Bronx County Clerk's Index Nos. 26245/04, 85073/06, 86150/07 and 83873/08

Court of Appeals
of the
State of New York

CHRISTOPHER PEAT,
Plaintiff-Respondent,

-against-

Index No. 26245/04

FORDHAM HILL OWNERS CORPORATION,
Defendant-Appellant,
FORDHAM HILL COOPERATIVE APARTMENTS,
Defendant,
FORDHAM HILL LEASING COMPANY,
Defendant-Respondent,

-and-

(Caption Continued on Next Page)

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF DRI - THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF FORDHAM HILL OWNERS CORPORATION'S MOTION FOR LEAVE TO APPEAL

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BILLY LERNER, as co-partners doing business as FORDHAM HILL LEASING COMPANY, and BILLY LERNER, individually, ROBERT ULL, as co-partners doing business as FORDHAM HILL LEASING COMPANY, and ROBERT ULL, individually, WENDY ULL, as co-partners doing business as FORDHAM HILL LEASING COMPANY and WENDY ULL, individually,

Defendants.

FORDHAM HILL OWNERS CORPORATION,

Third-Party Plaintiff-Appellant,

-and- -

FORDHAM HILL COOPERATIVE APARTMENTS,

Third-Party Plaintiff,

-against-

A. BRANTLEY FLOORING CO.,

Third-Party Defendant-Respondent,

Third-Party Index No. 85073/06

FORDHAM HILL LEASING COMPANY

Third-Party Plaintiff-Respondent,

-and- -

BILLY LERNER, ROBERT ULL and WENDY ULL, Individually and as principals of FORDHAM HILL LEASING COMPANY,

Third-Party Plaintiffs,

-against-

A. BRANTLEY FLOORING CO. and ABE BRANTLEY,

Third-Party Defendants-Respondents.

Third-Party Index No. 6150/57

FORDHAM HILL LEASING COMPANY and BILLY LERNER, ROBERT ULL and WENDY ULL, Individually and as principals of FORDHAM HILL LEASING COMPANY,

Third-Party Plaintiffs,

-against-

VERONICA A. BRADY,

Third-Party Defendant.

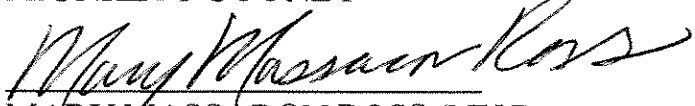
Third-Party Index No. 83873/08

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affirmation of MARY MASSARON ROSS, affirmed on the 26th day of March, 2014, and upon all papers, pleadings and proceedings heretofore and herein, the undersigned will move the New York State Court of Appeals at the Courthouse located at 20 Eagle Street, Albany, New York 12207-1095, on Monday the 14th day of April, 2014 for an Order granting DRI – The Voice of the Defense Bar leave to file an amicus curiae brief in the above-captioned appeal in support of Fordham Hill Owners Corporation's Motion for Leave to Appeal, pursuant to 22 NYCRR 500.23(a)(3).

Annexed to the instant motion is the proposed brief.

PLUNKETT COONEY

By: 
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Dated: March 26, 2014

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AFFIRMATION IN SUPPORT OF DRI – THE VOICE OF THE DEFENSE BAR'S MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF FORDHAM HILL OWNERS CORPORATION'S MOTION FOR LEAVE TO APPEAL

Mary Massaron Ross, an attorney duly admitted to practice law before the Courts of this State, affirms the following under penalties of perjury:

1. I am a shareholder of the law firm of Plunkett Cooney in Bloomfield Hills, Michigan. I have been admitted to the practice of law in New York since 2002, and will receive service in this matter by care of Goldberg, Segalla, 8 Southwoods Boulevard, Suite 300, Albany, NY 12211-2364. I submit this affirmation in support of the motion by DRI for leave to submit the annexed *amicus curiae* brief in support of Defendant-Appellant/Third-Party Plantiff-Appellant Fordham Hill Owners Corporation's Motion for Leave to Appeal the Appellate Division, First Department's October 31, 2013 Decision and Order, which affirmed an unprecedented $16 million pain and suffering award under N.Y. CPLR 5501(c) to a 36-year-old plaintiff with burn injuries, by fully adopting and endorsing the arguments and discussion set forth in DRI's amicus brief, dated March 31, 2014.

2. DRI is an international organization comprised of approximately 22,000 attorneys defending businesses and individuals in civil litigation. DRI is affiliated with both the Defense Association of New York and the Defense Trial Lawyers Association of Western New York. Committed to enhancing the skills,

effectiveness, and professionalism of defense lawyers around the globe, DRI seeks to address issues germane to defense lawyers and the civil justice system. A primary part of DRI's mission is to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI draws on the practical expertise of its members and participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

3. DRI has studied and discussed problems created by excessive verdicts, and the need for enforcement of appropriate standards for review of such verdicts. This case offers the opportunity for the Court to make clear that the standard established by the New York legislature has real teeth to it, and to ensure that New York's lower courts appropriate apply that standard to the circumstances of this case and of future cases. DRI believes that its brief will be helpful to the Court in determining whether to grant leave to appeal.

4. This Court has previously granted permission to DRI to file *amicus curiae* briefs in *Town of Oyster Bay v. Lizza Industries, Inc.* (22 NY3d 1024 [2013]), *Kirschner v. KPMG LLP* (15 NY2d 446 [2010]) and *Hamilton v. Beretta U.S.A. Corp.* (96 NY2d 222 [2001]).

5. WHEREFORE, it is respectfully requested that this Court enter an Order granting DRI – The Voice of the Defense Bar leave to submit its brief in the

annexed form, and for such other and further relief as this Court deems just and proper.

Dated: Bloomfield Hills, Michigan
March 26, 2014

MARY MASSARON ROSS, ESQ.

Bronx County Clerk's Index Nos. 26245/04, 85073/06, 86150/07 and 83873/08

Court of Appeals

of the

State of New York

CHRISTOPHER PEAT,

Plaintiff-Respondent,

Index No. 26245/04

– against –

FORDHAM HILL OWNERS CORPORATION,

Defendant-Appellant,

FORDHAM HILL COOPERATIVE APARTMENTS,

Defendant,

FORDHAM HILL LEASING COMPANY,

Defendant-Respondent,

(For Continuation of Caption See Inside Cover)

AMICUS CURIAE BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF FORDHAM HILL OWNERS CORPORATION'S MOTION FOR LEAVE TO APPEAL

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On the Brief:
MARY MASSARON ROSS
KAREN E. BEACH

Date Completed: March 26, 2014

– and –

BILLY LERNER, as co-partners doing business as FORDHAM HILL LEASING COMPANY and BILLY LERNER, individually, ROBERT ULL, as co-partners doing business as FORDHAM HILL LEASING COMPANY and ROBERT ULL, individually, WENDY ULL, as co-partners doing business as FORDHAM HILL LEASING COMPANY and WENDY ULL, individually,

Defendants.

FORDHAM HILL OWNERS CORPORATION,

Third-Party Plaintiff-Appellant,

Third-Party Index No. 85073/06

– and –

FORDHAM HILL COOPERATIVE APARTMENTS,

Third-Party Plaintiff,

– against –

A. BRANTLEY FLOORING CO.,

Third-Party Defendant-Respondent.

FORDHAM HILL LEASING COMPANY,

Third-Party Plaintiff-Respondent,

Third-Party Index No. 86150/07

– and –

BILLY LERNER, ROBERT ULL and WENDY ULL, Individually and as principals of FORDHAM HILL LEASING COMPANY,

Third-Party Plaintiffs,

– against –

A. BRANTLEY FLOORING CO. and ABE BRANTLEY,

Third-Party Defendants-Respondents.

FORDHAM HILL LEASING COMPANY and BILLY LERNER, ROBERT ULL and WENDY ULL, Individually and as principals of FORDHAM HILL LEASING COMPANY,

Third-Party Index No. 83873/08

Third-Party Plaintiffs,

– against –

VERONICA A. BRADY,

Third-Party Defendant.

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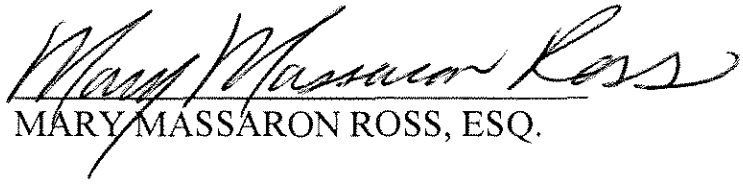
CORPORATE DISCLOSURE STATEMENT

DRI – The Voice of the Defense Bar is a not-for-profit corporation which has no parent companies, subsidiaries, or affiliates.

Dated: Bloomfield Hills, Michigan
March 26, 2014



MARY MASSARON ROSS, ESQ.

PRELIMINARY STATEMENT

DRI – The Voice of the Defense Bar is an international organization comprised of approximately 22,000 attorneys defending businesses and individuals in civil litigation. DRI is affiliated with both the Defense Association of New York and the Defense Trial Lawyers Association of Western New York. Committed to enhancing the skills, effectiveness, and professionalism of defense lawyers around the globe, DRI seeks to address issues germane to defense lawyers and the civil justice system. A primary part of DRI's mission is to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI draws on the practical expertise of its members and participates as *amicus curiae* in cases that raise issues of importance to its membership and to the judicial system. This is such a case.

DRI has studied and discussed problems created by excessive verdicts, and the need for enforcement of appropriate standards for review of such verdicts. This case offers the opportunity for the Court to make clear that the standard established by the New York legislature has real teeth to it, and to ensure that New York's lower courts apply that standard to the circumstances of this case and future cases. DRI believes that its brief will be helpful to the Court in determining whether to grant leave to appeal.

QUESTIONS PRESENTED

I

Is a review of the First Department's misapplication of CPLR § 5501(c) to uphold an unprecedented $16 million pain and suffering award necessary to stop the "upward spiral" of damages awards the statute was designed to prevent?

II

Is a review of the First Department's failure to grant a new trial for the trial court's refusal to give a missing witness charge necessary to prevent future plaintiffs from merely retaining a hired expert just before trial in lieu of presenting testimony from a plaintiff's current and former treating physicians?

ARGUMENT I

Review of the First Department's Misapplication of CPLR § 5501(c) To Uphold An Unprecedented $16 Million Pain And Suffering Award Is Necessary To Stop The "Upward Spiral" Of Damages Awards The Statute Was Designed To Prevent.

A. CPLR § 5501(c) requires the Appellate Division to carefully review damages awards for excessiveness by reference to previous awards in similar cases.

"In 1986, in an effort to curb escalating awards, the New York legislature created a statutory standard designed to give courts greater discretion in monitoring verdicts." *Geressy v. Digital Equipment Corp.*, 980 F.Supp. 640, 653 (E.D.N.Y., 1997). The legislative reform scheme, codified as CPLR § 5501(c), vests the Appellate Division with the authority and responsibility to review verdicts in medical malpractice and personal injury cases and, in the case of awards the Appellate Division deems excessive, to remit the verdict to a reasonable amount to be accepted in lieu of a new trial:

> In reviewing a money judgment ... 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.

CPLR § 5501(c) was "fashioned as a remedy for an insurance crisis marked by spiraling costs and unavailability of liability coverage, [and it] require[d] that [the courts] look to similar appealed verdicts and exercise [its] judgment to promote

greater stability in the tort system and greater fairness for similarly situated defendants." *Donlon v. City of New York,* 284 A.D.2d 13, 14; 727 N.Y.S.2d 94 (1st Dep't 2001). As articulated by the First Department in *Donlon*, review of verdicts under CPLR § 5501(c) requires a determination of whether the damages award "deviates materially from what would be reasonable compensation." (*Id.* at 18). This "deviates materially" standard was a deliberate departure from the previous "shocks the conscience" standard of review for jury verdicts, designed to "relax the former standard of review and facilitate appellate changes in verdicts." *O'Connor v. Graziosi,* 131 A.D.2d 553, 554; 516 N.Y.S.2d 276 (2d Dep't 1987), *lv. den.* 70 N.Y.2d 613; 524 N.Y.S.2d 432 (1987). Unlike judicial review of other aspects of jury verdicts which afford great deference to the trier of fact, review of damages awards for "material deviation" "is a mixed question of law and fact which has been legislatively committed to judicial oversight." (*Id.*).

The United States Supreme Court, in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 423-424 (1996) made the following observations about the heightened appellate scrutiny intended by the legislature in enacting CPLR § 5501(c):

> As stated in Legislative Findings and Declarations accompanying New York's adoption of the "deviates materially" formulation, the lawmakers found the "shock the conscience" test an insufficient check on damage awards; the legislature therefore installed a standard "*invit[ing] more*

> *careful appellate scrutiny*." Ch. 266, 1986 N.Y. Laws 470 (McKinney). At the same time, the legislature instructed the Appellate Division, in amended § 5522, to state the reasons for the court's rulings on the size of verdicts, and the factors the court considered in complying with § 5501(c). In his signing statement, then-Governor Mario Cuomo emphasized that the *CPLR amendments were meant to rachet up the review standard*: "This will 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." Memorandum on Approving L.1986, Ch. 682, 1986 N.Y. Laws, at 3184; see also Newman & Ahmuty, Appellate Review of Punitive Damage Awards, in Insurance, Excess, and Reinsurance Coverage Disputes 1990, p. 409 (B. Ostrager & T. Newman eds.1990) (review standard prescribed in § 5501(c) "was *intended to ... encourage Appellate Division modification of excessive awards*")

(emphasis supplied). Thus, it is clear CPLR § 5501(c) is an appellate review standard with teeth, expressly enacted to encourage modification of excessive damages awards by the Appellate Division.

Many states in which DRI's members practice have enacted caps on damages awards as a tort reform measure to control "runaway juries." In rejecting such a cap and instead enacting CPLR § 5501(c), New York's legislature has entrusted the Appellate Division with broad authority to examine, by reference to previously-reviewed verdicts in similar cases, whether the pain and suffering award in a particular case is excessive based on the evidence in that case. However, this enhanced review authority carries with it enhanced responsibility, as the legislature depends upon this judicial review to serve as a "'natural curbing

force' to check the upward spiral of non-economic jury awards[.]" *Donlon*, 284 A.D.2d. at 15. The "material deviation" standard, "in design and operation, influences outcomes by tightening the range of tolerable awards." *Gasperini*, 518 U.S. at 425.

The "material deviation" standard of review has been successfully applied by the Appellate Division in countless cases over the past 27 years. As the First Department observed in *Donlon*, "the vast bulk of decisions have involved fractional reductions as a by-product of greater scrutiny in a legislatively mandated attempt to keep compensation reasonable and uniform." 284 A.D.2d at 18. This "greater scrutiny" involves examining the record to find evidence supporting the nature, extent, and permanency of an injury. *Colson v. McCormick*, 55 A.D.3d 1330, 1332; 865 N.Y.S.2d 460 (4th Dep't 2008). It also requires the reviewing court "to determine what awards have been previously approved on appellate review and decide whether the instant award falls within those boundaries." *Donlon*, 284 A.D.2d at 18. The First Department's failure to identify relevant factual similarities between this case and other cases involving burn victims, and weigh the sufficiency of the evidence to support the jury's award of $16 million in pain and suffering damages, was an error of law warranting leave to appeal and a determination by this Court that the jury's award deviates materially from what would be reasonable compensation for Plaintiff's injuries. (*Id.* at 16); see *Heary*

Bros. Lightning Protection Co., Inc. v. Intertek Testing Services, N.A., Inc., 4 N.Y.3d 615, 618; 797 N.Y.S.2d 400 (2005) (reviewing Appellate Division decision on sufficiency of evidence to support damages award as a question of law); *Irrigation & Indus. Dev. Corp. v. Indag S. A.*, 37 N.Y.2d 522, 525; 375 N.Y.S.2d 296 (1975) (expressing willingness to review Appellate Division's discretionary rulings where there has been an abuse of discretion as a matter of law or Appellate Division, in exercising discretion, "has failed to take into account all the various factors entitled to consideration").

Further evidence of the First Department's abdication of its statutory responsibility to review the instant verdict under CPLR § 5501(c) is found in the court's failure, under CPLR § 5522(b), to set forth the reasons for its decision and the factors it considered in complying with § 5501(c). The First Department devotes all of one sentence in its opinion to applying § 5501(c), simply listing Plaintiff's 15 surgeries, "extensive physical and occupational therapies," and "significant depression and post-traumatic stress disorder" before citing to *Lei v. City University of New York,* 33 A.D.3d 467, 468; 823 N.Y.S.2d 129 (1st Dep't 2006), *lv. den.* 8 N.Y.3d 806; 832 N.Y.S.2d 488 (2007) and *Weigl v. Quincy Specialties Co.*, 190 Misc.2d 1; 735 N.Y.S.2d 729 (Sup. Ct. 2001), *aff'd.* 1 A.D.3d 132; 766 N.Y.S.2d 428 (1st Dep't 2003). The First Department offers no discernible comparison of the facts of this case and the facts in *Lei* and *Weigl* to

justify its decision to uphold a verdict twice as large as the verdicts in those cases. A departure of this magnitude certainly warrants discussion of the legal basis supporting it; in fact, § 5522(b) *requires* this discussion. The First Department declined, first upon appeal and again upon Fordham Hills Owners Corporation's subsequent request for rehearing, to provide future courts and litigants with a valid legal explanation for its decision to set a new benchmark in pain and suffering awards. This Court's intervention is required to ensure faithful application of CPLR §§ 5501(c) and 5522(b) in this and future cases.

The First Department's failure to properly assess the reasonableness of the jury's $16 million award for pain and suffering, representing a 200% increase from the next-largest such award for a burn victim, presents a question of public importance and therefore makes Fordham Hills Owners Corporation's request for leave to appeal to this Court appropriate and necessary. See 22 NYCRR 500.22(b)(4) (questions presented by a request for leave to appeal to the Court of Appeals must be "novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division").

DRI agrees with all of Fordham Hills Owners Corporation's asserted grounds for leave to appeal. But DRI focuses its brief on the need to give teeth to the standard by carefully evaluating the relevant facts in light of the statutorily

required comparison. The First Department failed to adequately address the relevant facts and misapplied CPLR § 5501(c) in upholding the jury's damages awards. And it compounded this error by denying relief based on the trial court's failure to give a missing witness instruction. If the First Department's decision is allowed to stand as precedent, plaintiffs' lawyers across the state will use it to further the very "upward spiral" of damages awards that CPLR § 5501(c) was intended to prevent.

B. Comparison of Plaintiff's pain and suffering to that of the *Lei* and *Weigl* plaintiffs does not justify a verdict over twice as large as in those cases.

While the First Department cited *Lei* and *Weigl* as comparison cases in its opinion, a review of the evidence in those cases compels the conclusion that the jury's $16 million award for Plaintiff's pain and suffering in this case lies far outside of the boundaries of similar verdicts sustained on appeal. Far from the intended purpose of "tightening the range" of pain and suffering awards for similarly-situated plaintiffs, the instant award of $16 million for Plaintiff's pain and suffering extends the range of "reasonable compensation" to an amount twice as much as the next-highest award.

In *Lei*, the First Department affirmed a $5 million pain and suffering award as reasonable compensation. The 23-year-old plaintiff sustained serious burn injuries while using an oxyacetylene torch at a college metal laboratory. The *Lei*

Court rejected the defendant's argument that "the damages awarded for past and future pain and suffering deviate materially from what is reasonable compensation" where "the evidence showed that, as a result of the accident, [the plaintiff] [] endured seven operations and numerous painful treatments,[1] required extensive physical therapy, and sustained permanent significant scarring to his upper torso, neck, lower jaw and left hand, which is gnarled and has diminished grip strength." (*Id.* at 468). Additionally, "[the plaintiff's] damaged skin itche[d] persistently; heat, cold and humidity [made] him uncomfortable; and he [] developed serious psychological problems, many of them permanent, including elements of post-traumatic stress disorder and severe depression." (*Id.*). The plaintiff had been committed as suicidal and his treating psychiatrist testified at trial that he was taking multiple prescription anti-depressant, anti-psychotic, and anti-anxiety medications to manage his psychological problems.

In *Weigl*, the 24-year-old plaintiff's $19.4 million pain and suffering award was remitted to $8 million. The plaintiff was injured when her laboratory coat caught on fire when a substance that she was mixing in a blender ignited. As a result of the accident, she was hospitalized for about one month, where she

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[1] These are the same debridement treatments misdescribed by the First Department here as "surgeries." See footnote 2, *infra*.

underwent "excruciating debridements"[2] and two skin graft surgeries, with scars from her burns and skin grafts covering her entire torso except for her stomach. About four years after the accident, the plaintiff had a third surgery to remove a thick scar across her breast that was causing pain, burning, and itching. The surgery failed to relieve her symptoms and no further treatment was available. Although the plaintiff returned to work, and functioned well with strong support of her family, she suffered from PTSD and had severe psychological problems that required long term treatments. Additionally, the plaintiff continued to endure physical pain and psychological problems. (*Id.* at 7-8). In considering the facts of the case, and in comparing the amounts awarded in every prior burn victim appeal in New York to date, the trial court concluded that the $19.4 million pain and suffering award materially deviated from reasonable compensation, and had to be reduced "in the interest of fairness and evenhandedness." (*Id.* at 9).

In its opinion, the First Department specifically mentioned Plaintiff's 15 surgeries, "extensive physical and occupational therapies," and significant depression and PTSD as comparable with the pain and suffering endured by the plaintiffs in *Lei* and *Weigl*. *Peat v. Fordham Hill Owners Corp.*, 110 A.D.3d 643,

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[2] These painful procedures are part and parcel of every burn victim's initial treatment, and as such should not have been quantified by the First Department as distinct "surgeries." See Fordham Hills Owners Corporation's Reply Brief on Appeal filed in Appellate Division, pp. 26-28.

645; 974 N.Y.S.2d 61 (1st Dep't 2013). However, upon closer inspection of the evidence in all three cases, the injuries proven by Plaintiff at trial pale in comparison to those suffered by Mr. Lei and Ms. Weigl, and in any event were by no means twice as severe:

- 99% of Plaintiff's treatment, as evidenced by his medical expenses, occurred in the 14 months following his accident (A-2944-A-3127, A-3639-A-3645) (the other 1% of medical expenses was attributable to his litigation psychiatrist's expert invoices);
- Five out of Plaintiff's nine total skin grafts involved placement of artificial skin, unlike Ms. Weigl and Mr. Lei, whose skin grafts exclusively involved skin harvested from their own bodies, which doubled their respective BSA scarring beyond just the area which was burned (A-979-A-2943) (see Fordham Hills Owners Corporation's Reply Brief on Appeal filed in Appellate Division, pp. 26-28);
- In the six years immediately preceding trial, Plaintiff had been managing his pain with Advil, using lotion to treat his skin, maintaining a home exercise program, and only took antidepressants during the brief period he treated with his litigation psychiatrist (A-173, A-176, A-182, A-183, A-637, A-765);
- Plaintiff admitted he is not presently treating with any doctor, psychologist, dermatologist or therapist, and has not done so in the past six years except for bimonthly check-ups with his "regular doctor," and has not received any recommendation for future surgeries or treatment (A-176, A-181);
- While Plaintiff cannot carry heavy loads or work for prolonged periods of time, cannot fully extend his right arm, and has a club left pinky finger, his condition has improved considerably since his accident, and he can take care of himself and his personal hygiene with some difficulty (A-173, A-215).

A review of the evidence in this case suggests Plaintiff's only significant long-term injury is his mental injury due to depression and PTSD. However, even

the inherently nebulous nature of mental suffering cannot justify the jury's $16 million pain and suffering award, when compared to other *Lei, Weigl*, and other cases in which burn victims suffering significant mental distress have received much lower awards:

- *Gallo v. Supermarkets General Corp.*, 112 A.D.2d 345, 346; 491 N.Y.S.2d 796 (2d Dep't 1985): $1.4 million pain and suffering award affirmed where the plaintiff, who suffered extensive third-degree burns over much of his body after hot tar was poured onto him at work, had become a "virtual recluse" with severe psychological and mental problems, requiring 10 years of regular psychotherapy and continued contacts thereafter on an irregular basis.

- *Neissel v. Rensselaer Polytechnic Institute*, 54 A.D.3d 446, 453; 863 N.Y.S.2d 128 (3d Dep't 2008): $3 million future pain and suffering award affirmed where the plaintiff, who sustained third, fourth and fifth degree burns, had his treating psychologist testify regarding plaintiff's PTSD, flashbacks, nightmares, social isolation and panic attacks.

- *Moskowitz v. Massachusetts Inst. of Tech.*, 100 A.D.2d 810; 474 N.Y.S.2d 742 (1st Dep't 1984): undifferentiated $10.3 million award reduced to $5 million where the plaintiff suffered "unspeakable" damage requiring 100 skin grafts and 500 future surgeries after being doused with a liter of sulphuric acid.[3]

- *Whitfield v. City of New York*, 239 A.D.2d 492; 657 N.Y.S.2d 757 (2d Dep't 1997): $8 million pain and suffering award reduced to $4 million where the plaintiff suffered third degree burns, severe facial disfigurement and PTSD, causing him to become suicidal.[4]

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[3] See Fordham Hills Owners Corporation's Reply Brief on Appeal filed in Appellate Division, pp 22-24.

[4] See Fordham Hills Owners Corporation's Reply Brief on Appeal filed in Appellate Division, pp 22-24.

Comparison of Plaintiff to these plaintiffs does not support the First Department's finding that a $16 million award for pain and suffering is within the boundaries of previous awards approved by appellate review. Review by this Court is necessary to ensure the application of proper scrutiny to the jury's award, as required by CPLR §§ 5501(c) and 5522(b).

C. Denying leave to appeal of the $16 million award for Plaintiff's pain and suffering would cause an upward spiral in jury verdicts, both for less severely and more severely injured plaintiffs.

As an organization of defense lawyers, DRI and its members are especially attuned to decisions which threaten to obliterate any reasonable comparison between jury awards of damages by raising the "benchmark" for such awards beyond a reasonable level. Precisely because damages are so difficult to quantify, an intelligible legal standard to provide uniformity and fairness for these awards is necessary. As previously stated, because New York lacks a statutory cap on damages, appellate review of jury verdicts under CPLR § 5501(c) functions to "tighten the range of tolerable awards" as a "natural curbing force" to check the upward spiral of jury awards. *Donlon*, 284 A.D.2d at 15. Otherwise, defendants and the legal system at large would be subjected to wildly unpredictable valuations of human pain and suffering, with the potential for abuse of the legal system by an unduly sympathetic jury.

In a review scheme dependent upon comparisons between the facts of similar cases, it can be assumed that the case in which the highest damages are awarded must feature the most severely injured plaintiff suffering those types of injuries. If this Court allows the $16 million award to Plaintiff to stand, then this case will establish the highest award to any burn victim—$8 million higher than *Weigl*, the next-highest case. Incredibly, the jury's verdict is also the highest award to *any* victim under CPLR § 5501--$4 million higher than the Fourth Department's $12 million remitted award to a 24-year-old quadriplegic. *Barnhard v. Cybex Intern., Inc.*, 89 A.D.3d 1554, 1557; 933 N.Y.S.2d 794 (4th Dep't 2011).

If this Court fails to reexamine the First Department's decision, then Plaintiff—a 36-year-old man who received less than two years of treatment for his injuries, takes no antidepressant medications, and can functionally care for himself—will be viewed as New York's worst-ever injured plaintiff, with his $16 million pain and suffering award serving as a new benchmark. Plaintiff attorneys with clients injured more severely than Plaintiff will demand, under CPLR § 5501(c)'s standard of verdict comparison, pain and suffering awards of $20 million or more. Plaintiff attorneys with clients injured equally or less severely than Plaintiff will also point to his $16 million award and argue that their clients' pain and suffering merits at least $10 million, even if their clients were not receiving treatment and could care for themselves. This is precisely the "upward spiral" of

damages awards that CPLR § 5501(c) was intended to prevent. The "material deviation" standard enacted by the legislature cannot function as intended if this Court is willing to allow the First Department to double the highest-ever award of damages for a plaintiff whose injuries do not remotely justify a verdict twice as high as the next comparable plaintiff. Review by this Court is sorely needed in this case because in response to the legislature's directive to apply greater scrutiny and "rachet up" the review standard for damages, the First Department has instead rubber-stamped the jury's award and left future courts and defense attorneys with the impossible task of keeping pain and suffering verdicts within a reasonable range of compensation.

ARGUMENT II

Review Of The First Department's Failure To Grant A New Trial For The Trial Court's Refusal To Give A Missing Witness Charge Is Necessary To Prevent Future Plaintiffs From Merely Retaining A Hired Expert Just Before Trial In Lieu Of Presenting Testimony From A Plaintiff's Current And Former Treating Physicians.

A. A missing witness charge was appropriate because the testimony of Plaintiff's treating physicians would not have been cumulative of the testimony of Plaintiff's hired experts.

DRI agrees with Fordham Hills Owners Corporation that the First Department seriously misapprehended the law and facts in its review of the trial court's refusal to grant a missing witness charge regarding plaintiff counsel's failure to call Plaintiff's treating physicians. Fordham Hills Owners Corporation requested a missing witness charge because Plaintiff did not call any of his treating physicians, instead electing to present his proofs through medical records from the 18 months immediately following his injury, and the testimony and written opinions of retained experts Drs. Hausknect, Ladopoulos and Goldstein, all of whom had seen Plaintiff shortly before trial upon referral from plaintiff counsel. Plaintiff called neither Dr. Macenat, his current primary care physician, nor Dr. Winston, his treating surgeon following the accident, as witnesses. Nor did Plaintiff call any of the numerous treating physicians, physiatrists, physical therapists or occupational therapists referred to throughout his medical records

from July 2003 through December 2004, or any of his unnamed treating doctors since.

The "missing witness" charge, a common feature in courts across the country, "derives from the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." *Adam K. v. Iverson*, 110 A.D.3d 168, 176; 970 N.Y.S.2d 297 (2d Dep't 2013). In New York, "it is well settled that a missing witness charge is warranted for the failure to call a treating physician as a witness at trial, unless the party opposing the inference shows that the witness is either unavailable, not under his control, or that the witnesses' testimony would be cumulative." *Dayanim v. Unis*, 171 A.D.2d 579, 580; 567 N.Y.S.2d 673 (1st Dep't 1991). In *Adam K.*, the Second Department upheld a missing witness instruction given in response to a mental institution's decision to call an expert psychiatrist who had interviewed the patient once and reviewed his medical records, instead of the patient's treating psychiatrist who had treated the patient continuously over a period of months. "[I]t goes without saying that the treating psychiatrist, as opposed to the reviewing doctors, possesses the greatest knowledge about the patient and 'information on a material issue' raised in the proceeding." (*Id.* at 180).

Here, the First Department erroneously ruled that the testimony of Plaintiff's treating physicians would have been cumulative of the testimony of life care planner Dr. Carfi, which was based on medical records from only the first 18 months following Plaintiff's accident. *Peat*, 110 A.D.3d at 644-645. It is grossly inaccurate (and a misapprehension of law) to state that Plaintiff's paid expert's review and discussion of medical treatment records limited to 2003-2004 would render the testimony of Plaintiff's treating doctors from 2003-2011 "cumulative." In *Adam K.*, 110 A.D.3d at 182, the Second Department ruled that "[t]he quantity and quality of the information possessed by [the expert, who saw the patient once and reviewed his records] and [the treating psychiatrist] were vastly different and cannot be considered equivalent." The testimony of Plaintiff's hired experts, based on six-to-eight-year-old medical records and their evaluations of Plaintiff for the purposes of this litigation, would not have been cumulative of the testimony of Plaintiff's primary care physician Dr Macenat, who had seen Plaintiff every two to three months as his treating physician in the six years leading up to trial—a period of time not covered by any medical records offered into evidence. The defense was entitled to a missing witness charge where Plaintiff inexplicably failed to call any of his treating physicians to substantiate the $35 million in damages he sought.

B. The First Department's ruling encourages plaintiffs to inflate damages awards through speculative expert testimony rather than testimony from current treating physicians regarding a plaintiff's actual medical needs.

The First Department's ruling provides a perverse incentive for plaintiff counsel to pad damages testimony by offering medical records and testimony solely through paid experts rather than a plaintiff's disinterested treating physician. The missing witness charge reflects the law's sensible assumption that a plaintiff who is unwilling to offer damages testimony through the physicians who have been treating him must be asking for higher damages than the evidence will support, and is unwilling to provide the jury with the best evidence of his actual damages. The jury here was entitled to make such an inference based on Plaintiff's failure to call his treating physicians, and the trial court's denial of the missing witness charge was reversible error warranting a new trial.

Plaintiff's life care planner, Dr. Carfi, provides a perfect example of the inherent danger in allowing a hired expert, unbridled by the truth of what a plaintiff's disinterested treating physicians testifies the plaintiff actually needs and has been receiving, to tell the jury the plaintiff needs every possible medical expense imaginable without allowing a contrary inference based on the plaintiff's failure to call any of his treating physicians. Dr. Carfi is a physiatrist who "very rarely" sees burn patients (A-641). Not one to let his lack of personal experience

interfere with an opportunity to serve as an expert life care planner (he creates 100 such plans each year, A-638), Dr. Carfi wrote a life care plan for Plaintiff which included regular treatment by physicians, dermatologists, orthopedists, physiatrists, psychologists, and physical and occupational therapists (A-4558-A-4566). At trial, Dr. Carfi admitted that neither he nor hired plastic surgeon Dr. Goldstein knew if Plaintiff had seen any rehabilitation specialists, and was unaware of any therapies or home exercise programs currently being done by Plaintiff (A-534, A-632-A-635). He took Plaintiff's word on the need for high blood pressure medications and Zoloft, despite Plaintiff not being diagnosed with high blood pressure, not taking any antidepressants, and taking only Advil as necessary to treat his pain (A-633-A-636, A-765). He recommended weekly visits with a psychologist, absent testimony by Dr. Ladopoulos that weekly visits were necessary for a patient who had stopped going to therapy on even a monthly basis (A-692). He listed a $20,000 elbow surgery as a future medical expense while admitting that no doctor had recommended any future surgeries (A-182, A-634–A-635). Dr. Carfi also listed a scooter, urinal and hospital bed as necessary future medical expenses despite Plaintiff's lack of any ambulatory, sleep or continence problems (A-640-A-643). He prescribed daily household help from a home health aide, although Plaintiff could admittedly care for himself, and recommended increasing this aid as Plaintiff grew older (A-215, A-624, A-626-A-627).

Missing from Dr. Carfi's extensive compilation of all the possible wants and needs of a burn victim is evidence from Plaintiff's current treating health care professionals that some, if not all, of these items are actually medically necessary *for Plaintiff*. Not only was Dr. Carfi permitted to speculate as to the necessity of certain items, but the jury was deprived of a valid inference that could have changed its decision to award the full amount of the requested future medical expenses. Plaintiff counsel have every reason to see the First Department's opinion as an opportunity to use hired experts like Dr. Carfi to secure multi-million dollar awards of future medical expenses without any foundation for those expenses in the plaintiff's current treatment or prognosis. Such a practice would inevitably escalate jury awards to the detriment of New York's legal system and liability insurance landscape. DRI urges this Court to grant leave to review and correct the legal and factual misapprehensions made by the First Department in ruling that a missing witness charge was not appropriate in this case.

CONCLUSION

For the foregoing reasons, this Court should grant Fordham Hills Owners Corporation's motion for leave to appeal with respect to Plaintiff's $16 million pain and suffering award and request for missing witness charge, with such other and different relief as the Court deems just and proper.

Respectfully submitted,

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On MAR 2 6 2014

deponent served the within: **Motion for file Amicus Curiae Brief**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on MAR 2 6 2014

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