eeeSupreme Court of the State of New York
Appellate Division: First Department

KEIMONEIA REDISH,

Plaintiff-Respondent,

against

DARRYL ADLER, ET AL.,

Defendants-Appellants.

Index No. 2020-01297

REPLY AFFIRMATION OF MARYELLEN CONNOR IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* BY 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

MARYELLEN CONNOR, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am duly admitted to practice law before the courts of the State of New York and a Partner in the law firm of Malaby & Bradley, LLC, attorneys 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.

2. I submit this reply affirmation in further support of the motion to submit a brief as *amici curiae* on behalf of a broad coalition of New York's healthcare providers, businesses, builders and affordable housing advocates, truckers, insurers, and civil justice organizations; fifteen *amici* entities in all.

3. While our office normally declines to submit reply affirmations in connection with such motions, we do so here to correct and respond to several arguments offered in Plaintiff's Affirmation in Opposition.

4. Contrary to the Plaintiff's opposition, anchoring is not the only issue raised by *amici*. Plaintiff spends the entirety of the opposition arguing against the Court's consideration of anchoring practices, while ignoring the other critical issue raised by *amici* ("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?").

5. The overarching argument set forth by the broad coalition of interests – itself a telling signal of the importance of this issue – involves an urgent request, backstopped by a lengthy policy discussion that the Court properly and stringently adhere to CPLR 5501(c)'s case comparison mandate and the existing sustainable range. This request is the opposite of "harmful." (Isaac Aff. at 2). Rather, the brief reflects recognition of the growing harm inflicted upon all New Yorkers and all New York businesses by unmoored pain and suffering awards.

6. Plaintiff's concern directed at preservation of the other issue raised, improper anchoring, is a red herring. On one hand, Plaintiff asserts that the *amici* provide no helpful perspective as they rehash issues "amply and ably covered" by the Defendants-Appellants. (Isaac Aff. at 2). On the other hand, Plaintiff simultaneously asserts that *amici*'s attempts to discuss the improper summation arguments, which prompted the excessive verdict, are unpreserved. (*Id*.) All of the defendants argued that the verdict was unreasonable compensation pursuant to CPLR 5501(c). Defendants-Appellants also raised issues and objections going to Plaintiff's improper summation comments with the Adler appellants concluding that as a result of these comments, "the jury overlooked all of the glaring logical gaps in the proof, and awarded $90,000,000 for pain and suffering, an eye-popping sum that is supported purely by misplaced anger towards the Defendants." (Adler Appellant's Br. at 56-59). *Amici* elucidate on these two raised issues and invite the Court's

attention to law that "might otherwise escape the Court's consideration," 22 NYCRR 500.23(a)(4)(ii), – namely that CPLR 5501(c) was violated in part due to improper summation commentary.

7. While an "*amicus* is not at liberty to inject new issues in a proceeding; [an] *amicus* is not confined solely to arguing the parties' theories in support of a particular issue. To so confine *amicus* would be to place him in a position of parroting 'me too' which would result in his not being able to contribute anything to the court by his participation in the cause." *Keating v. State*, 157 So. 2d 567, 569 (Fla. Dist. Ct. App. 1963); *see also Lewis v. Harris*, 378 N.J. Super. 168, 185 n.2 (N.J. App. Div. 2005) ("Although an *amicus curiae* is ordinarily limited to arguing issues raised by the parties, an *amicus* may present different arguments than the parties relating to those issues."). New York law is consistent with these principles. *See Kemp v. Rubin*, 187 Misc. 707, 709 (Sup. Ct. 1946) (recognizing that the "function of an 'amicus curiae' is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration" and denying non-party organizations' request to participate in a manner "virtually tantamount to full intervention as parties").

8. Separate and apart from this, CPLR 5501(c), by its very operation, creates precedent in every Appellate Division decision where it is applied to approve, reduce, or increase a pain and suffering award. If improper argument significantly

influences a jury's verdict on pain and suffering (as occurred in this matter), and the Court finds that conduct unpreserved for review because the individual litigant did not object, then the precedent ultimately set by the award in that decision, harms *all* future litigants and contributes to the upward spiral that CPLR 5501(c) was specifically enacted to prevent.

9. As such, unless the Appellate Division chooses to explicitly designate the damages determination on appeal as *non*-precedential (similar to a summary order in the Second Circuit), the Court should always deem the issue of improper argument that unduly influences the amount of a damage award preserved for appellate review because of the very operation of CPLR 5501(c) and its broad impact on all litigants. Failing this, the Court should do so through its broad interests of justice jurisdiction for the identical reasons.

10. Plaintiff's opposition attempts to sanitize the improper anchor by referencing some of trial counsel's more ambiguous surrounding language (Isaac Aff. at 3). This ignores that Plaintiff's trial counsel, as an officer of the court, first vouched to the jury that the reasonableness of his improper anchoring figures totaling $40 million or more were the product of his lengthy experience in representing people with similar disabilities (Tr. 1665-1669). This very specific vouching, of course, must be considered along with the undisputed fact that the Appellate Division has determined a range of reasonable compensation with a high

(for injuries to a 12-year-old that dwarf those in this case) that is 25% of that amount for any brain injury. For Plaintiff to seize upon his additional language and the jury charge as having somehow unrung the bell, makes no sense under the circumstances. The bell was rung, the jury heard it, and took it and ran to the tune of $90 million.

11. Contrary to Plaintiff's arguments (Isaac Aff. at 4, 11-12), *amici's* proposed brief fully examines the issue of statutory interpretation and will not be repeated here. Suffice it to say, Plaintiff is incorrect because it is axiomatic that CPLR 5501(c) and CPLR 4016(b) must be read together and must not controvert each other's language or purposes: unfettered anchoring does exactly that. But even disregarding CPLR 5501(c), Plaintiff's opposition ignores the most basic and fundamental reason why Plaintiff's interpretation of CPLR 4016(b) is incorrect. The key words contained in the statutory text of CPLR 4106(b) – "appropriate" and "believe" – both have to mean something.[1] Plaintiff's interpretation reads both words completely out of the statute, which is impermissible under rules of statutory interpretation.

12. In a statutory scheme with a de facto cap of $10 million, and only two approved awards ever permitted above that range as constituting reasonable compensation, it is unreasonable for Plaintiff's counsel to tell the jury that in his experience $40 million or more is appropriate compensation for pain and suffering.

[1] "The attorney for a party shall be permitted to make reference, during closing statement, to a specific dollar amount that the attorney *believes* to be *appropriate* compensation for any element of damage that is sought to be recovered in the action." CPLR 4016(b) (emphasis added).

There exists no plausible interpretation of CPLR 4016(b) that permits Plaintiff to request amounts that the Appellate Division deems unreasonable compensation under CPLR 5501(c). Plaintiff's logic would similarly permit demands in the hundreds of millions or billions of dollars.

13. Plaintiff's opposition curiously takes umbrage with basic undeniable facts, complaining that *amici* refer to Plaintiff's grossly improper and unreasonable summation anchor as $40 million – when it was actually $10 million past plus $30 million future damages for pain and suffering (Isaac Aff. p. 2-3). *Amici* do not profess to understand this point,[2] except that the total $40 million anchoring figure is impossible to justify.

14. Plaintiff's opposition also asserts that *amici* "fail to acknowledge that the trial court reduced plaintiff's overall pain and suffering award by two/thirds to $30,000,000" (Isaac Aff. at 3). Not so. *Amici* acknowledge this repeatedly (*Amici Curiae* Br. at 4, 23, 30), and this is precisely the point: The cycle of plaintiffs' counsel "suggesting" that juries return amounts as purportedly appropriate compensation that, if awarded, will certainly be reduced by trial and appellate courts is inefficient, costly, and wholly avoidable (*Amici Curiae* Br. at 20-21).

15. Especially noteworthy is Plaintiff's attack on the *amici* themselves as economically-motivated (Isaac Aff. at 5). The *amici* have been candid about their

[2] The *amicus* brief indicates the precise request at its outset (*Amici Curiae* Br. at 3).

and the entirety of New York's financial interest in the outcome here and the precedent this case will set for future litigants, which is not improper – indeed, an *amicus curiae* is supposed to be a "nonparty with an interest in the case" that "wishes to submit a brief and support a particular side" (Siegel, NY Prac. § 525 n.15 [6th ed 2020]); *see also* 22 NYCRR 1250.4(f) (proposed *amici* must set forth their interest in the case). In other words, Plaintiff attacks *amici* for serving as proper *amici*.

16. The opposition's rhetoric minimizing the *amici* or attacking their motivations (Isaac Aff. at 5) should be considered alongside the tangible harm that nuclear verdicts have on health care providers, businesses, nonprofit organizations, and the public. The threat posed by spiraling damages awards has the potential to sink all boats, not just those of private enterprises. The cost of automobile and homeowner's insurance, the availability of healthcare, the affordability of housing, the ability of small businesses to operate, and more all depend on a predictable tort system that provides reasonable compensation for injuries, not excessive awards prompted by extraordinary demands. This harm is laid out in the *amicus curiae* brief. Plaintiff's opposition does not respond teeo these legitimate concerns.

WHEREFORE, I respectfully request that the Court grant the *amici's* Motion and enter an order:

(a) granting *amici* leave to submit a brief in support of Defendant-Appellant; and

(b) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York

January 4, 2021

MALABY & BRADLEY, LLC
By:

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Maryellen Connor, Esq.
Robert C. Malaby, Esq.