New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case Nos.
2020-01297
2020-02923

KEIMONEIA REDISH,

Plaintiff-Respondent,

against

DARRYL ADLER, THE ESTATE OF RONALD L. CIUBOTARU BY THE PUBLIC ADMINISTRATOR OF WESTCHESTER COUNTY, R. STUMACHER, ST. BARNABAS HOSPITAL and ABDURHAM AHMED,

Defendants-Appellants.

BRIEF FOR *AMICI CURIAE* AMERICAN MEDICAL ASSOCIATION, MEDICAL SOCIETY OF THE STATE OF NEW YORK, BUSINESS COUNCIL OF NEW YORK STATE, LAWSUIT REFORM ALLIANCE OF NEW YORK, BUILDING TRADES EMPLOYERS ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF NEW YORK STATE, NEW YORK STATE ASSOCIATION FOR AFFORDABLE HOUSING, TRUCKING ASSOCIATION OF NEW YORK, NEW YORK INSURANCE ASSOCIATION, INC., MLMIC INSURANCE COMPANY, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TRUCKING ASSOCIATIONS, INC., COALITION FOR LITIGATION JUSTICE, INC., AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES ADDRESSING CPLR 5501(c) LEGISLATIVE AND POLICY IMPERATIVES AND IMPROPER ANCHORING PRACTICES

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QUESTIONS PRESENTED

1. May plaintiffs' counsel in closing argument request a pain and suffering award that substantially exceeds the limit approved by New York law?

Proposed Answer: No. It is improper and unfairly prejudicial for plaintiffs' attorneys to request a noneconomic damages award that substantially exceeds New York awards sustained on appeal to persons with comparable injuries. While CPLR 4016(b) permits an attorney to suggest a specific amount the attorney believes to be "appropriate compensation" for any element of damages, this authority is constrained by and must be read alongside CPLR 5501(c), which provides that an award will not be sustained on appeal "if it deviates materially from what would be reasonable compensation." Here, Plaintiffs urged the jury to award $40 million for past and future pain and suffering—a level that substantially exceeds amounts sustained on appeal as reasonable in cases involving individuals with similar or more severe injuries.

2. Does the Legislature's policy design as enacted in CPLR 5501(c) require a further significant reduction in the pain and suffering award to the existing sustainable range?

Proposed Answer: Yes. This Court's decision will serve as precedent affecting future litigants, including healthcare providers, businesses, and individuals. The Court should strictly adhere to the legislative compromise

embodied in CPLR 5501(c) and the existing range sustained by this Court for individuals with comparable injuries. Any upward modification of the existing range of reasonable compensation under the statute will harm all New York stakeholders. This result is especially inappropriate when the upward shift stems from use of an arbitrary and improper "anchor."

STATEMENT OF INTEREST

Amici are a broad coalition of organizations representing New York's healthcare providers, businesses, builders and affordable housing advocates, insurers, and civil justice organizations. *Amici* have a substantial interest in ensuring that personal injury awards in New York remain predictable and within their historical range. *Amici* are concerned with the use of improper anchoring tactics to unduly influence juries to award increasingly high sums for pain and suffering. "Anchoring" occurs when plaintiffs' counsel requests that a jury award an unjustifiably large award, which then serves as a baseline for the jury's damages calculation. As a result of this practice, pain and suffering awards in New York threaten to spiral beyond their current levels. If courts continue to permit attorneys to urge juries to award amounts that vastly exceed prior awards sustained as reasonable to individuals with similar injuries, and begin to affirm awards that

exceed these levels, then current trends will inevitably lead to higher demands, frustrate settlements, and increase costs for taxpayers and consumers.

STATEMENT OF THE CASE AND FACTS

This case involves a now 48-year-old woman who experienced a severe, permanent brain injury following admission to a hospital for a 2010 asthma attack. The jury found that a team of doctors deviated from accepted standards of care in her treatment. According to a neurologist and life care planner who testified for the Plaintiff at trial, she now needs assistance in daily life activities, uses a wheelchair due to lack of balance, has slowed and slurred speech, and has reduced cognitive functioning.

In closing argument, Plaintiff's counsel "suggested" that the jury award $10 million for past pain and suffering and $30 million for future pain and suffering (Tr. 1665-1669). Plaintiff's counsel represented to the jury that this was an appropriate level of compensation, indicating "I have come to my suggestion based upon my experience as an attorney representing people with similar disabilities" (Tr. 1665). These amounts, Plaintiff's counsel represented, "would fully and fairly compensate her" for past and future pain and suffering (Tr. 1666, 1669). Yet, as discussed below, this $40 million total was four times larger than the

highest figure ever permitted by the First Department for the most catastrophic injuries.

Plaintiffs' counsel invited the jury to award an amount higher or lower than this anchor (Tr. 1665). That is what the jury did. Primed by Plaintiffs' "suggestion," the jury awarded more than double that amount, $90 million ($60 million for 8.5 years of past pain and suffering and $30 million for 34.5 years of future pain and suffering) (Tr. 1703-04). After including damages for hospital expenses, the cost of a home health aide and apartment alterations, and other costs (Tr. 1704-08), the total award reached $110.6 million, which may be the largest medical liability award ever for a single-plaintiff suit in New York history. Y. Peter Kang, *The Biggest Personal Injury and Med Mal Verdicts of 2019*, Law360, Dec. 19, 2019.

Post-trial, the court reduced the pain and suffering award to $30 million ($7 million for past pain and suffering and $23 million for future pain and suffering), even as the court recognized that the First Department has never approved a pain and suffering award in excess of $16 million, and even then only once. All other such runaway verdicts for catastrophic injuries have been remitted by this Court to $10 million or below.

SUMMARY OF THE ARGUMENT

New York juries are returning pain and suffering awards that dwarf prior awards. Injuries are not becoming more extreme. Rather, plaintiffs' attorneys are aggressively asking jurors to award extraordinary sums. Attorneys know that "anchoring"—setting an unjustifiably high amount as a baseline—is highly effective, particularly when sympathetic jurors lack objective means to determine compensation for unquantifiable pain.

CPLR 4016(b) permits an attorney to request a specific amount for any element of damages, including pain and suffering, but the statute does not grant attorneys boundless authority to request extraordinary sums that are unsupported by law. The amount requested must reflect "appropriate compensation." CPLR 4016(b). Thus, the amount requested for pain and suffering should serve a compensatory purpose—which does not occur when the amount requested is a level that would take countless lifetimes to earn—and fall within the range established by CPLR 5501(c) (i.e., prior awards sustained on appeal as reasonable to individuals with similar injuries).

When attorneys specify amounts that vastly exceed these constraints, as here, they mislead jurors to believe that the amount, however arbitrary, is fair and reasonable compensation. This practice is improper and unduly prejudicial.

Further, the cycle of plaintiffs' counsel asking for and receiving extraordinarily large pain and suffering awards that are inevitably reduced post-trial and further on appeal is wasteful and delays plaintiff recoveries.

Amici urge the Court to make clear that "specific dollar amount" requests for "appropriate compensation" made by plaintiff attorneys pursuant to CPLR 4016(b) shall not include requests for noneconomic damages that exceed the historical range established by CPLR 5501(c) in comparable injury cases. *Amici* also urge the Court not to accept Plaintiff's invitation to increase the upper limit of that range for brain injury.

The First Department has permitted pain and suffering awards to individuals who experience brain injuries in a range from approximately $2 million to $6.5 million. Even for the most catastrophic injuries, including those involving paralysis combined with unrelenting physical pain, New York courts have adhered to a $10 million upper limit. These values have been established in a large body of case law, including recent cases.

Applying this standard, the aggregate $30 million pain and suffering award here cannot be sustained. The Court should vacate the judgment or reduce it to reflect historical norms for damages in similar cases. Approval of an award that exceeds the First Department's existing range for brain injuries will lead to higher

demands, frustrate settlements, result in more trials and appeals (exacerbating any COVID-19 backlog), and increase the cost of goods and services for New Yorkers.

ARGUMENT

I. "ANCHORING" PRACTICES UNDULY INFLUENCE JURORS AND MUST BE CONSTRAINED BY THE COMPENSATORY GOALS OF TORT LAW AND BOUNDS SET BY CPLR 5501(c)

A. Anchoring Practices are Highly Effective in Misleading Jurors, Who Struggle With Placing a Monetary Value on Pain and Suffering, to Render Excessive Verdicts

The pattern cannot be missed: Personal injury lawyers are urging jurors to return ever-higher sums for pain and suffering. Aggressive anchoring practices are driving up verdicts far beyond amounts sustained as "reasonable compensation" by New York appellate courts.

Noneconomic damages are highly subjective and inherently unpredictable. There is no standard measurement of pain and suffering or "even a conception of those damages or what they represent." Dan B. Dobbs, Law of Remedies 8.1(4), at 383 (2d ed 1993). Consequently, juries can be significantly influenced by a figure given to them by plaintiffs' counsel. "People often rely on the first number they are given as a baseline when making decisions." Kathleen Flynn Peterson, et al., *Dropping the Anchor*, Trial (Apr. 2017). "[O]nce an anchor number has been provided, the number exerts undue influence on the final figure" and "can sway

decisions even when the anchor provided is completely arbitrary." Sonia Chopra, *The Psychology of Asking a Jury for a Damage Award*, Plaintiff (Mar. 2013), at 1; *see also* Timothy D. Wilson, et al., *A New Look at Anchoring Effects: Basic Anchoring and its Antecedents*, 125 J. Experimental Psychol. 387, 399 (1996) ("completely arbitrary numbers can anchor people's judgments").

In the late 1950s and 1960s, plaintiffs' lawyers began employing this controversial, though now ubiquitous, practice, routinely asking jurors to award an extraordinary amount for pain and suffering. *See* Joseph H. King, Jr., *Counting Angles and Weighing Anchors: Per Diem Arguments for Noneconomic Personal Injury Tort Damages*, 71 Tenn. L. Rev. 1, 13 (2003). An "anchor" provided by plaintiffs' counsel establishes an arbitrary but psychologically powerful baseline for jurors struggling with assigning a monetary value to pain and suffering. *See id.* at 37-40. Jurors may accept the suggested amount or "compromise" by negotiating it upward or downward. While any category of damages can be influenced by anchoring, the practice has the greatest impact with respect to noneconomic damages, since pain and suffering is the least susceptible to quantification. *See* Don Rushing, et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings*, Def. Counsel J. 378, 381 (July 2013).

New York has experienced an upward trend in pain and suffering verdicts as a result of anchoring tactics. *See* Timothy R. Capowski & John F. Watkins, *CPLR 5501(c) Review in the Age of Summation 'Anchoring' Abuse*, N.Y.L.J., June 26, 2019. The requested sums continue to grow because plaintiffs' attorneys know that anchoring works. *See, e.g.*, Patricia Kuehn, *Translating Pain and Suffering Damages*, Trial (Nov. 2020) ("It is well recognized that a numerical anchor influences jurors' judgment about damages even if they do not recognize that the anchor affected their decision."). In short, "the more you ask for, the more you get." Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol. 519, 526 (1996).

Recent empirical evidence confirms that anchoring "dramatically increases" noneconomic damage awards. *See* John Campbell, et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 Wash. U. L. Rev. 1, 28 (2017). For example, in the Campbell study, participants watched a mock medical malpractice trial where a doctor allegedly failed to diagnose a case of lumbar radiculopathy, which would have both avoided the need for surgery and the plaintiff suffering a permanent disability. The trial videos differed only in the plaintiffs' counsel's closing argument. Where mock jurors were left to decide the

amount of pain and suffering a plaintiff would experience for his or her life (an expected 9.5 years) without influence, they awarded an average of $473,489. Where, on the other hand, mock jurors heard plaintiffs' counsel request $5 million for 9.5 years of pain, jurors awarded an average of $1.9 million—quadruple the unanchored amount.

Defense counsel are often reluctant to counter the plaintiffs' anchor by suggesting that a lower amount of damages for pain and suffering is appropriate because the statement could be viewed by jurors as a concession of liability. *See* John Campbell, et al., *Countering the Plaintiff's Anchor, Jury Simulations to Evaluate Damages Arguments*, 101 Iowa L. Rev. 543, 551 (2016).

Here, Plaintiff's counsel advised jurors that $40 million or more was fair and reasonable compensation for his client's pain and suffering based on his legal experience, an amount eclipsing all prior approved awards to individuals with similar or even more substantial injuries. The jury ultimately awarded $90 million for pain and suffering, more than double Plaintiff's counsel's extraordinary request.

This case is just one illustration of the pernicious effect of improper anchoring in New York. *See* Timothy R. Capowski & Jonathan P. Shaub, *Improper Summation Anchoring is Turning the New York Court System on its Head and*

Contributing to the Demise of New York State, N.Y.L.J., Apr. 28, 2020. Over the past decade, plaintiffs' lawyers have asked for amounts above $20 million for pain and suffering in dozens of New York cases, including several requests in the $80 million range and one as high as $130 million. *See* Shaub Ahmuty Citrin & Spratt, *Top NYS Court Pain & Suffering Personal Injury Verdicts & Improper Anchoring (2010-Present),* https://www.sacslaw.com/media/publication/6_Improper-Anchoring-42620.pdf (compiling thirty cases, in addition to the case at bar, including case name, index number, summation anchor, verdict, and reduced award). In several of these cases, jurors returned the precise extraordinary sum for pain and suffering damages requested during the summation. *See id.* In others, they returned an inflated amount that was obviously influenced by the arbitrary, unsupportable baseline. *See id.*

These "nuclear" verdicts are continuing. For example, a trial court recently upheld a pain and suffering verdict of over $59 million against the New York City Department of Education after a chemistry experiment went tragically wrong. *See Yanes v. City of New York*, Index No. 161066/2014, 2020 WL 4586299, 2020 N.Y. Slip Op. 32607(U) (N.Y. Sup. NY County Aug. 10, 2020). In that instance, plaintiffs' counsel asked the jury to "write in $70 million for the past pain and suffering" and, having set that context, told the jury to award even more for future

pain and suffering because "the biggest part of this case is his future. . . ." *Yanes v. City of New York*, Index No. 161066/2014, NYSCEF Doc. 93, Tr. 2079-80 (N.Y. Sup. NY County June 27, 2019).

B. Urging Juries to Return Extraordinary Sums for Pain and Suffering is Improper Because These Damages Must Serve a Compensatory Purpose

A pain and suffering award is a form of compensatory damages, which are intended to "restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred." *McDougald v. Garber*, 73 N.Y.2d 246, 253-54 (1989) (citation omitted). As the Court of Appeals has recognized, awards for pain and suffering rest on "the *legal fiction* that money damages can compensate for a victim's injury." *Id*. at 254 (quoting *Howard v. Lecher*, 42 N.Y.2d 109, 111 (1977) (emphasis added)). Courts know that money cannot replace a lost limb or remove a disability, but award damages "in [an] effort to right the wrong." *Id*. The purpose of the award of damages is to "compensate the victim, not to punish the wrongdoer." *Id*.

The Court of Appeals' "willingness to indulge this fiction comes to an end, however, when [an award for noneconomic loss] ceases to serve the compensatory goals of tort recovery." *Id*. Valuing pain and suffering by the amount that a juror would accept to trade places with the plaintiff is one measure long recognized as

excessive. *See, e.g.*, *Liosi v. Vaccaro*, 35 A.D.2d 790 (1st Dep't 1970). Moreover, any award that is intended to punish a tortfeasor for his or her conduct or deter similar actions in the future ceases to be compensatory. *See Sharapata v. Islip*, 56 N.Y.2d 332, 335 (1982). Punitive damages are warranted only for "wrongful conduct that goes beyond mere negligence." *Chauca v. Abraham*, 30 N.Y.3d 325, 331-32 (2017). Such damages are rightly subject to substantive and procedural constitutional safeguards. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-83 (1996) (providing constitutional guideposts for evaluating excessiveness of punitive damage award); *see also* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47, 49 (2002) (predicting that without proper oversight by courts, plaintiffs' counsel will use pain and suffering awards to punish a defendant without the safeguards applicable to punitive damage awards).

Here, the jury was asked to award $40 million or more solely for noneconomic damages. The sheer size of the request suggests a punitive purpose. The $40 million requested for pain and suffering would take the average New

Yorker nearly 600 working years to earn.[1] As such, this level cannot be viewed as serving a legitimate compensatory purpose and is therefore improper.

C. Urging Juries to Return Amounts for Pain and Suffering that Cannot Possibly be Sustained is Improper and Unduly Prejudicial

Plaintiff's counsel effectively instructed the jury that $40 million is a fair and reasonable amount to compensate his client for his pain and suffering. While CPLR 4016 permits an attorney to suggest that the jury award a particular amount of compensation, requesting an amount that cannot possibly be sustained under CPLR 5501(c) as "reasonable compensation" is improper and unduly prejudicial.

In the face of the 1980s financial crisis that led to spiraling insurance premiums, Mario Cuomo's "Governor's Advisory Commission," chaired by former Court of Appeals Judge Hugh Jones, drafted a report of recommendations and observations that ultimately led to the enactment of CPLR 5501(c). The Jones Commission recognized that jurors are inclined to award ever-higher amounts to compensate for a person's pain and suffering:

> All of us are moved by the pain and anxiety that most people who suffer more than minor injuries go through. Our natural tendency is to want to help. Inasmuch as there is no objective way to value these harms, our inclination is to err on the high side. Over time, this tendency gathers its own momentum, a momentum which has no natural curbing force. Particularly in an era where the existence of

[1] *See* U.S. Census, Historical Income Households, tbl. H-8, Median Household Income by State (reporting average household income in New York was $67,264 in 2018).

> insurance is commonly assumed, so that the defendant is not expected to bear most of the loss, the urge to provide the most assistance possible becomes nearly irresistible.

Donlon v. City of New York, 284 A.D.2d 13, 15 (1st Dep't 2001) (quoting Hugh R. Jones, *Insuring Our Future—Report of the Governor's Advisory Commission on Liability Insurance*, Apr. 7, 1986, at 85). The Jones Commission Report (on which the 1986 legislative reforms were based) focused on pain and suffering awards as a driving force behind the "cost surge" which threatened the ability to obtain insurance coverage. *Id*. (citing *Insuring Our Future* at 137-52).

As the Court of Appeals recently noted, the Jones Commission found that the expansion of tort liability in New York State led to insurance prices that businesses could not afford, and that courts had been blind to "the health of the risk-spreading mechanism that American society . . . developed to assure that compensation is in fact available for those who are entitled to receive it." *Artibee v. Home Place Corp.*, 28 N.Y.3d 739, 751 (2017) (quoting *Insuring Our Future* at 128). The Commission observed that 'the ends of justice are subverted when insurance is unavailable at an affordable price." *Id*. (quoting *Insuring Our Future* at 128).

While the $250,000 "hard cap" on noneconomic damages proposed by the Jones Commission was not adopted, the legislative compromise that followed was

the rejection of the deferential common law "shocks the conscience" standard and the enactment of CPLR 5501(c). The replacement—the "deviates materially" formulation—was specifically enacted to stop the upward spiral of awards by "tightening the range of tolerable awards." *Donlon*, 284 A.D.2d at 16 (quoting *Gasperini v. Center for Humanities,* 518 U.S. 415, 425 (1996)). This statute sought to decrease uncertainty as to the value of injuries and increase fairness to similarly situated plaintiffs and defendants, and to facilitate settlements and reduce the strain on judicial resources. *See Gasperini,* 518 U.S. at 423-25; *Consorti v. Armstrong World Indus., Inc*., 72 F.3d 1003, 1009-10, 1013 and n.10, 1014-16 (2d Cir. 1995), *vacated on other grounds*, 518 U.S. 1031 (1996).

Indeed, *amicus curiae* The Business Council of New York State supported the legislation precisely for these reasons. *See* Letter from Raymond T. Schuler, President, The Business Council of New York to the Hon. Evan A. Davis, Counsel to the Governor, June 27, 1986, at 1 (supporting the deviates-materially standard because it would "invite more careful appellate scrutiny" and "lead to more consistency in awards"). As New York's Attorney General observed, CPLR 5501(c) was part of a legislative package that was "carefully drafted to avoid unduly harsh results" and "represent[ed] a fair compromise of the many diverse interests of the groups and individuals [concerned about] the current state

of tort law and the insurance industry." Attorney General Robert Abrams, Memorandum for the Governor re: Senate 9391-A, July 21, 1986, at 4. CPLR 5501(c) was "designed to discourage rapid increases in liability insurance premiums without limiting the ability of a plaintiff to fully and fairly recover all damages due to him." Memorandum from Langdon Marsh, Executive Deputy Director, N.Y.S. Dep't of Envt'l Conservation to Evan Davis, Chief Counsel to the Governor, Senate 9391-A, July 31, 1986, at 2. When approving the bill, Governor Mario Cuomo observed that the new standard would "assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." Bill Approval Memorandum filed with S. 9391-A, June 30, 1986, at 2.

Those objectives are not served when attorneys, with increasing frequency, urge juries to award amounts for pain and suffering that are well beyond the permissible range of "reasonable compensation" established by appellate courts pursuant to CPLR 5501(c). As no objective formula assigning a monetary value to pain and suffering exists, achieving an evenhanded, fair, and predictable system requires courts to use their authority under CPLR 5501(c) to "exercise responsibility to keep jury awards within limit." *Consorti*, 72 F.3d at 1009. Alternatively, "[w]hen courts fail to exercise the responsibility to curb excessive

verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one." *Id*. at 1010.

D. The Court Should Apply CPLR 5501(c) to Constrain Abusive Anchoring Tactics

To address the subjective, unpredictable nature of pain and suffering awards, about half the states (though not New York) have adopted a hard cap applicable to at least some types of personal injury cases. *See* Cary Silverman & Mark A. Behrens, State of Liability: New York's Costly Tort Laws and How to Fix Them 7 (Empire Ctr. Dec. 2017). These laws generally establish a limit that ranges from $250,000 to about $1 million. *See* Victor E. Schwartz & Cary Silverman, *The Case in Favor of Civil Justice Reform*, 65 Emory L.J. Online 2065, 2072-73 (2016).

Some states, including several of New York's neighbors, prohibit the use of anchoring tactics.[2] In addition, the Second Circuit has observed, "A jury is likely to

[2] About one third of states prohibit use of "lump sum" arguments, "per diem" arguments, or both. *See* Campbell, *Time is Money*, 95 Wash. U. L. Rev. at 6-9 and App'x A. These include Pennsylvania and New Jersey. Pennsylvania has long recognized that lump sum demands in "cases where the damages are unliquidated and incapable of measurement by any mathematical standard" are impermissible because "they tend to instill in the minds of the jury impressions not founded upon the evidence." *Stassun v. Chapin*, 188 A. 111, 111 (Pa. 1936). In New Jersey, an attorney may discuss a plaintiff's life expectancy in units of time, but cannot suggest an amount to award per unit of time or in total. *See* N.J. Ct. Rule 1:7-1(b). Delaware courts prohibit attorneys from requesting a specific sum, finding no court would allow an expert to testify on the value of an individual's pain and suffering and that anchoring practices can be used "solely to introduce and keep before jury figures out of all proportion to those which the jury would otherwise have had in mind, with the view of securing from the jury a verdict much larger than that warranted by the evidence." *Henne v. Balick*, 146 A.2d 394 (Del. 1958).

infer that counsel's choice of a particular number is backed by some authority or legal precedent. Specific proposals have a real potential to sway the jury unduly." *Consorti*, 72 F.3d at 1016 (applying CPLR 5501(c) to reduce award to $3.5 million after plaintiffs' counsel requested and the jury returned a $12 million pain and suffering award). It is for that reason that the Second Circuit has indicated that anchoring is "disfavored" and has urged trial court judges to bar this "[un]desirable practice." *Id*.

In New York, CPLR 5501(c) provides courts with the primary means for keeping pain and suffering awards in a predictable and fair range. The Court should apply the approach set forth in that law to preclude attorneys from suggesting that juries award artificially high amounts for pain and suffering that are well outside the permissible range established by prior court decisions.

When plaintiffs' attorneys suggest amounts never before sustained as "reasonable" in New York courts, they mislead jurors. Worse, defense counsel has no way of rebutting this, and cannot even present the jury with the sustainable range based on case law, which is (a) not evidence before the jury; and (b) a legal, not factual, argument, and thus not properly presented to a jury in any event. The result is a paradox: plaintiffs' counsel is free to suggest any number to the jury, as long as that number is not specifically tied to any precedent. This undermines the

goals of CPLR 5501(c), which sought to arrest the upward spiral of pain and suffering awards by tethering them to precedent.

While courts can, and in some cases have, acted where juries cannot and enforced the de facto cap of $10 million on noneconomic damage awards, the practice of anchoring, which routinely generates awards far in excess of the sustainable range, has made the post-trial motion and appeal for *remittitur* a staple, if not an obligatory, part of New York practice. This, too, imposes costs on litigants and the courts—costs that could be avoided if prophylactic measures against improper anchoring are adopted.

Amici do not ask this Court for a blanket prohibition on attorneys suggesting amounts for pain and suffering awards. Such arguments are, of course, expressly authorized by CPLR 4016(b). Rather, *amici* suggest that the Court constrain anchoring tactics via the key language of CPLR 4016(b)—which permits suggesting a level that constitutes "appropriate compensation" to a jury, not a wildly inflated amount that cannot be sustained on appeal.[3] Canons of statutory interpretation require the phrase "appropriate compensation" to be given force and effect and require CPLR 4016(b) to be harmonized with the rest of the CPLR. *See,*

[3] In addition, reading the two CPLR provisions as precluding an attorney from asserting that a specific amount represents reasonable compensation for pain and suffering damages when it is vastly in excess of sustained levels is consistent with RPC 3.3(a)(1)-(2), which prohibits a

e.g., Nadkos, Inc. v. Preferred Constr. Inc. Co. Risk Retention Group LLC, 34 N.Y.3d 1, 10 (2019). Both of these interpretive rules require that "appropriate compensation" for pain and suffering must be consistent with CPLR 5501(c), which indicates that an award will not be sustained if it "deviates materially from what would be reasonable compensation" based on a comparative approach to analogous cases. The alternative position—that CPLR 4016(b) authorizes any suggested amount, unencumbered by CPLR 5501(c)—renders CPLR 4016(b)'s "appropriate compensation" language a surplusage and destroys any harmony between CPLR 4016(b) and 5501(c).

Attorneys should not be permitted to misuse CPLR 4016(b) to generate a runaway verdict, then force a defendant to address the abusive anchoring tactic through seeking *remittitur* followed by a lengthy appeal. The result of these tactics is not equivalent to a jury, on its own, reaching a result that, objectively, cannot be sustained. Rather, the result has been procured specifically by improper, prejudicial arguments by plaintiffs' counsel. Simply remitting awards that result from these tactics to the top of the permissible range or requiring defendants to resort to appellate litigation will not disincentivize attorneys from urging juries to award ever higher and more unsustainable amounts. To the contrary, a *remittitur* to the

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lawyer from making a false statement of fact or law to a tribunal.

high end rewards these tactics and does nothing to counteract the marketing boost plaintiffs' counsel obtains from publicizing the initial, inflated verdict.

Amici urge the Court to hold that it is improper for attorneys to suggest that jurors award an amount for pain and suffering that is beyond that which is defensible based on sustained awards in similar cases. This case presents the Court with an opportunity to provide guidance to both attorneys and trial courts, instructing attorneys that before they present an amount to the jury, they must first familiarize themselves with the permissible range of noneconomic damage awards for similar injuries. Any amount requested must be consistent with the compensatory purpose of tort law and be justifiable based on CPLR 5501(c) and comparable cases. For their part, trial court judges should vigilantly exercise their authority under CPLR 5501 to prevent such practices by granting motions in limine[4] and by admonishing counsel when an unjustifiable anchor is "dropped" during a summation. A request by plaintiffs' counsel for a jury to award an amount beyond the permissible range that is granted should render the verdict

[4] Consistent with *Consorti*, district courts in the Second Circuit have granted defendants' motions in limine to preclude plaintiffs' attorneys from offering a specific damage amount for pain and suffering. *See, e.g.*, *Othman v. Benson*, No. 13-cv-4771, 2019 U.S. Dist. LEXIS 38594, at *17-18 (E.D.N.Y. Mar. 11, 2019); *Bermudez v. City of New York*, No. 15-cv-3240, 2019 U.S. Dist. LEXIS 3442, at *28-30 (E.D.N.Y. Jan. 8, 2019).

presumptively infirm and excessive and, in extreme cases, require a new trial on damages to discourage this practice from continuing.

These criteria are clearly satisfied by the proposal here that the jury return an amount that is more than six times the highest amount approved by this Court for brain injury, four times New York's traditional $10 million upper limit for the most catastrophic injuries, and almost double the state's highest single sustained award for pain and suffering, as discussed below.

II. THE REMITTED PAIN & SUFFERING AWARD, $30 MILLION, IS WELL BEYOND THE RANGE PERMITTED FOR THE MOST CATASTROPHIC INJURIES AND WILL CONTRIBUTE TO THE SPIRALING OF DAMAGE AWARDS IN NEW YORK

A. The Remitted Award Would Shatter New York's Longstanding Ceiling on Pain and Suffering Awards

In applying CPLR 5501(c) over the past three decades since its enactment, appellate courts have effectively established that a pain and suffering award above $10 million will be sustained in only the most exceptional circumstances. Here, the amount requested of the jury, $40 million, substantially exceeded the permissible range. The $90 million amount the jury returned as a result of the impermissible, inflated anchor vastly exceeded the range of what New York courts consider reasonable compensation for pain and suffering. The trial court ordered remittitur of this award to $30 million – a level still well beyond the $2 million to

$6.5 million sustained range for analogous or worse brain injuries in this Court. If this Court does not reverse this decision and reduce the pain and suffering award to the traditional permissible range, the outcome will drive up damages and settlement demands in medical liability and other personal injury cases.

Appellate courts have only twice permitted pain and suffering awards in excess of $10 million under the statute in 34 years: a $16 million award in this Court involving a 36-year-old plaintiff who experienced catastrophic burn injuries[5] and a $12 million award in the Fourth Department involving a 24-year old personal trainer who was rendered a quadriplegic after an exercise machine tipped over on her.[6] Outside of these two extreme cases, $10 million has served as an upper limit for pain and suffering awards for even the most catastrophic injuries, including those involving paraplegia combined with unrelenting physical pain. When verdicts exceed this level, the Appellate Division has repeatedly ordered a *remittitur* to $10 million as constituting the maximum amount permissible.[7]

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[5] *See Peat v. Fordham Hill Owners Corp*., 110 A.D.3d 643, 645 (1st Dep't 2013) *lv. den*. 23 N.Y.3d 903 (2014).

[6] *Barnhard v. Cybex Int'l Inc*., 89 A.D.3d 1554, 1557 (4th Dep't 2011).

[7] *See Miraglia v. H & L Holding Corp.*, 36 A.D.3d 456 (1st Dep't 2007), *lv. denied* 10 N.Y.3d 703 (2008) (*remittitur* of $75 million verdict for pain and suffering to $10 million to 42 year-old paraplegia victim who fell from a height and was impaled through the scrotum on rebar for hours, and suffering permanent and chronic pain, loss of sexual function, and incontinence of bowel and bladder); *Ruby v. Budget Rent A Car Corp*., 23 A.D.3d 257 (1st Dep't 2005), lv. denied 6 N.Y.3d 712 (2006) (*remittitur* to $10 million to 25-year-old paraplegia victim run over by a package truck in a crosswalk, and suffering permanent and chronic pain, loss of

With respect to pain and suffering awards for moderate to severe brain injuries, this Court has permitted awards under CPLR 5501(c) in a range from approximately $2 million to $6.5 million to plaintiffs between the ages of 12 to 66 years old.[8] *Amici* provide the following chart for this Court's convenience:

Name	**Year**	**Pain & Suffering Award**	**Plaintiff's Age**
Andino	2016	$3.3 million (*remittitur*)	35
Ramos	2016	$4.9 million	12
Higgins	2012	$2.5 million	32
Godfrey	2011	$2.5 million (*remittitur*)	21
Angamarca	2011	$5 million (*additur*)	34
Williams	2011	$1.8 million	66
Ashkinazy	2010	$5 million (*remittitur*)	50
Hernandez	2009	$2.75 million	63
Cintron	2008	$4.75 million (*remittitur*)	14
Paek	2006	$4.3 million (*remittitur*)	35
Coore	2006	$1.85 million	30s

sexual function, and incontinence of bowel and bladder); *Bissell v. Town of Amherst*, 56 A.D.3d 1144, 1148 (4th Dep't 2008), *lv. dismissed in part and denied in part* 12 N.Y.3d 878 (2009) (remittitur to $10 million to 39-year-old paraplegia victim who fell from a municipal garage roof, and suffering permanent and chronic pain, loss of sexual function, and incontinence of bowel and bladder); *Aguilar v. NYCTA*, 81 A.D.3d 509, 509 (1st Dep't 2011) (*remittitur* to $10 million to 45-year-old mother of three young children with functional paraplegia from being run over and dragged by bus).

[8] *See Andino v. Mills*, 135 A.D.3d 407 (1st Dep't 2016); *Ramos v. NYCTA*, 139 A.D.3d 590 (1st Dep't 2016); *Higgins v. West 50th St*., 94 A.D.3d 522 (1st Dep't 2012); *Godfrey v. G.E. Capital*, 89 A.D.3d 471 (1st Dep't 2011); *Angamarca v. NYCPHD Fund*, 87 A.D.3d 206 (1st Dep't 2011); *Williams v. Hooper*, 82 A.D.3d 448 (1st Dep't 2011); *Ashkinazy v. Con Ed*, 78 A.D.3d 434 (1st Dep't 2010); *Hernandez v. Vavra*, 62 A.D.3d 616 (1st Dep't 2009); *Cintron v. NYCTA*, 50 A.D.3d 466 (1st Dep't 2008); *Paek v. City of New York*, 28 A.D.3d 207 (1st Dep't 2006); *Coore v. Franklin Hosp. Med. Ctr*., 35 A.D.3d 195 (1st Dep't 2006); *Smith v. Au*, 20 A.D.3d 364 (1st Dep't 2005); *Reed v. City of New York*, 304 A.D.2d 1 (1st Dep't 2003); *Weinstein v. New York Hosp*., 280 A.D.2d 333 (1st Dep't 2001); *Vasquez v. Figueroa*, 262 A.D.2d 179 (1st Dep't 1999).

Smith	2005	$6 million	37
Reed	2003	$5 million	43
Weinstein	2002	$6.5 million	22
Vasquez	1999	$4 million	24

The highest sustained pain and suffering award for any brain injury over the three-decade history of CPLR 5501(c) in any New York appellate department involved a 12-year old plaintiff on a bicycle who was struck by a speeding car. *See Turturro v. City of New York*, 127 A.D.3d 732, 734 (2d Dep't 2015). The child sustained horrific skull and brain injuries, and was in a coma for five months. The child was left with significant, permanent deficits in his ability to learn, think, remember and express himself. He also sustained numerous severe orthopedic injuries. He underwent numerous surgeries, suffers from seizures, and requires assistance with many activities of daily living. The Second Department ordered the pain and suffering award to be remitted to $10 million. *See id.* at 733-34; *Turturro*, 2011 Jury Verdicts LEXIS 197208.

Finally, the decisions relied upon by both the trial court and plaintiff's counsel in this matter are the standard plainly inapplicable fare routinely relied upon by plaintiffs unable to justify an excessive or runaway verdict. *See* Timothy R. Capowski, et al., *The Bar's Most Common Repeated Mistakes in Applying CPLR 5501(c)*, N.Y.L.J., Apr. 28, 2020.

Precedent for various categories of injuries must remain stable under CPLR 5501(c) in order to vindicate the statutory objective of preventing an upward spiral of awards.[9] The Court's decision on the pain and suffering award will serve as precedential authority affecting New York businesses, healthcare providers, and citizens. The remitted $30 million pain and suffering award in this case constitutes a sudden, unjustifiable jump; it will establish a new high value for brain injury awards in this Court, driving up the permissible range of such awards in personal injury cases. The result will lead to higher demands and further complicate settlements.

Further, should this Court embrace higher than existing values for pain and suffering, the result would be especially problematic given the growing backlog of civil cases as a result of COVID-19-related court closures. Parties need to be able to rely on historical data to settle cases. Instability with respect to case values will lead to more trials when the courts fully reopen and more appeals at a time when the courts will be trying to make progress on resolving aging cases.

[9] To this end, this Court's recent CPLR 5501(c) decisions rely on precedent from 2000, 2001, 2005, 2008, and 2010. *See, e.g.*, *Thomas v. NYCHA*, 180 A.D.3d 484, 484 (1st Dep't 2020) (relying on *Donlon v. City of New York*, 284 A.D.2d 13, 18 (1st Dep't 2001), and *Garcia v. Queens Surface Corp.*, 271 A.D.2d 277 (1st Dep't 2000), for *additur*); *Martinez v. Premium Laundry Corp.*, 181 A.D. 439 (1st Dep't 2020) (relying on *Dowd v New York City Tr. Auth.*, 78 A.D.3d 884 (2d Dep't 2010), and *Filipinas v. Action Auto Leasing*, 48 A.D.3d 333 (1st Dep't 2008) for *remittitur*); *Carino v. Friendly Fruit, Inc.*, 177 A.D.3d 506, 506 (1st Dep't 2019)

B. Raising the Permissible Range for Unquantifiable Pain and Suffering Awards Will Adversely Affect New Yorkers

The costs of excessive pain and suffering awards are real and will adversely impact New Yorkers by increasing insured losses that impact premiums for healthcare providers, homeowners, drivers, construction, businesses, and municipalities, and raising the prices of goods and services.

New York already has the highest tort costs of any state, according to a study of insurance data. *See* Paul Hinton & David McKnight, Costs and Compensation of the U.S. Tort System (U.S. Chamber Inst. for Legal Reform 2018). That study estimated that the New York tort system costs about $43.7 billion each year, based on 2016 data. *See id.* at 22. This amount is the equivalent of $6,066 for each household annually and the equivalent of three percent of the state's GDP. *Id*. These costs are distributed through insurance premiums paid by New York healthcare providers, businesses, and homeowners.

New York also has the highest medical malpractice payouts in the nation, with $661.7 million in claims paid in 2019, and the second highest payouts per capita. *See* Diederich Healthcare, 2020 Medical Malpractice Payout Analysis, May 17, 2020 (based on the U.S. Department of Health and Human Service's National

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(relying on *Singh v. Catamount Dev. Corp*., 21 A.D.3d 824 (1st Dep't 2005), and *Donlon*, *supra* to affirm).

Practitioner Data Bank Public Use Data File). Many New York physicians pay higher insurance premiums than they would if practicing elsewhere. *See* State of Liability, *supra*, at 14-16. This leads to fewer physicians opting to practice in New York and those that do to engage in overly cautious testing and defensive medicine practices to avoid lawsuits. *See* Patrick Connelly & Tracey Drury, *Medical Malpractice in New York*, Buffalo Business First, July 15, 2019. In 2020, New York was named the worst state for doctors, due, in part, to its high medical malpractice payouts and the cost of insurance. *See* John S. Kiernan, *Best & Worst States for Doctors*, WalletHub, Mar. 16, 2020.

Anchoring practices and excessive pain and suffering awards not only affect doctors, they impact average New Yorkers. New Yorkers pay among the highest auto insurance rates. *See* State of Liability, *supra,* at 21. In addition, the cost of excessive liability is passed on to New Yorkers in increased costs of housing, products and services, most notably healthcare, operating as a hidden tax almost of the magnitude of New York's personal income tax.[10] And unlike New York's personal income tax, this tax is not progressive, but disproportionately borne by

[10] New York's personal income tax raised $47 billion in fiscal year 2016, just 10% more than the estimate cost of the New York tort system that year. *See* New York State Dep't of Taxation & Fin., Fiscal Year Tax Collections: 2015-2016.

those who pay the highest share of their income to rent, healthcare, and auto insurance.

This is the state of affairs *with* relatively consistent enforcement of CPLR 5501(c)'s comparative pain and suffering review. If New York courts permit sky-is-the-limit anchoring practices and allow any rise in pain and suffering awards, then these costs will surge and make the situation far worse.

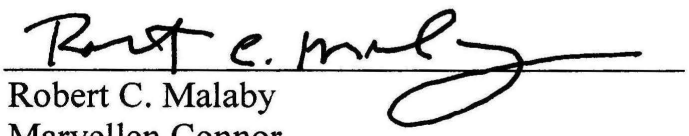
CONCLUSION

For these reasons, *Amici* respectfully request that the Court find:

(1) use of an anchor that vastly exceeded the permissible range for a pain and suffering award under CPLR 5501(c) was improper and unduly prejudicial; and

(2) the pain and suffering award that resulted, even after *remittitur* to $30 million, vastly exceeds the range permitted by the First Department under CPLR 5501(c).

Respectfully submitted,



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I certify pursuant to 22 N.Y.C.R.R. § 1250.8(j) that this brief was prepared on a computer using Times New Roman proportionally spaced typeface in 14-point font for the body (12-point font for the footnotes). The portions of the brief that must be included in the word count pursuant to 22 N.Y.C.R.R. § 1250.8(f)(2) contain 7,000 words.

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