasonable. To this end, the evidence at trial revealed that the sole task Respondent was completely unable to perform as a result of the accident was

sitting down. R. 619:23-25; 620:1-3. Similarly, Respondent testified that her greatest difficulty came from performing quotidian tasks, such as cleaning, sweeping, and folding. R. 619:11-22. With respect to the need for future medical care, there was no evidence presented that Respondent's shoulder would "slowly over time fail," as suggested by Respondent's counsel in summation. R. 994:9-11. To the contrary, Dr. Sen had merely testified that the extent of Respondent's recovery would likely plateau within two years. R. 791:24-25; 792:1-2. Respondent also testified that she would have to take over-the-counter medicine daily as a result of a subsequent, unrelated stroke she admitted had no causal connection to the injuries sustained in the underlying accident. R. 612:2-4; 613:15. Respondent's subsequent treatment for this stroke consisted of a regimen of physical activity, involving "walking, … run[ning] on the treadmill [and] doing a lot of walking." R. 613:9-11. And there was no evidence presented that the injuries sustained in the accident hindered her recovery from this stroke in any way. The record also reveals that Respondent had not received medical treatment related to her proximal humerus fracture since receiving surgery in 2015; after Dr. Lager performed surgery on her in 2015, Respondent did not visit a doctor with respect to her fracture until visiting Dr. Sen in 2018. R. 670:4-25. This visit was solely for the purpose of litigation. R. 810:16-25; 811:1-19. Accordingly, in light of the extent of

Respondent's injuries at the time of trial, active recovery, and lack of treatment subsequent to surgery, a reduction of damages is appropriate.

The jury's consideration of Respondent's employment status in awarding damages was also inappropriate, further warranting a reduction of damages. As concerns future employment, Respondent admitted that, despite her difficulties sitting and performing quotidian tasks, she was, at one point, working five days per week and, at the time of trial, actively seeking employment as a "companion," a job involving "sit[ting] with older people," "taking them for a walk and giving them medicine." R. 673:12-13; 618:25; 619:1-6. Notwithstanding, Respondent made no claim whatsoever for lost wages, which rendered consideration of past or future employment inappropriate. R. 50, ¶50. As a whole, the testimony revealed little future suffering and active recovery and employment on behalf of Respondent, warranting a new trial on the issue of damages or reduction thereof.

In this respect, the trial court misapplied *Thompson v. Toscano*, 166 A.D.3d 446 (1st Dep't 2018). In *Thompson*, this Court affirmed the trial court's order setting aside the verdict to the extent of awarding the defendants a new trial on the issue of damages unless the plaintiff stipulated to a reduction of damages from $400,000 to $300,000 for past paint and suffering and from $750,000 to $250,000 for future pain and suffering for twenty-five years. The plaintiff who was twenty-nine years old, suffered a labral tear for which she underwent two courses of

physical therapy, and continued to suffer intermittent pain and loss of range of motion with a likelihood of further surgery in the future. Although Respondent suffered a fracture rather than a tear, Respondent was nonetheless in her fifties at the time of accident, received no treatment subsequent to surgery, and was actively recovering at the time of trial, all of which warrant a reduction.

Jones v. New York Presbyt. Hosp., 158 A.D.3d 474 (1st Dep't 2018), further illustrates the unreasonableness of Respondent's award of damages. In *Jones*, this Court upheld the trial court's order of a new trial on damages unless the plaintiff stipulated to a reduction of damages for past paining and suffering from $600,000 to $150,000. Like Respondent, the plaintiff suffered a proximal humerus fracture. Though the plaintiff was admittedly much older than Respondent, unlike Respondent, her injury healed in a misaligned manner, significantly impacted her quality of life, and rendered her unable to care for herself. This is not the case with Respondent. To the contrary, here, there was no evidence presented of any complications as a result of Dr. Lager's surgery. Further, Respondent was actively recovering from both her surgery and an unrelated stroke. She was also actively employed. *Jones* warrants *remittitur*.

Accordingly, Appellants are entitled to a new trial on the issue of damages or *remittitur* thereof, as the jury's award of $800,000 for past and future pain and suffering deviates materially from reasonable compensation.

B) New Trial in the Interest of Justice

Alternatively, a new trial is warranted in the interest of justice, given the inflammatory summation of Respondent's counsel, which exceeded the scope of evidence presented. Pursuant to CPLR 4404, this Court and the trial court are imbued with the discretion to order a new trial in the interest of justice. This encompasses "errors in the trial court's rulings on admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise." *Duman v. Scharf*, 2020 NY Slip Op 04537, 5, 186 A.D.3d 672 (2d Dep't 2020). Here, a new trial is warranted in light of resultant surprise to Appellants from the inflammatory summation of Respondent's counsel.

Counsel's statement in summation that Respondent "will witness her shoulder slowly over time fail," amounted to unfair surprise to Appellants. R. 994:9-11. Even assuming the permanence of Respondent's injuries *arguendo*, the record contains no evidence to support that, in time, Respondent's shoulder will fail altogether. To the contrary, Dr. Sen merely testified that Respondent's recovery would likely plateau in two years:

> A: Well, after the surgery and after seeing everything heal, you expect to make improvement up to a point, usually most of the improvements are made in the first year, and then smaller gains you may see up to a year after that, so say probably after about two years.
>
> You usually reach the point where you are not going to make much more improvement, unless there is an intervention that's needed that gives you improvement.

***

> And with this type of injury to see someone at two years with a hundred percent restoration of motion and strength is difficult. And to see someone with that kind of recovery at her age is very rare, it would be very rare.

R. 791:24-25; 792:1-2.

And, when specifically asked about regression, Dr. Sen spoke only in general terms:

> Q: Is there any regression in this type of injury?
>
> A: There can be. I mean as with anything, you know, with age, the muscles and tendons can get weaker. So if you start from an area of damage getting weak from there you can regress.

R. 792:9-12.

So, too, regarding pain:

> Q: And in that particular part of the body that you just described getting worse over time, would that affect movement of the shoulder?
>
> A: It can.
>
> Q: Is that associated with pain?
>
> A: It can be.

R. 793:6-11.

He also testified as to a possibility of arthritis:

> A: So he's [Dr. Lager] looking at the cartilage through his camera … just by looking at the cartilage, you can see that there is cartilage damage…. It's still there, but it looks abnormal, and that's a precursor

> to arthritis. So the natural history of arthritis is that it gets worse over time.

R. 792:21-24, 24-25; 793:2-5.

Such testimony regarding the potential limits of Respondent's recovery, generalized explanations of the nature of Respondent's injuries, and the possibility of arthritis, is a far cry from demonstrating a "total failure" of Respondent's shoulder; Dr. Sen never testified as to a total failure of Respondent's shoulder.

Dr. Sen's testifying in mere general terms further evinces the inappropriateness of counsel's summation. As evidenced by his responses "There can be" or "It can be," much of Dr. Sen's testimony as to the potential for regression was stated in mere general terms, not to any reasonable degree of medical certainty with respect to Respondent's injuries. Accordingly, the attempt of Respondent's counsel to equate Dr. Sen's testimony to evidence of an eventual total failure of Respondent's shoulder amounted to unfair surprise to Appellants, warranting a new trial in the interest of justice. *See*, *e.g.*, *Smith v. Rudolph*, 151 A.D.3d 58 (1st Dep't 2017). Equally inappropriate, counsel's mischaracterization of Dr. Sen's testimony improperly encouraged the jury to speculate as to the full extent of Respondent's future damages and pain and suffering. This alone warrants a new trial. *See*, *e.g.*, *Jasinski v. New York C. Railroad*, 21 A.D.2d 456, 461 (4th Dep't 1964) (holding new trial warranted where the proof adduced "opened a wide and collateral field for the jury to speculate unjustifiably").

Accordingly, the trial court abused its discretion in declining to afford Appellants a new trial in the interest of justice, given this surprise and resultant prejudice, warranting reversal of the underlying Decision and Order. Alternatively, and notwithstanding this abuse of discretion, reversal is warranted pursuant to this Court's inherent power to order a new trial in the interest of justice.

CONCLUSION

Because Transit is an arm of the State of New Jersey, and because New Jersey has not consented to suit herein, the action must be dismissed outright with prejudice for lack of subject-matter jurisdiction pursuant to the doctrine of interstate sovereign immunity.

Alternatively, should the Court decline to find that New York's courts lack subject-matter jurisdiction herein, Respondents are nonetheless entitled to a new trial on damages or *remittitur* thereof, as the damages awarded to Respondent materially deviated from reasonable compensation, or a new trial in the interest of justice, given the undue surprise resulting to Appellants from the summation of Respondent's counsel.

Accordingly, Appellants respectfully request dismissal of the action with prejudice for lack of subject-matter jurisdiction pursuant to the doctrine of interstate sovereign immunity, or, alternatively, a new trial on damages or

remittitur thereof, or a new trial in the interest of justice, along as such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 5, 2020

Respectfully submitted,

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I hereby certify pursuant to 22 NYCRR § 1250.8(j) that the foregoing was prepared in Microsoft Word 2013.

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NEW YORK SUPREME COURT
APPELLATE DIVISION – FIRST DEPARTMENT

KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSITCORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

STATEMENT PURSUANT TO CPLR §5531

1. The index number of this case in the court below is 156496/2015.

2. The full names of the original parties to this action are set forth in the caption above. There has been no change.

3. This action was commenced in the Supreme Court, New York County.

4. This action was initiated by the filing of a Summons and Complaint on or about June 29, 2015. Defendant Nakar filed his answer on or about August 10, 2015. Defendants New Jersey Transit and Pierrelouis filed their answer on or about September 23, 2015.

5. This is an action for personal injuries, automobile accident.

6. This appeal is taken from the Post-Trial Decision and Order of Hon. Lillian Wan, J.S.C., New York County, dated Jun. 27, 2019 and entered Jul. 3, 2019.

7. This appeal is being made on the fully reproduced record on appeal.

8. The order to be reviewed was rendered after trial.