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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2020-00380

KATHLEEN HENRY,

Plaintiff-Respondent,

against

NEW JERSEY TRANSIT CORPORATION;
RENAUD PIERRELOUIS,

Defendants-Appellants,

and

CHEN NAKAR,

Defendant.

BRIEF FOR PLAINTIFF-RESPONDENT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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KATHLEEN HENRY,

Plaintiff-Respondent,

-against-

NEW JERSEY TRANSIT CORPORATION,
RENAUD PIERRELOUIS,

Defendants-Appellants,

CHEN NAKAR,

Defendant.

--X

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Case No. 2020-00380

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

Plaintiff-respondent, Kathleen Henry (the "plaintiff") respectfully submits this brief in connection with the appeal taken by defendants-appellants New Jersey Transit Corporation ("NJTC") and Renaud Pierrelouis ("Mr. Pierrelouis") (collectively "defendant" and/or "defendants")[1] from the order of the Supreme Court, New York County (Wan, J.) dated June 27, 2019 (7-19), which denied defendant's motion to set aside the verdict and order a new trial or, in the alternative, to conditionally reduce plaintiff's past and future $800,000 pain and suffering award as excessive pursuant to CPLR §5501(c) (18). For the reasons set forth herein at length, it is respectfully submitted that defendant's appeal should be denied in all respects.

[1] Numbers in parenthesis refer to pertinent pages of the record on appeal.

INTRODUCTION AND BACKGROUND

Plaintiff was injured in a motor vehicle accident that occurred on October 5, 2015. Plaintiff was a passenger in a bus owned by NJTC and operated by Mr. Pierrelouis. The bus contacted a vehicle driven by defendant Chen Nakar ("Mr. Nakar"). As recounted in the trial court's order (7-8), plaintiff, who was 54 years of age at the time of the accident, was a passenger in NJTC's bus which was traveling in the Lincoln Tunnel from Manhattan to New Jersey. Plaintiff sustained serious injuries to her right shoulder and ultimately required an open reduction and internal fixation with the insertion of permanent hardware and screws to stabilize her shoulder. Plaintiff was unable to work for 2 years after the accident and her dominant right shoulder continues to cause her serious pain based upon the three-part right proximal humerus impact fracture that resulted from her fall to the floor of the bus (7-10).

Interestingly, defendant's principal argument on appeal is one that was not raised below; to wit, that the case against it must be dismissed based on the Supreme Court's decision in Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 [2019] ("Hyatt III" and/or "Franchise Tax Bd."). Defendant claims that NJTC, an arm of the State of New Jersey, and Mr. Pierrelouis, as a Transit employee acting within the scope of his employment, are immune from suit because sovereign immunity precludes them from being sued in New

York under the Eleventh Amendment to the United States Constitution. Although this matter was not raised below, defendant claims that it is reviewable on its appeal from the trial court's denial of its post-trial motion to set aside the verdict because questions raised as to the court's subject matter jurisdiction may be raised at any time. See, Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison v. FLRA, 56 F.3d 273, 275 [D.C. Cir. 1995]; Jacobson v. United States, 422 N.J. Super. 561 [App. Div. 2011]. In this regard, in Pollard v. State, 173 AD2d 906, 908 [3d Dept. 1991], the Appellate Division, citing to Heisler v. State, 78 AD2d 767 [4th Dept. 1980], held that the defense of sovereign immunity can be raised for the first time on appeal because it "brings into question jurisdiction of the subject" and "may be raised at any time."

Despite this precedent, this Court should not rule on the issue because defendant's legal and factual arguments ignore issues of law and fact that deal directly with immunity of state actors under New York, New Jersey and federal law.

NJSA §§59:1-59:1-13 is the statutory mechanism through which the New Jersey Legislature effectuated a waiver of sovereign immunity. In fact, the Act was a response by the legislative and executive branches of government to the New Jersey courts' arrogation of that traditional common law doctrine to themselves. See, Velez v. City of Jersey City, 180 NJ 284, 288-289 [2004]. The

Velez court, in fact, described the Tort Claims Act as the means by which the legislature "reestablished" sovereign immunity (D.D. v. University of Medicine and Dentistry of New Jersey, 213 NJ 130, 133 [2013]). Here, NJSA §27-25.5(a) dealing with the powers and duties of NJTC provides that it can "sue and be sued." The "sue and be sued" language has historically been interpreted broadly by the New Jersey courts to allow suits for negligence and personal injury (Taylor v. New Jersey Highway Authority, 22 NJ 454 [1956]; Lieberman v. Port Auth., 132 NJ 76, 82-83 [1992]).

In this regard, NJSA §59:2-2(a) provides "a public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." See, Pacifico v. Froggatt, 249 NJ Super. 153 [Sup. Ct., Union County, 1991].

As the New Jersey Supreme Court noted in Tice v. Cramer, 133 NJ 347, 355 [1993], "When the public employee is liable for the acts within the scope of that employee's employment, so too is the entity." As such, under the Tort Claims Act, a public entity "is liable for injury caused by its employee acting or failing to act within the scope of his employment" (Massachi v. AHL Services, Inc., 396 NJ Super. 486, 495-496 [App. Div. 2007]). Accordingly, sovereign immunity under Hyatt III is inapplicable at bar, because

NJTC has expressly consented to suit and has waived any sovereign immunity that it possesses statutorily.

Plaintiff notes that the dominant theme of the New Jersey Tort Claims Act is immunity, with liability being the exception (Rochinsky v. State, Dep't of Transp., 110 NJ 399, 408 [1988]). A public entity is immune from liability unless there is a specific provision in the Act that imposes liability (Molloy v. State, 76 NJ 515, 518-519 [1978]). NJSA §59-2(a) does just that.

Moreover, case law discussed herein establishes that a state court can exercise jurisdiction over a non-resident foreign defendant, even a governmental entity, with regard to accidents occurring in the host state. Vehicle and Traffic Law ("VTL") §253(1) provides that the use or operation by a non-resident of a vehicle in the State authorizes the New York courts to exercise jurisdiction over such person, and it has been held that such statute is constitutionally valid. It is thus wrong for NJTC to claim that it has the right to use this State's roads and highways and then claim an immunity for accidents that occur within this State where those accidents results in injures to New York residents.

Courts have long held that the right to interstate travel is fundamental, and that restrictions on that right are normally subject to "strict scrutiny" (Shapiro v. Thompson, 394 US 618, 634 [1969]; Memorial Hospital v. Maricopa County, 415 US 250 [1974]). "Freedom to travel throughout the United States has long been recognized as

a basic right under the Constitution" (Dunn v. Blumstein, 405 US 330, 338 [1972], quoting United States v. Guest, 383 US 745, 758 [1966]). Under defendant's paradigm, NJTC would have an unrestricted right to use New York State roadways without affording New York the corresponding ability to protect its citizens against the negligence of New Jersey drivers. To state the proposition is to set forth the predicate basis for its denial. Hyatt III simply does not apply here as a matter of both fact and law.

Given the lack of a proper record, this Court should enforce the rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" (Recovery Consultant v. Shih-Hsieh, 141 AD2d 272, 275-276 [1st Dept. 1988]). In this appeal from a post-trial order, not a judgment, which brings up for review all unappealed interlocutory orders (see, In re Aho, 39 NY2d 241 [1976]), defendant's appeal should be dismissed. If it is not dismissed, the sovereign immunity claim should be rejected as legally and factually untenable.

As to the portion of defendant's appeal that is properly preserved, the jury's verdict did not constitute a material deviation from reasonable compensation pursuant to CPLR §5501(c) as a matter of law. In fact, the jury verdict was quite moderate and could have been far higher given the nature and extent of plaintiff's injuries.

In order to conserve space, this brief will "follow form" to that of defendant. We discuss the immunity issue in Point I. In Point II, we discuss the damage award as well as the pertinent facts relevant to that issue.[2]

QUESTIONS PRESENTED

1. Should a court entertain, for the first time on appeal, a claim that the trial court lacks subject matter jurisdiction to consider a personal injury action where the record is incomplete ignoring substantial case law and legislation dealing with the entity claiming that immunity despite the existence of case law holding that the issue can be raised for the first time on appeal?

Plaintiff submits that this question should be answered in the affirmative.

2. Should a court apply sovereign immunity to a New Jersey public corporation whose employees regularly enter New York and use New York's roads where the New Jersey corporation has waived sovereign immunity and New York does not have the right to restrict interstate travel constitutionally and where New York has validly enacted a statute deeming nonresident motorists amenable to New York jurisdiction where they violate rules of the road while driving in this State?

This question should be answered in the negative.

[2] In Point II we discuss other claims made in defendant's brief.

3. Where a jury's pain and suffering award, far from being a material deviation from reasonable compensation, is actually quite conservative, should an appellate court reduce same in accordance with CPLR §5501(c) where the jury fully considered defendant's position at trial and rejected it?

Plaintiff submits that this question should be answered in the negative.

DISCUSSION

POINT I

DEFENDANT'S UNPRESERVED ARGUMENT THAT IT IS ENTITLED TO SOVEREIGN IMMUNITY SHOULD NOT BE ENTERTAINED BY THIS COURT GIVEN THE LACK OF A PROPER RECORD AND DISCUSSION OF THE APPLICABLE LAW AND FACTS AS IT RELATES TO NJTC; IF THIS COURT ELECTS TO DECIDE THE ISSUE SUBSTANTIVELY, NJTC AND ITS EMPLOYEES ARE NOT ENTITLED TO SOVEREIGN IMMUNITY FOR INJURIES CAUSED BY THE NEGLIGENCE OF NJTC DRIVERS IN NEW YORK SINCE NJTC CONSENTED TO SUIT UNDER NEW JERSEY LAW AND NEW YORK VALIDLY ENACTED A STATUTE HOLDING THAT NEW JERSEY DRIVERS ARE SUBJECT TO THE JURISDICTION OF THIS COURT FOR IN STATE ACCIDENTS SUCH AS THIS ONE

a. Defendant's Sovereign Immunity Claim Should Not be Adjudicated by This Court Because the Record is Incomplete Despite the Lack of Prohibition on Raising Jurisdictional Defenses Based on Lack of Subject Matter Jurisdiction for the First Time on Appeal Generally

Relying on the doctrine that subject matter jurisdiction cannot be waived and may be challenged for the first time on appeal (Murray v. State Liquor Authority, 139 AD2d 461 [1st Dept. 1988]; Deile v. Boettger, 250 AD 633 [2d Dept. 1937]), defendant posits

that this Court should dismiss this case because the Supreme Court decision in Hyatt III supports its claim that NJTC and its employees are immune from negligence suits in New York even where a NJTC driver injures a New York resident while operating a vehicle on a New York roadway. Plaintiff acknowledges the general rule but submits that this Court should not decide the issue substantively given the lack of a proper record and defendant's failure to discuss the pertinent facts and law fully in its brief. The general rule that a party may not "argue on appeal a theory never presented to the court of original jurisdiction" should be followed here. See, Sean M. v. City of New York, 20 AD3d 146, 149 [1st Dept. 2005].

Initially, defendant's brief fails to discuss the constitutional right of interstate travel, which is "virtually unqualified" (Califano v. Aznavorian, 439 US 170, 176 [1978]; Califano v. Torres, 435 US 1, fn. 6, [1978]). See generally, Griffin v. Breckenridge, 403 US 88, 105-106 [1971]; United States v. Guest, supra, at 757-758. As such, New York does not have the right to prevent New Jersey residents and/or corporations, even sovereign or governmental ones, from entering New York, traveling on its roadways and using its facilities and establishments. Yet, under defendant's paradigm, New York would have no ability to secure compensation for citizens who are injured by the negligent operation of vehicles by drivers of foreign governmental agencies who can claim sovereign immunity.

As a condition of allowing non-residents to use its roads and highways, the New York Legislature enacted VTL §253(1). That statute provides:

> The use or operation by a non-resident of a vehicle in this State, or the use or operation in this State of a vehicle in the business of a non-resident, or the use or operation in this State of a vehicle owned by a non-resident, if so used or operated with his permission, express or implied, shall be deemed equivalent to an appointment by such non-resident of the Secretary of State to be his true and lawful attorney upon whom may be served the summons and any action against him, growing out of any accident or collision in which such non-resident may be involved while using or operating such vehicle in this State, or in which such vehicle may be involved while being used or operated in this State in the business of such non-resident with the permission, express or implied, of such non-resident owner; and such use or operation shall be deemed a signification of his agreement that such summons against him which is so served shall be of the same legal force and validity as if served on him personally within the State, and within the territorial jurisdiction of the court from which the summons issues, and that such appointment of the Secretary of State shall be irrevocable and binding upon his executor or administrator.

The New York State Court of Appeals has consistently held that the statute is constitutional, as it is based upon general experience, probability and fairness, since a person may waive a constitutional right especially where, like here, it involves securing access to a specific market or territory. See generally, Aranzullo v. Collins Packing Co., 248 NYS2d 874 [1964], affg., 18 AD2d 1068 [1st Dept. 1963]; Leighton v. Roper, 300 NY 434 [1950]; Shushereba v. Ames, 255 NY 490 [1931]; see also Gesell v. Wells, 229 AD 11 [3d Dept. 1930], affd., 254 NY 604 [1930].

The United States Supreme Court has affirmed the propriety of this doctrine of law as well. In Hess v. Pawloski, 274 US 352, 356 [1927], it declared: "Motor vehicles are dangerous machines; and even when skillfully and carefully operated, their use is attended by serious dangers to persons and property." Statutes such as VTL §253 and its antecedent incarnations have been upheld as a valid exercise of the police power of the state (Hess v. Pawloski, supra). The statute applies to foreign corporations and entities and was enacted to meet the conditions laid down by Chief Justice Taft in Wuchter v. Pizzutti, 276 US 13, 20 [1928].

As stated above, statutes like VTL §253(1) have long been upheld by the United States Supreme Court (Burnham v. Superior Court of Cal., 495 US 604 [1990]); indeed, states can require that non-resident entities or corporations appoint an in-state agent upon whom process can be served as a condition for transacting business within their borders (St. Clair v. Cox, 106 US 350 [1882]). The state's power to regulate the use of motor vehicles on its highways extends to residents as well as non-residents (Kane v. New Jersey, 242 US 160 [1916]; Burnham v. Superior Court of Cal., supra).

There is no complete discussion of NJTC's legislative history, its corporate development, its classification as a government entity under New Jersey law or for that matter its charter in defendant's brief. VTL §253(1) and like statutes are

also not mentioned. While defendant does, citing to Karns v. Shanahan, 879 F.3d 504 [3d Cir. 2018], claim that NJTC is entitled to sovereign immunity because it is an "arm of the state" (Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655 [3d Cir. 1989]), even the Karns court noted that its analysis had changed significantly from the time it decided Fitchik.

It is certainly true that even though "a State is not named a party to the action; the suit may nonetheless be barred by the Eleventh Amendment." See, Edelman v. Jordan, 415 US 651, 663 [1974]. This is because the Eleventh Amendment immunizes from suit both non-consenting states and those entities that are so intertwined with them as to render them "arms of the State" (Bowers v. NCAA, 475 F.3d 524, 545 [3d Cir. 2007]). But this doctrine of law does not properly encapsulate the jurisdictional issue that is before this Court.

Defendant does not deal directly with NJSA §27:25-5(a) which provides that NJTC may "sue and be sued." Nor does it note that in Lieberman v. Port Auth., supra, 132 NJ at 83, the New Jersey Supreme Court stated: "Since 1956 we have interpreted the consent language 'sue and be sued' broadly to allow plaintiff to sue public authorities for their negligence in conducting proprietary actions. See also, Taylor v. New Jersey Highway Authority, supra.

In Interstate Wrecking Co. v. Palisades Interstate Park Com., 57 N.J. 342, 346 [1971] the New Jersey Supreme Court, construing

the statute that established the Palisades Interstate Parkway, stated: "There was little reason to doubt that when the New Jersey Legislature approved the 'sue and be sued' clause in the Compact it meant to waive sovereign immunity and to authorize suits against the Commission generally."

Plaintiff notes that restrictions on jurisdiction that relate to state actors only being amenable to suit in the Court of Claims (Benz v. New York State Thruway Authority, 9 NY2d 486 [1961], app. dsmd., 369 US 147 [1962]) are distinguishable because at bar defendant's "sue and be sued" clause "does not restrict a judicial forum available" to the claimant, contrary to defendant (Lakeland Water Dist. v. Onondaga County Water Authority, 24 NY2d 400, 406 [1969]). Plaintiff also observes that United States Supreme Court decisions hold that the states may waive foreign sovereign immunity by consenting to suit in implementing regulations allowing the governmental defendant to "sue and be sued" Petty v. Tennessee-Missouri Bridge Comm'n, 359 US 275, 283 [1959].

Under the New Jersey Tort Claims Act "the public policy of this State is that the public entity shall be liable for their negligence only as set forth in the Tort Claims Act." See, Pico v. State, 116 NJ 55, 59 [1989]; Dickson v. Town of Hamilton, 400 NJ Super. 189 [App. Div. 2008]. The New Jersey Tort Claims Act is not fully discussed in defendant's brief nor is NJSA §59:2-2(a) which provides "a public entity is liable for injury proximately caused

by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." While a public entity "is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice or willful misconduct" (NJSA §59:2-10), negligence claims involving respondeat superior plainly are waived under the New Jersey Tort Claims Act (Pacifico v. Froggatt, supra).

In this regard, the "relevant question is whether (New Jersey) has consented to suit" not "whether it has expressly consented to be sued in another forum" (Next School v. At-Net Services-Charlotte, 2020 S.C. C.P. LEXIS 3693 [Ct. of Comm. Pleas, SC 2020]).

Accordingly, on this record, there is plainly an insufficient basis to adjudicate a claim of sovereign immunity, especially given New York's settled public policy of assuring not only that motorists who use state roads impliedly consent to suit and jurisdiction in the State, but also the public policy that attempts to guarantee persons injured by the negligence of drivers the means to secure recovery through a financially responsible defendant. See, Murdza v. Zimmerman, 99 NY2d 375, 379 [2003]; Continental Auto Lease Corp. v. Campbell, 19 NY2d 350, 352 [1967]. See generally, Morris v. Snappy Car Rental, 84 NY2d 21, 27 [1994].

For all these reasons, this Court should refuse to rule on defendant's sovereign immunity defense argument.

b. Even Assuming That This Court Elects to Rule On The Sovereign Immunity Defense Substantively, It Should Reject Defendant's Claims Since It Has Consented To Suit In This State Under Both Its Laws, The Laws Of The State Of New York And The Case Law Interpreting Waivers Of Sovereign Immunity

As we have shown, on a substantive basis, NJTC has consented to jurisdiction in this State by waiving sovereign immunity. An analysis of substantive New Jersey, New York and federal law establishes the propriety of this claim. NJTC can "sue and be sued" and it has waived sovereign immunity for respondeat superior negligence claims committed by its employees under the New Jersey Tort Claims Act.

Any argument that Hyatt III precludes New York from exercising jurisdiction over NJTC and its drivers for negligent driving that leads to injuries to New York citizens in New York is plainly, we submit, wrong and legally untenable.

In Hyatt III, Gilbert Hyatt received a computer chip patent that proved very profitable. He left the high-tax state of California for Nevada. In 1993, the California Franchise Tax Board ("FTB") audited his 1991 tax return, which had not reported money earned from his patent. After an investigation, FTB assessed approximately $11 million in taxes, penalties and interest for 1991 and 1992. In 1998, Hyatt sued FTB in Nevada state court seeking declaratory relief, and for negligence and intentional tortious behavior by FTB investigators. The Nevada Supreme Court held that the full faith and credit clause did not render FTB

immune from suit but granted immunity from the negligence claim on comity grounds because a Nevada agency would enjoy such immunity in Nevada courts. See, Franchise Tax Bd. of Cal. v. Hyatt, 335 P3d 125, 131 [Nev. 2014].

FTB sought certiorari, which was granted in one of three cases that reached the United States Supreme Court. In a unanimous decision, the Supreme Court affirmed the Nevada Supreme Court's ruling, holding that Nevada did not violate the full faith and credit clause when it refused to apply California's immunity rule to FTB (Franchise Tax Bd. v. Hyatt, 538 US 488, 494 [2003], "Hyatt I"). It was enough that there was no "policy of hostility" toward California (id., 538 US at 499). Because FTB did not ask the Supreme Court to overrule a prior decision that authorized the exercise of jurisdiction over state agencies (Nevada v. Hall, 440 US 410 [1979]), and had permitted state courts to render judgments against sister states, the court refused to consider the issue.

On remand, and after a four-month trial, the jury found for Hyatt on all intentional tort claims, awarding him $388,000,000. On appeal, the Nevada Supreme Court upheld the denial of immunity to FTB, because Nevada law would not give a Nevada agency immunity for bad faith conduct or for intentional torts. The court upheld the jury's judgment on Hyatt's fraud claim and rejected FTB's request to enforce Nevada's statutory cap on government damages. Since it would be against the state's public policy, comity did

not require it. The court also upheld the intentional infliction of emotional distress judgment but vacated the damage award and remanded for a new damage trial on that claim.

Over a decade after its first trip to the Supreme Court, FTB made its second. This time, it did ask the court to overturn Hall, but an equally divided court let Hall stand (Franchise Tax Bd. v. Hyatt, 136 S. Ct. 1277 [2016]; "Hyatt II"). The Supreme Court also considered whether the Nevada courts could award damages against another state's agencies in excess of what could be awarded against a Nevada agency. Writing for the court, Justice Breyer held that the Nevada courts had violated the full faith and credit clause by "refusing to apply either California law – which would have applied to FTB in California courts – or Nevada law – which would have applied to a Nevadan agency and Nevadan courts; this would have constituted "unfair discrimination against California" (136 S. Ct. at 1282). Chief Justice Roberts dissented on the ground that Nevada articulated a sufficient policy rationale to justify not applying the damages cap it would apply to a Nevadan agency, and that this was all that the full faith and credit clause required (136 Sup. Ct. at 1287).

On remand, the Nevada Supreme Court reduced Hyatt's damages to $50,000 pursuant to the Nevada statutory damage cap. FTB sought and obtained certiorari, again asking the Supreme Court to reconsider and overrule Hall. Writing for a 5-4 majority, Justice

Clarence Thomas held that Hall was "contrary to our constitutional design", such that stare decisis did not require following the erroneous precedent (139 Sup. Ct. at 1492]). Looking at the legal system that was in place before the Constitution was ratified, Justice Thomas found that the common law and "law of nations" afforded states immunity in their own courts and the courts of sister states (id. at 1493-1495). Justice Thomas concluded that the Framers presumed the Constitution would not upset that state's affairs, as evidenced by Congress's swift action to negate Chisholm v. Georgia, 2 US 419 [1793], by passing the Eleventh Amendment.

In Hyatt III, however, California had not consented to unequal treatment. Just as it would be unfair for the State of New York to claim sovereign immunity where a driver of one of its vehicles injured a New Jersey resident in New Jersey where there was an implied consent to jurisdiction, so too, it is completely unfair for NJTC to claim immunity here for the negligence of its driver in injuring a New Yorker in New York. Hyatt III cannot be properly applied to this case.

The Hyatt III decision was based on the doctrine that one state could not adjudicate the rights of another in its own forum where there was no consent to jurisdiction. To apply that decision to this case would essentially abrogate statutes which have been constitutionally enforced, that hold that there is implied consent to jurisdiction in a case where a driver who is a resident of one

state travels into another and causes physical injury to a resident there. It also violates New Jersey case law interpreting the Tort Claims Act.

New Jersey based persons and entities have tried before to claim immunity from motor vehicle injury suits in New York, without success. See, Ayars v. Port Auth., 180 AD3d 520 [1st Dept. 2020]. Recently, Justice Silvera, in Fetahu v. New Jersey Tr. Corp., 2020 NY Misc. LEXIS 1672 [Sup. Ct., NY County, 2020], rejected such a sovereign immunity defense and specifically rejected the citation to Hyatt III. He added, "Even if this Court were to find that NJTC is an arm of the State of New Jersey, defendant had failed to prove that New Jersey is exempt from suit by a private citizen in the State of New York"; the Hyatt III court, after all, found that "Suit against a foreign state is permissible so long as it is consistent with the full faith and credit clause", and New Jersey permits victims of motor vehicle accidents to sue the State of New Jersey in New Jersey, and has not raised jurisdictional objections to suits against New York citing Ceretta v. New Jersey Transit Corp., 267 AD2d 128 [1st Dept. 1999]. In Hyatt III, the Supreme Court found that the FTB did not consent to jurisdiction in Nevada from the inception of the suit. It is true that in Fetahu, supra, Justice Silvera found that NJTC's invocation of the lack of jurisdiction defense was waived, but apparently no one brought up the implied consent to jurisdiction elements of the VTL.

Defendant's reference to Reale v. State, 192 Conn. App. 759 [2019], is unavailing, as the facts of that case did not raise an issue of consent to jurisdiction based on the operation of a motor vehicle. Instead, Reale was a spoliation action; moreover, the court noted that no state immunity claim applied to an individual defendant. See, Ott v. Barash, 109 AD2d 254 [2d Dept. 1985].

Certainly, immunity should not be conveyed or denied to a state actor where it is not appropriate to be so (Trepel v. Hodgins, 183 AD3d 429 [1st Dept. 2020]). Immunity statutes and doctrines should be narrowly construed as they are in derogation of the common law. They should not be applied to situations where they have no application, such as a car accident case where the owner and driver of the vehicle implicitly and explicitly consented to the jurisdiction of the court. To so apply it here would fundamentally alter Supreme Court, New York and New Jersey State court decisional law and validate the implied consent provisions of the New York State Vehicle & Traffic Law.

As we shown, given that New Jersey residents have the constitutional right to come to and travel within this State, NJTC's claim that it, and, derivatively, its employees, are entitled to immunity trenches upon this constitutionally protected liberty. Under the paradigm urged by NJTC, this State would have no recourse but to allow NJTC and its employees access to the state's roadways without a corresponding right to insure that New York residents,

injured by the negligent driving of NJTC employees, possessed a right of action to seek compensation for injuries in the very State where the accident took place here. The only way to protect New York residents from the negligent act of state or state sponsored entities that operate motor vehicles on New York state roads and highways would be to restrict their right to travel in this State. But, as we have shown, such a restriction is constitutionally prohibited. As such, it is clear that VTL §253 establishes NJTC's consent to the jurisdiction of this Court, a fact that demolishes defendant's immunity claim here as a matter of law.

The fact NJTC has also consented to "sue and be sued" based on its charter and the New Jersey Tort Claims Act authorizes suit against it for the negligent acts of its employees only heightens the propriety of this analysis.

For the foregoing reasons, it is respectfully submitted that, substantively NJTC's sovereign immunity argument fails as a matter of law.

c. Regarding the Claims in Defendant's Brief

In an attempt to avoid the unfair import of its sovereign immunity argument, NJTC raises a number of legal claims in its brief that, we believe, do not correctly reflect the law as applied to the facts of this case.

NJCT initially sets forth general arguments regarding sovereign immunity (Brief at 7-9) and then posits broadly that

because it is an "arm of the state" (Brief at 9) it is entitled to sovereign immunity such that it is "not subject to suit in New York courts absent New Jersey's consent" (Id.). It cites to Karns v. Shanahan, and Robinson v. N.J. Rail Operations, Inc., 2019 US App. LEXIS 3386 [3d Cir. 2019][3] (Brief at 9-14) as well as Muhammad v. N.J. Transit, 176 NJ 185 [2003] and Weiss v. N.J. Transit, 128 NJ 376 [1992] to support its claim that it is entitled to sovereign immunity.

However, defendant's assertion that it has not "consented to suits in New York" (Brief at 14) is not accurate factually or legally. Plaintiff notes that the Supreme Court's decision in Nevada v. Hall, supra involved a case where the State of Nevada did not consent to suit in California, a claim expressly affirmed in Hyatt III.

Despite defendant's assertion that it has "not expressly consented to suit" because it never provided an "unequivocal expression of consent" that constituted a "clear declaration" (Brief at 15-16), the opposite is actually true. NJTC references notice of claim provisions set forth in NJSA §59:8-1-11 stating that those provisions "cannot be interpreted to extend to out of state...courts" (Brief at 17). It then posits that NJSA §59:9-1

[3] Plaintiff notes that the decision in Robinson was vacated based on an amendment to New Jersey law which limited the latter's right to sovereign immunity with respect to certain federal claims. See, Robinson v. New Jersey Transit Rail Operations, Inc., 776 Fed. Appx. 99 [3d Cir. 2019].

confirms that "New Jersey courts are the sole 'appropriate' forum for litigating claims against" (Id.). However, the statute does not create a separate court, like the New York State Court of Claims, for adjudicating causes of action against NJTC. Rather, the statute provides: "Tort claims under this Act shall be heard by a judge sitting without a jury or a judge and a jury where appropriate demand therefore is made in accordance with the rules governing the courts of the State of New Jersey." Thus, defendant's assertion that when the statutes are read together, they "provide for suits solely in appropriate courts within the State of New Jersey" (Brief at 18) is plainly wrong as demonstrated by the manner in which NJTC conducted this litigation.

At no time up until the filing of its brief, did NJTC assert that negligence causes of action against it could only be brought in the State of New Jersey in accordance with New Jersey's procedural and statutory requirements. While it does cite to Hyatt III in claiming sovereign immunity, the defense that New Jersey Transit could not be properly sued in New York because the only appropriate forum in which such an action could be brought was in New Jersey raises an argument that could and should have been raised at the inception of this litigation if it was truly viable. The fact that defendant failed to raise that argument at that time establishes its inapplicability now.

Plainly, defendant has charted its litigation course and cannot now assert that its sovereign immunity defense is cognizable because it was only amenable to suit in the State of New Jersey under New Jersey case law and statutes. See, Mitchell v. New York Hospital, 61 NY2d 208 [1984]; Martin v. Cohoes, 37 NY2d 162, 165 [1975]; Cullen v. Naples, 31 NY2d 818, 820 [1972]. In this regard, the provisions of the New Jersey Tort Claims Act cited by NJTC does not compel that it be sued in New Jersey. It merely establishes that the rules for suit in the forum where it is sued comport with that of New Jersey. Since there is no evidence that New York court rules and procedures differ markedly from that of New Jersey, and since NJTC did not raise a jurisdictional defense when this litigation was begun on the basis that it could only be sued in New Jersey, its current thesis that it is amenable to suit "solely in appropriate courts within the State of New Jersey" (Brief at 18) should be rejected as an after the fact attempt to justify a jurisdictional claim that is not cognizable or meritorious.

NJCT is correct when it points out that the New Jersey Legislature enacted the New Jersey Tort Claims Act in response to court decisions arrogating to the courts the responsibility to adjudicate "the tort liability of the state itself" (Brief at 22). However, its discussion of legislative history dealing with the New Jersey courts "existing court system" or "regular court system" (Brief at 23-24), in no way immunizes NJTC from liability in New

York for tortious acts committed by its employees on New York State roadways that injure New York residents where New York has a compelling interest in insuring compensation for its citizens and where New York does not have the right to prohibit New Jersey, or any other state, from using its roads constitutionally.

In this regard, although not directly relevant, loss allocating rules involving conflict of law cases militate strongly in favor of plaintiff's position. See, Padula v. Lilarn Properties, 84 NY2d 519 [1994]; Cooney v. Osgood Mach., Inc., 81 NY2d 66 [1993]; Neumeier v. Kuehner, 31 NY2d 121 [1972]. The Court of Appeals has held that New York's "vicarious liability through permissive use" law codified in VTL §388 is designed to insure that an injured party is afforded a financially responsible party against whom he or she can recover (Farber v. Smolack, 20 NY2d 198 [1967]). When it enacted the statute "the legislature intended to enlarge the vehicle owner's vicarious liability and not to draw a line at the border" (Sentry Ins. Co. v. Amsel, 36 NY2d 291 [1975]). Here, where the tort occurred in New York and where a New York resident was injured, New York plainly has the greater interest in assuring that its loss allocating rules apply. See, Shaw v. Carolina Coach, 82 AD3d 98 [2d Dept. 2011].

Indeed, as noted in Schultz v. Boy Scouts of Am., 65 NY2d 189, 196-197 [1985] where a New York domiciliary is injured in an accident with a foreign defendant in this State, New York law

applies generally where following the laws of the non-resident would result in the loss of substantive rights to the New York domiciliary. See, Miller v. Miller, 22 NY2d 12 [1968]; Farber v. Smolack, supra; Macey v. Rozbicki, 18 NY2d 289 [1966].

It should also be noted that defendant has not claimed that plaintiff did not comply with the notice of claim provisions applicable to NJTC. Indeed, plaintiff's complaint specifically posits that a notice of claim was served on NJTC and that the action was timely commenced in accordance with New Jersey law (482-483). Defendant's answer does not contain an affirmative defense that plaintiff failed to comply with conditions precedent to suit, including filing a timely notice of claim and commencing suit within the applicable statute of limitations (490-496).

Accordingly, when viewed in context, defendant's claim that it is entitled to sovereign immunity fails as a matter of both fact and law.

POINT II

THE JURY'S PAST AND FUTURE PAIN AND SUFFERING AWARD FOR PLAINTIFF'S SERIOUS INJURIES THAT ARE ONLY GIVEN CURSORY DISCUSSION IN DEFENDANT'S BRIEF WERE NOT A MATERIAL DEVIATION FROM REASONABLE COMPENSATION PURSUANT TO CPLR §5501(C); IF ANYTHING, THE DAMAGE AWARD WAS QUITE MODERATE, REFLECTING THE JURY'S CAREFUL CONSIDERATION OF THE EVIDENCE

a. The Governing Standard

CPLR 5501(c) provides:

> In reviewing a money judgment in an action in which an itemized verdict is required by Rule Forty-One Hundred Eleven of this chapter, in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

This is generally held to be peculiarly a function for the jury, and a damage verdict should not be disturbed unless it can be said to be inadequate or excessive (Hallenbeck v. Caiazzo, 41 AD2d 784 [3d Dept. 1973]; Petosa v. New York, 63 AD2d 1016 [2d Dept. 1978]; Hofbauer v. Withey, 53 AD2d 926 [3d Dept. 1976]). The Appellate Division, Second Department has stated, "it is well settled that the amount of damages to be awarded for personal injuries is primarily a question of fact for the jury" (Schare v. Welsbach Electric Corp., 138 AD2d 477 [2d Dept. 1988]; O'Brien v. Covert, 187 AD2d 419 [2d Dept. 1992]).

In Caprara v. Chrysler Corp., 52 NY2d 114, 126-127 [1981], the Court of Appeals pointed out that in such a task, "no less than a

sophisticated elasticity will ever do. In no two cases are the quality and quantity of such damages identical. As has been pointed out by pragmatists and theorists who have wrestled with how the problem of how damages in such cases may be justly arrived at, evaluation does not lend itself to neat mathematical calculations."

"In ascertaining whether or not a verdict is excessive, consideration must be given to the nature and extent of the injuries; whether or not they are permanent; the extent of the pain, past, present and future; and what effects the lasting injury has, had or will have in the future" (Suria v. Shiffman, 107 AD2d 309 [1st Dept. 1985], mod., 67 NY2d 87 [1986]; Riddle v. Memorial Hospital, 43 AD2d 750 [3d Dept. 1973]).

Prior verdicts sustained by the Appellate Division may provide a framework within which an analysis of the propriety of the jury verdict can be evaluated. "Prior verdicts may guide and enlighten the court, and in a sense constrain it [cits.]. A long course of practice, numerous verdicts rendered year after year, orders made by trial justices approving or disapproving them, decisions on the subject by appellate courts, furnish to the judicial mind some indication of the consensus of opinion of jurors and courts as to the proper relation between the character of the injury and the amount of compensation awarded [cits.]" (Senko v. Fonda, 53 AD2d 638, 639 [2d Dept. 1976]).

"Great deference" is given to the "interpretation" of the evidence by a jury, and a court "will set aside an award of damages only when it deviates materially from what would be reasonable compensation under the circumstances" (Abar v. Freightliner Corp., 208 AD2d 999 [3d Dept. 1994]; Raucci v. City Sch. Dist., 203 AD2d 714 [3d Dept. 1994]).

The Second Department, in Braun v. Ahmed, 127 AD2d 418, 424 [2d Dept. 1987], declared:

> Pain and suffering have no known dimensions, mathematical or financial. There is no exact correspondence between money and physical or mental injury or suffering, and the various factors involved are not capable of proof in dollars and cents. For this reason, the only standard for evaluation is such amount as reasonable persons estimate to be fair compensation... . For hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been fair and reasonable compensation...because of the universal acknowledgment that a more specific or definitive one is impossible. There is and there can be no fixed basis, table, standard or mathematical rule which would serve as a guide to the establishment of damage awards for personal injuries. And it is equally plain that there is no measure by which the amount of pain and suffering endured by a particular human being can be calculated...The varieties and degrees of pain are almost infinite. Individuals differ greatly in susceptibility to pain and in capacity to withstand it...

This is why "the size of the verdict alone does not determine whether it is excessive" (Mather v. Griffin Hospital, 540 A2d 666, 673 [1988]). "The fact that an award may set a precedent by its size does not, in and of itself, render it suspect" (Rodriguez v.

McDonnell Douglas Corp., 87 Cal. App. 3d 626, 654-655, 151 Cal. Rptr. 399, 414 [1978]).

The determination of what is an excessive verdict changes with the times, the state of the economy, and ideas current in society. Jury verdicts have increased over time, so that what was excessive 10-20 years ago may not be excessive today. See, Batteast v. Wyeth Laboratories, Inc., 172 Ill. App. 3d 114, 526 NE2d 428 [Ill. App. 1 Dist. 1988]. Thus, "although possessing the power to set aside an excessive jury verdict … a court should nonetheless be wary of substituting its judgment for that of a panel of factfinders whose peculiar function is the fixation of damages. Modification of damages, which is a speculative endeavor, cannot be based upon case precedent alone, because comparison of injuries in different cases is virtually impossible" (Po Yee So v. Wing Tat Realty, Inc., 259 AD2d 373, 373-374 [1st Dept. 1999]).

b. The Damage Evidence Elicited at Trial

Plaintiff, who was born on February 9, 1960, and whose injury was so severe that her son had to cancel his plans to move in with his girlfriend to care for her after the accident (582-584), stated that she felt "shooting pain" in her right shoulder after she fell to the floor of the bus. Plaintiff, who was right side dominant, came to this country when she was 33 and her son was 12 to provide a better life for her family (584-586). She has obtained her citizenship from the INS (585-587).

Prior to the accident, plaintiff had performed housekeeping for private clients for $60 per day (586-587) and had also worked in a spa for 14-15 years, earning $14 per hour for cleaning and assisting clients. She had worked at the spa for 14 to 15 years before the subject accident (586-90).

Plaintiff was injured on October 5, 2014 at around 4 to 4:30 in the afternoon in the Lincoln Tunnel (589-592). She was living in New Jersey at the time and would take a bus home from work (589-594).

Plaintiff was standing because a woman with a stroller was attempting to sit in one of the seats on the bus; she maintained her balance by holding onto a pole (590-596). She heard a "bang" and "was on the floor" (596). At the time, she was facing the back of the bus. She landed on her right shoulder feeling an extreme "shooting pain" that was so severe that she was unable to rise from the floor (596-597). A tall woman tried to assist plaintiff but when she grabbed her hand plaintiff screamed in pain (597-599).

Plaintiff was taken from the bus by ambulance to Hoboken Hospital; the pain in her shoulder was "excruciating" and the process of disrobing caused her even more suffering (599-601). Plaintiff was told that she required emergency surgery because she had a broken shoulder, but she had to wait until Tuesday to have it because a surgeon was not available (600-601).

Plaintiff described her hospital course, the pain she suffered and how she was hooked up to tubes, some of which contained pain medication. She was unable to use the bathroom independently or to bathe or clean herself (600-603).

Plaintiff was taken home from the hospital by cab; the pain in her shoulder prevented her from sleeping that night (601-604). Plaintiff was given a brace that she wore for 2 weeks; she was unable to take the pain medication that she was prescribed because it made her drowsy (603-604).

Despite being a conscientious worker, plaintiff was unable to work for 2 years after the accident (604-605). She testified that she had two surgeries, one with Dr. Lager and the other with Dr. Sen; after the first surgery she underwent physical therapy for 6 weeks, taking a train to the therapy office (603-606). She performed stretches, strengthening exercises and other PT modalities. Thereafter, she was given exercises to do at home (605-607).

Showing her honesty, plaintiff testified that physical therapy was painful but that it did assist her temporarily. However, because of pain in her right upper extremity that traveled to her hand, she had difficulty sleeping and currently has to place a pillow under her right shoulder when she sleeps on her right side (606-608).

Plaintiff testified that she had a second surgery because she had decreased range of movement in her right shoulder with pain

radiating down her arm (607-608). She stayed in the hospital one day and thereafter undertook a course of physical therapy that encompassed 4 or 5 separate sessions (607-610). Plaintiff confirmed that her second round of physical therapy was also painful (608-611).

Unfortunately, 2 to 3 years after the accident, plaintiff suffered a stroke and was hospitalized for a couple of days. The stroke was apparently not severe since plaintiff's treatment consisted primarily of taking Tylenol to prevent blood clots that could lead to a second stroke (610-612).

In this regard, plaintiff walks regularly as part of her stroke protocol (611-612). Plaintiff suffered no damages as a result of the stroke and stayed in the hospital "for a couple of days" just to allow the doctors "to make sure everything was okay" (612-613).

Plaintiff suffers no side effects from the stroke currently. Her workout and NSAID regimen have obviously been successful (612-614). Indeed, plaintiff also performs yoga and other "light exercises" which include "stretching" (613-615).

Plaintiff testified that she had hardware implanted in her shoulder as a result of the first surgery. She also had a significant scar from the surgery that she exhibited to the jury (614-615). Plaintiff was not able to perform basic activities of

daily living after her initial surgery. She could also not undertake household duties that she had previously performed (615-618).

Plaintiff did return to work for a short time in 2016 getting a parttime job at K-Mart (617). Plaintiff worked "in a soft line folding clothes and putting away clothes"; she ensured that the tables where customers shop were properly organized (617-618). Plaintiff was unable to return to her house cleaning and spa jobs because they were too demanding physically (616-618). Even the K-Mart job was too difficult for plaintiff who was unable to arrange clothes properly because of her shoulder injury (618-619). Because of her physical disability, plaintiff is hoping to secure a job caring for older people which is not as physically demanding as working in a spa, store or performing house cleaning (618-621).

Plaintiff is "getting older" and she is worried about her future. Normal activities of daily living and home management are difficult for her (619-620).

After defense counsel improperly moved for a mistrial by claiming that plaintiff exaggerated her injuries, an argument that the trial court properly rejected (620-627), plaintiff was cross-examined by defendant's attorney. Defense counsel went over plaintiff's exercise regimen, her living arrangements and how she traveled to and from work (628-631). After recounting the accident (630), plaintiff testified that she originally saw Dr. Sen

approximately 6 times; Dr. Sen then referred her to Dr. Lager who performed surgery (633-634).

Interestingly, plaintiff testified that Dr. Lager had reservations about her returning to work in December of 2015, but she wanted to work to support herself and her family (641-643). She rated her pain 2 out of 10 in November of 2015 when she saw Dr. Lager, but this was "because I was taking therapy" (642).

Plaintiff conceded that she was able to move her arm but not "all the way up" (643-644). Interestingly, plaintiff "always complained about weakness and a pain in my shoulder and shooting down my arm, my fingers" (644). Plaintiff could not lift her right arm as high on the right side as the left (643-645).

Plaintiff explained that although she was told that her shoulder and hand were "healing nicely" she always had hand weakness and shoulder pain notwithstanding that the surgery was medically successful (646-650). Moreover, her reference to "healing" in the medical records related to the stitches that she had in the surgery (649-653). All of plaintiff's doctors knew that she "had weakness in (her) shoulder" (653).

Plaintiff denied that she had returned to work in housekeeping after which defense counsel asked plaintiff about how she got to work pointing that she had to walk and take a bus to her place of employment, all factors that were not inconsistent with her testimony (670-673). On redirect examination, plaintiff emphasized

that her testimony about her "healing nicely" related to stitches; she was able to walk to work because she was careful with her shoulder; and the place she lived was leased with her and her husband being named on the document (673-674).[4]

Dr. Milan Sen, a well credentialed physician who attended McGill University where he underwent an orthopedic residency and who also did a fellowship in Kentucky for hand and microsurgery as well as an orthopedic trauma fellowship at HSS, testified for the plaintiff and did so impressively (768-770). Dr. Sen stated that he was "primarily a traumatologist" who deals with "fractures and dislocations anywhere in the body", excluding the spine and head (770). Much of his treatment deals with trauma induced fractures to plaintiff's musculoskeletal system (769-771).

It should be noted that Dr. Sen was an assistant professor at the University of California in San Francisco and was the director of upper extremity injuries at San Francisco General Hospital. He

[4] Plaintiff notes that defendants did themselves no favors by setting forth testimony that was obviously false. For example, Elmira Buongiorno, the acting director of bus safety (744), who authenticated the defendant's accident report refused to concede that the report, in which the driver admitted that he "suddenly stopped" (740-751) did not necessary deal with "safety issues" despite the fact that the report stated that three people were injured (749-752). He would not admit that this accident involved a "major event" (753) even though reports of that type are only filled out in cases of serious injuries (754-755) and that he would need more information to answer plaintiff's counsel's questions (754-755). Video footage of the accident should have been available, but Mr. Buongiorno stated that there was no retained footage of the accident despite the presence of automatic recording devices in the bus (756-760). Ultimately, Mr. Buongiorno stated that nothing from the camera was saved despite the presence of an accident in which three people claimed to be injured (766). Furthermore, one of the "criteria for triggering this camera was a hard break." The incident report specifically states that the "operator had to hard break to avoid an accident" (766).

also accepted a chief of orthopedic trauma position at Memorial Herman Hospital in Texas, one of the busiest trauma centers in the country where he was an assistant professor teaching fellows at that hospital as well (771-773). When he came to New York, he had an appointment at Jacobi Medical Center and was an assistant professor at Albert Einstein College of Medicine.

At the time of trial, Dr. Sen had transitioned to a full-time position at Jacobi as the chief of orthopedics and the director of orthopedic trauma (772-773). Plainly, this physician's professional credentials, experience and education are of the highest order.[5]

Dr. Sen affirmed that he had performed between 150 to 200 shoulder surgeries prior to October of 2014 (773-774). Dr. Sen had only testified as a medical expert one time previously (774).

Dr. Sen first began treating plaintiff in October of 2014 after she presented at Hoboken University Hospital. Plaintiff suffered a fracture dislocation of her shoulder which had to be reduced because the shoulder separated from the joint (774-775). Initial attempts at reducing the fracture were unsuccessful, but the top part of the arm, which was in a "normal position" was not connected to the glenohumeral joint (775-776). That joint allows for movement in an individual's shoulder. Plaintiff's proximal

[5] Unsurprisingly Dr. Sen also published extensively in medical periodicals and journals (773).

humerus, which made up a part of her shoulder joint, was fractured in more than 2 places (776-777).

Dr. Sen performed an open reduction internal fixation that was required after the initial reduction failed; the surgery typically takes between 2 and 4 hours to complete. Plaintiff remained in the hospital for 5 days after her surgery (776-779).

Dr. Sen described plaintiff's treatment at the hospital and her post-discharge therapy and medical regimen. On returning home from the hospital, plaintiff engaged in physical therapy three times a week. She experienced pain and stiffness (780-782).

Three months after the accident, plaintiff saw Dr. Sen while she was participating in physical therapy. She was progressing but still had pain, discomfort and a great deal of sensitivity around the surgery site (784). Importantly, plaintiff was "anxious about returning to work" and wanted her "right arm" to be sufficiently mobile "for her job" (784). Unfortunately, strength in her shoulder joint was diminished. Plaintiff's deltoid muscle was plainly compromised (784-785). Dr. Sen was "worried" because plaintiff "did not have good range of motion", but he felt that she was "progressing with therapy" and that she would eventually regain "functional range of motion", so he ordered more therapy (785).

Dr. Sen saw plaintiff three more times at 4½, 5½ and 7 months post-surgery. Unfortunately, plaintiff was not able to work within the 10-pound weight restriction that is necessary to "bring people

back into the workplace" (786-787). While plaintiff made "some improvements in range of motion" she still "complained of weakness". She had particular weakness in internal and external rotation as well as in lifting her arm forward (787).

Dr. Sen believed that surgery to release the scar tissue that formed around the broken bone might be of benefit since it would reduce pain, restriction and stiffness (787-788). Dr. Sen recommended Dr. Lager, a sports medicine surgical specialist, to clean out the scar tissue and create more space in the joint (787-788). Dr. Lager performed the surgery to release the scar tissue, after which plaintiff embarked on a physical therapy course that she undertook three times per week (788).

Although plaintiff's physical therapy records were "surprisingly poor", it was clear that her therapists were attempting to improve her mobility and reduce her pain. Unfortunately, plaintiff continued to experience pain and decreased rotator cuff strength; she had difficulty rotating her right shoulder (789-790).

Interestingly, Dr. Sen affirmed that plaintiff's symptomatology was not "unexpected" because she suffered a "dislocation" in which the bone did not simply "stay in place." When a shoulder dislocates it has the capacity to "tear the capsule off the front of the shoulder blade" which is precisely what happened in plaintiff's case (790). Based upon the nature of

plaintiff's injury and her age, plaintiff's symptomatology was not unexpected. Most improvement is made in the first year following the surgery with limited improvement possible up to 2 years. But after that period the patient generally "plateaus in terms of improvement of function" (791).

With respect to a patient of the plaintiff's age, Dr. Sen would be happy if the patient was able "to get the arm over their head, comb their hair, reach something above here in this kind of area and reach behind themselves to clean themselves" (792). Unfortunately, plaintiff suffered cartilage damage in the shoulder as well as chondromalacia, a condition that is a natural precursor to arthritis (792-793).

Plaintiff treated with Dr. Lager for approximately 4 ½ months and then went to physical therapy until she "ran out of visits" (793).

Dr. Sen examined plaintiff the Monday prior to trial (793-794). He conducted a thorough physical examination that he explained to the jury. Plaintiff suffered weakness in rotation and forward motion. Forward flexion was 3 out of 5 while other functional disabilities were not noted numerically (795-796). Plaintiff will not have much improvement in her condition since she is 4 years removed from the surgery (796-797). Plaintiff suffers from pain and weakness in her shoulder, particularly on

rotation (796-797). Plaintiff's medical expenses were roughly $360,000 (797-798). Dr. Sen's surgical fee was $55,000 (798).

Defense counsel brought out that Dr. Lager's notes demonstrated that while plaintiff had range of motion limitations, they were fairly small (804-807). He also performed tests that were negative for impingement (807-810). While plaintiff's rotator cuff was intact, Dr. Lager noted that there was "a lot of bursitis, which is inflammation which is often the cause of a lot of pain"; he described a "cartilage problem" in plaintiff's shoulder resulting from the accident (810). Dr. Sen then conceded that the insurance company, consistent with its normal practice, probably reduced his bill in this case substantially (811-813).

Dr. Sen also affirmed that plaintiff's condition plainly worsened in terms of range of motion and strength (814). Injuries such as those suffered by the plaintiff "can deteriorate further either from recondition of the muscles" or "from progression of some arthritis" (814). While Dr. Lager did a fair amount of medical-legal work, he preferred practicing medicine and doing surgeries (815-816). It was also brought out that prior to the pretrial examination, Dr. Sen last saw plaintiff on May 4, 2015 while Dr. Lager saw her one day later (816-817).

When Dr. Sen last saw the plaintiff, she had only 150 degrees forward flexion, 155 degrees of abduction, 30 degrees of external rotation and 20 degrees internal rotation. She had full muscular

strength except she was only 3 out of 5 on right side forward flexion (816-817). When Dr. Lager saw plaintiff on May 5 his range of motion limitations were far greater than those found by Dr. Sen, a difference that was highly "unusual" (816-818). Some of the differences measured 10 to 30 degrees (819).

Dr. Sen then explained how the surgery Dr. Lager performed could aid in range of motion and pain but that it did not ameliorate the damage that was caused by the multiple fractures that plaintiff sustained to the proximal humerus or the damage caused by the dislocation that was present in the cartilage and underlying soft tissue in plaintiff's right shoulder (819-822). Plaintiff's cartilage damage was not going to change, and her pain, stiffness and limitation of motion can increase based on her age and the nature of her injury (820-824).

Defendant called Dr. Gregory Galano, an orthopedic surgical expert, to testify at trial (878). He conducted an examination of the plaintiff in January of 2017 at his office (879-880).

Plaintiff underwent a right humerus open reduction and internal fixation on October 7, 2014 at Hoboken Hospital; she suffered a three-part right proximal humerus fracture with a glenohumeral dislocation (881). Plaintiff also underwent an arthroscopic subacromial decompression with debridement of the glenohumeral joint and a debridement of both the capsule and the rotator cuff on August 7, 2015 (882).

Plaintiff was in pain when she saw Dr. Galano; he noted that she missed approximately 2 years from work following the injury (882-884). Using a goniometer, Dr. Galano admitted that plaintiff’s right shoulder abduction was 150/180 degrees a 30-degree deficit (885). Abduction was normal bilaterally (885-886). Right shoulder forward flexion was limited to 150 degrees out of 180 (886).

Extension, or reaching behind the body, was normal bilaterally (886-887). Internal rotation, which measures the arm “out to the side and down” or “reaching in the back pocket” was normal bilaterally (887). External rotation was limited to 70 degrees out 90 on the right side (887-888).

Dr. Galano did not actively test for strength believing it was unnecessary (888-889). Furthermore, the Neer’s Belly Press, Hawkins and O’Brien tests were all negative for injury (887-891). Dr. Galano opined that plaintiff “had a right proximal humerus fracture, and that she was status post...open reduction and internal fixation surgery for the fracture” and “status post... arthroscopic surgery with lysis of adhesions.” Plaintiff was “clinically healed and recovered” (891). Dr. Galano was then questioned about plaintiff’s stroke and how it could impact on his examination (890-894). The best he could do was to state that “there is a possibility if there was a stroke that that could have affected range of motion and strength in her right arm and right

shoulder” (894). This speculation, however, is not a substitute for evidence.

Cross-examination was devastating. Dr. Galano admitted he never spoke to plaintiff and had no knowledge of her current condition (895). He could not offer an opinion as to whether the limitations of motion she exhibited in January of 2018 were neurological in nature, or whether they were “residuals from the car accident.” He admitted that he misspoke when he testified that plaintiff was seated in the bus when she was injured (896-897). The hardware used to repair her shoulder was designed to stabilize the shoulder and was still present (895-897). He was hired to do one examination of the plaintiff so as to testify for defendant (897-899).

Dr. Galano often serves attorneys as an expert witness (898-901). He has a large volume of cases for defendants (900-901), yet he had never before appeared in court to testify as an expert witness (902-03). He did not admit that a negative report from him could save defendant money in a personal injury case (904-05). Dr. Galano admitted he could have tested for muscular strength but did not; his statement that he “tested...against gravity” and found “no resistance” was hardly compelling, based on the jury’s verdict (907-09). He sought to test whether plaintiff was “strong enough against gravity” to be able to lift an extremity (911). He admitted

he could not thus ascertain the "maximal strength" in plaintiff's shoulder (912).

When he attempted to justify his failure to conduct real strength testing by pointing out that plaintiff, by history, "went back to working as a housekeeper", Dr. Galano was confronted with plaintiff's testimony that she worked for only one day in that capacity (913-14). He responded, "I was not aware of that" (913). He admitted that plaintiff told him she suffered burning pain in her shoulder that worsened when she reached over her head, as well as "locking and weakness", yet he did not ask her what she meant (914-16).

Dr. Galano was familiar with impairment ratings in the Workers Compensation setting and knew the loss of motion that constituted "zero impairment" (918).

On redirect, Dr. Galano attempted to repair the damage inflicted on cross-examination, but his words were hardly persuasive (918-920). He knew that plaintiff's shoulder strength was at least 3 out of 5, but he did not know the "extent" of her strength because he never conducted the appropriate tests (921-922).

Thus, defendant's expert found limitations of motion, could not offer an opinion as to plaintiff's current condition, omitted test likely to be favorable to plaintiff, misstated the facts of the accident, and tried to minimize her serious injuries resulting

from the three-part fracture and dislocation that impaired both the joint and the underlying muscles and soft tissues.

c. The Jury's Pain and Suffering Award Was Not Excessive

The jury's $800,000 past and future pain and suffering award apportioned $400,000 for past pain and suffering and $400,000 for future pain and suffering over 21 years was not a deviation from reasonable compensation under the governing case law. In this regard, "where the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (Jankusas v. Sandberg, 71 AD3d 1090 [2d Dept. 2010]; Koopersmith v. GM, 63 AD3d 1013, 1013-1014 [2d Dept. 1978]).

Plaintiff notes that 7 figure pain and suffering awards or awards approaching that figure have been deemed appropriate by appellate courts for severe shoulder injuries similar to those suffered by plaintiff at bar. See, (Molina v. NYCTA, 115 AD3d 416 [1st Dept. 2014]) [$600,000 for past pain and suffering and $800,000 for future pain and suffering]; Rubio v. NYCTA, 99 AD3d 532 [1st Dept. 2012]. In Bernstein v. Red Apple Supermarkets, 227 AD2d 264 [1st Dept. 1996], this Court, over 20 years ago, reduced a jury's award of $750,000 to $600,000 for plaintiff who suffered a rotator cuff injury. Similarly, in Radder v. CSX Transp., Inc., 68 AD3d 1743 [4th Dept. 2009], a case that is over 10 years old, the Fourth Department affirmed an award of $550,000 for a period of 4 years

of past pain and suffering. In Guillory v. Nautilus Real Estate, 208 AD2d 336 [1st Dept. 1995] this Court sustained a $1.2 million past and future pain and suffering award for plaintiff who suffered a torn rotator cuff that required surgery. This decision is now almost 25 years old.

In Baez v. NYCTA, 15 AD3d 309 [1st Dept. 2005] the Second Department affirmed an award of $600,000 of past pain and suffering for plaintiff who suffered a comminuted, mid-shaft fracture of her right arm that required two surgeries.

Serious upper extremity or arm injuries have commanded pain and suffering awards exceeding or close to $1,000,000 for decades. See, Rojas v. NYCTA, 176 AD3d 990 [2d Dept. 2019] [$1.8 million pain and suffering ward not excessive where plaintiff sustained serious arm injuries necessitating surgery that impaired the functioning of plaintiff's arm]. In Roshwalb v. Regency Maritime Corp., 182 AD2d 401 [1st Dept. 1992], lv. den., 80 NY2d 756 [1992] this Court sustained a $750,000 pain and suffering award to a 63-year-old woman who suffered a comminuted fracture of the elbow requiring surgery. In Capuccio v. City of New York, 174 AD2d 543 [1st Dept. 1991], lv. den., 79 NY2d 751 [1991]. The $997,690.00 damage award to a 53-year-old woman who suffered a fractured humerus with permanent pain and limited mobility in her right shoulder was held appropriate by this Court.

In Ernish v. City of New York, 2 AD3d 256 [1st Dept. 2003] this Court permitted a total award of $1.8 million to stand for the serious injuries a 63-year-old plaintiff suffered to his head and both shoulders and right arm when he fell from a ladder. See generally, Robinson v. Cambridge Realty Co., LLC, 58 AD3d 582 [1st Dept. 2009] [$700,000 for comminuted shoulder fracture requiring shoulder replacement surgery and five years of pain prior to trial]; Sternemann v. Langs, 93 AD2d 819 [2d Dept. 1983] [$1 million pain and suffering award was sustained for an ulnar nerve injury resulting in causalgia with permanent excruciating pain, over two decades ago]; Summerville v. City of New York, 257 AD2d 566 [2d Dept. 1999] [$2 million pain and suffering award for serious hand injuries]; Flynn v. MABSTOA, 94 AD2d 617 [1st Dept. 1983], affd., 61 NY2d 769 [1985] [$850,000 for permanent hand and arm damage causing partial disability and not interfering with plaintiff's dental studies]; Ruppel v. Entenmanns, Inc., 149 AD2d 679 [2d Dept. 1989] [$1,250,000 for truck driver, 47, whose left hand and arm were crushed]; Stackhouse v. NYCHHC, 179 AD2d 357 [1st Dept. 1992] [$1,550,000 for Erb's Palsy and shoulder dystocia]; Jansen v. C. Raimondo & Son Constr. Corp., 293 AD2d 574 [2d Dept. 2002] [$750,000 for subluxation of right shoulder, dislocation of left shoulder, fractures of left humerus and clavicle causing carpal tunnel syndrome, 2 surgeries and 14 months of occupational therapy]; Quackenbush v. Gar-Ben Assocs., 2 AD3d 824 [2d Dept. 2003].

Here, the trial court relied on a tri-level decision, Fudali v. NYCTA, 6 Misc.3d 1020 [Sup. Ct., NY County, 2005]. That case involved a 57-year-old plaintiff who was struck by a bus and sustained a fracture of the proximal humerus with a protruding bone, cracks in the greater tuberosity and humeral head and a rupture of the biceps tended. Placement of hardware in the shoulder was needed and plaintiff was hospitalized, underwent two surgeries and endured physical therapy. She also had a scar on her shoulder and was unable to perform several household chores. The jury's $1.25 million past pain and suffering award and $1.5 million future pain and suffering award over 22.3 years was conditionally reduced to $650,000 and $550,000 respectively.

To put it simply, the jury's damage award here, given the nature of plaintiff's injuries, was not a material deviation from reasonable compensation when the evidence is construed in a light most favorable to plaintiff as the prevailing party.

d. The Claims in Defendant's Brief Respecting the Damage Issues Are Unpersuasive Legally And Factually

Defendant's attempt to convince this Court that the jury's verdict was excessive fails as a matter of both fact and law, and the claims are indirectly refuted in the brief itself. In this regard, NJTC concedes that "Whether a material deviation exists is an exercise of discretion and solely 'committed to the trial court and the Appellate Division'" (Brief at 28). Here, NJTC claims the

trial court misconstrued "pertinent precedent" because "the evidence at trial revealed that the sole task Respondent was completely unable to perform as a result of the accident was sitting down" (Brief at 28-29). As we showed in our discussion of the evidence, that is simply not true. There was evidence that plaintiff's condition would deteriorate, and defendant's statement that Dr. Sen "testified that the extent of Respondent's recovery would likely plateau within two years" (Brief at 29) is supportive of plaintiff's position.

Defendant observes that plaintiff's stroke was not disabling, and that the injuries from the accident did not "hinder her recovery" from the stroke – this supports the jury's conservative $800,000 pain and suffering award, since the injuries, not the stroke, caused the disability and suffering. That plaintiff did not go to a doctor for her fracture until 2018 and has not undergone unnecessary treatment since 2015 (Brief at 29-30), shows that she is not a malingerer and did not seek to exaggerate her injuries by continuing with treatment that would not improve her condition. And, again, Dr. Sen's testimony that plaintiff's condition would plateau within two years demolishes defendant's implication that plaintiff's testimony lacked credibility in any way.

Equally vacuous is defendant's argument that plaintiff's determination to work and support her family means the jury's pain and suffering award should be set aside (Brief at 30). As set forth

in the fact section of this brief, plaintiff testified that she decided to work instead of seeking compensation for lost wages, a decision which no doubt pleased the jury, who saw her as credible, hardworking and committed to her family.

Defendants often argue that plaintiffs in personal injury actions feign disability, and choose not to work when they can, to increase the size of their recovery. Yet when a plaintiff who sustained admittedly serious injuries goes to work to support her family despite being in pain, defendants posit that the injuries cannot be serious. This is obviously unfair and contradictory.

Here, plaintiff testified that she could no longer work at the spa or at house cleaning because they were too physically demanding (616-18), that her job at K-mart proved too difficult because she could not arrange clothes properly, and that she hopes for a job that requires limited movement because of her shoulder injury.

The trial court did not misapply the two cases defendant cited in its motion regarding excessiveness (Brief at 30-31). In Thompson v. Toscano, 166 AD2d 446 [1st Dept. 2018], plaintiff underwent outpatient arthroscopic surgery on her shoulder with a Dr. Cilaris at a New Jersey facility, and went home by car the same day (139-41).[6] She was able to perform daily activities (156), and at visits to Jacobi Hospital after the initial

[6] Numbers in parentheses refer to pages of the record on appeal in that case.

Emergency Room visit, she did not complain of shoulder pain (180-84); the worked regularly as a bookkeeper (149) and was not taking prescription drugs (156-57). The facts, then, are completely different from those in the case at bar, where plaintiff has continuing pain, limitations of motion and weakness. Dr. Sen testified that he would be happy if plaintiff could get her arm over her head, comb her hair, and clean herself (792).

Jones v. New York Presbyt. Hosp., 158 AD3d 474 [1st Dept. 2018], supports plaintiff's position. In that case, a $400,000 future pain and suffering award was reduced by the trial court to $150,000 over only a 5-year period for a comminuted proximal humeral fracture, which healed improperly. This Court reinstated the original award. Defendant points out that the past pain and suffering award was reduced from $600,000 to $150,000, and that reduction was affirmed by this Court, but ignores this Court's recitation of the fact that plaintiff was 84 when she was injured and 89 at the time of trial, so that her loss of enjoyment of life would be over a rather brief period of time. Her post-accident course was managed conservatively (816-17).[7] She admitted she was alone and did not engage in a lot of activities (98). She took Tramadol, a painkiller, at the time of the accident (116-17, 732, 742), and had physical therapy in her home (118-19, 126). Again,

[7] Numbers in parentheses refer to pages of the record on appeal in that case.

the case is not similar factually to the case at bar. The jury's $400,000 future pain and suffering award here was over 21 years, four times the span of the award in Jones. This shows that the award at bar was conservative, if not low, for the injuries plaintiff sustained in the subject accident.

Finally, defendant briefly seeks a new trial because plaintiff's counsel stated that she "will witness her shoulder slowly over time fail" (Brief at 32), allegedly a summation error. That argument was so weak below that the trial court did not deign to discuss it substantively. As set forth previously, plaintiff's counsel's statement is congruent with Dr. Sen's testimony. Indeed, when the court asked counsel what authority he had for requesting a curative instruction, counsel had no answer to offer (491-496).[8] Counsel's claim that "regression" was not the same as "failure" (496) was plainly pretextual. The court re-charged the jury that counsel's claims in summation were not error (498-499).

Counsel, of course, are afforded wide leeway in summation (People v. Galloway, 54 NY2d 396 [1981]; Williams v. Brooklyn E. R. Co., 126 NY 96 [1891]; Gregware v. City of New York, 132 AD3d 51 [1st Dept. 2015]), and this isolated comment did not have a substantial influence in bringing about the verdict. See, Cadwalader, Wickersham & Taft v. Spinale, 197 AD2d 403 [1st Dept.

[8] Numbers refer to pages of the trial transcript.

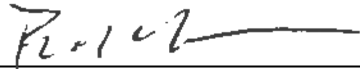
1993]; Jetson Air Center, Inc. v. Green Drake Leasing Co., 128 AD2d 677 [2d Dept. 1987]. "Isolated instances of hyperbole" during a summation are an improper basis for a reversal (Schechtman v. Lappin, 161 AD2d 118, 121 [1st Dept. 1990]; Selzer v. NYCTA, 100 AD3d 157, 163 [1st Dept. 2012]). Even summations that are unfair do not warrant a mistrial unless they create a climate of hostility that deprives the opposing party of a fair trial (Calzado v. NYCTA, 304 AD2d 385 [1st Dept. 2003]).

In this context, defendant's argument obviously lacks salience. Defendant was not entitled to a curative instruction, and the one it received certainly clarified for the jury the fact that statements in summation do not constitute evidence, thereby dissipating any possible prejudice. There is nothing here that justifies setting aside the jury verdict.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Court should deem the notice of appeal an application for leave to appeal, and, upon granting that application, reverse the trial court's order and reinstate the complaint in full, and that this Court should issue any other, further or different relief it deems just, proper and equitable.

Respectfully submitted,



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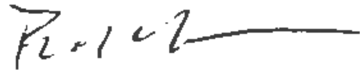

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