

To Be Argued By: Carl J. Summers
Time Requested: 20 minutes

No. _____

**New York Supreme Court
Appellate Division — Fourth Department**

DENNIS M. RADDER,

Plaintiff-Respondent,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellant.

On Appeal From the Supreme Court for Erie County
Index No.: I 2005-8536

BRIEF FOR DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

1. Whether a new trial is required because the trial court allowed plaintiff to use information obtained through a series of undisclosed meetings with one of defendant's employees whose actions were imputed to defendant for purposes of plaintiff's claim, in violation of New York's "no-contact" rule, DR 7-104.

Trial Court's Answer: No.

2. Whether \$550,000 is excessive compensation for past pain and suffering associated with a broken bone in the wrist, damage to soft tissue in the hand, and damage to tendons in the shoulder resulting in a permanent mild to moderate partial disability when plaintiffs in cases with analogous or more severe injuries have been limited to substantially lower amounts.

Trial Court's Answer: No.

3. Whether \$650,000 is excessive compensation for future pain and suffering associated with a permanent mild to moderate partial disability in the hand and shoulder when plaintiffs in cases with analogous or more severe injuries have been limited to substantially lower amounts.

Trial Court's Answer: No.

PRELIMINARY STATEMENT

The trial court allowed plaintiff to rely on testimony that his counsel obtained through a series of secret meetings with plaintiff's supervisor, in blatant violation of the ethical rule prohibiting attorneys from contacting agents of a represented party. The trial

court believed that these contacts did not violate DR 7-104, citing four different reasons for its conclusion. None has merit.

First, the federal law governing the liability of railroads for injuries suffered by their employees does not abrogate the ethical rules governing attorneys. Second, the fact that plaintiff's counsel also represents plaintiff's supervisor in unrelated litigation against defendant did not give them license to ignore DR 7-104 and discuss *plaintiff's* case with the supervisor without notice to defendant. Third, the fact that plaintiff's supervisor had, since plaintiff's accident, gone out on "long-term illness" status did not alter his status as a current employee of defendant subject to the strictures of DR 7-104. Finally, the fact that defendant had an opportunity to interview and cross-examine the supervisor is irrelevant to whether plaintiff's counsel violated New York's no-contact rule by conducting a series of secret meetings with him to discuss plaintiff's case.

The only appropriate remedy for counsel's ethical violations is exclusion of the improperly obtained testimony. Because the trial court allowed the testimony, and because the evidence was central to plaintiff's theory of the case, a new trial is required.

If the Court does not order a new trial, then both the past and future pain and suffering awards—\$550,000 and \$650,000 respectively—should be significantly reduced. A comparison to other awards for similar injuries indicates that the past and future pain and suffering awards should be reduced to not more than \$65,000 and \$225,000 respectively.

STATEMENT OF FACTS

This case involves a February 20, 2004, accident that damaged plaintiff Dennis Radder's left hand and shoulder. Because plaintiff was injured in the course of his employment for defendant CSX Transportation, Inc. ("CSXT"), a railroad, his claim is governed by the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.* On March 12, 2008, after a seven-day trial, the jury returned a verdict for plaintiff.

A. Plaintiff's Injury

Plaintiff has been an employee of CSXT or its predecessors for approximately 30 years. R. II:947-50. His occupation at the time of the accident, and his primary job for the last several decades, was repairing freight cars in the railroad's shop, a position sometimes referred to as a "car man." R. II:950.

On the day of the accident, plaintiff and his partner, Thomas Pajak, were attempting to replace a "cushion unit," part of the suspension system on a freight car, that had become stuck underneath the car. R. II:952-53. After placing the car on jacks, plaintiff used a torch to burn off the bolts that held the cushion unit in place. R. II:955-57. When the unit remained stuck, plaintiff and Pajak attempted to dislodge it by attaching a chain to the unit and pulling on the chain with a fork truck (*i.e.*, a forklift). R. II:957-58. After they attached one end of the chain to the cushion unit under the freight car and the other end to the fork truck, plaintiff got down on his hands and knees beside the fork truck so that he could see under the freight car. R. II:959-60. Pajak then pulled the chain taut and plaintiff gave him the signal to put the fork truck into reverse, thereby pulling on the chain and hopefully dislodging the cushion unit. R. II:961-63. When

Pajak put the fork truck into reverse, one of the forks came off the truck and landed on plaintiff's left hand. R. II:967.

Plaintiff suffered a broken bone in his left wrist, damage to the soft tissue of his left hand, and damage to the tendons in his left shoulder. These injuries are discussed in greater detail below. *See infra* pp. 38-40.

After the accident, plaintiff was taken to the hospital, given a shot for the pain, and discharged. R. II:972-74. His hand was placed in a cast for several months, he eventually had arthroscopic surgery on his shoulder, and he received various types of therapy to maintain use of and regain strength in his hand and shoulder. *See infra* pp. 39-40. Plaintiff showed improvement over time, although he did not regain full use of his hand or shoulder, and was discharged to work with a 30-pound lifting restriction approximately 8½ months after the accident. R. II:989-90; R. III:1195-97. Despite being released to work, plaintiff has been unable to find employment in the intervening years. R. II:1014-19. Plaintiff did not testify that he suffered significant pain at the time of trial, and his doctors diagnosed him as having only a "mild" or "moderate" "partial permanent disability" in his left hand and left shoulder. R. III:1197-1200, 1217; R. VI:2592; Tetro, Plaintiff's Trial Ex. 17, 15:19 to 15:23.

B. Plaintiff's Counsel's Improper Contacts With William Pauley

As described in more detail below, plaintiff's star witness at trial was William Pauley, plaintiff's and Pajak's direct supervisor in the car shop on the day of the accident. Approximately a year after plaintiff's accident, Pauley became involved in litigation with CSXT arising out of a separate incident, and retained the same firm to represent him as

had plaintiff, Kantor & Godwin (“K&G”). *See* R. III:1280-82. Although Pauley has been out on “long-term illness” status since that incident, he is still an employee of CSXT, with various rights (including maintaining his seniority) and obligations (including a contingent obligation to report to work). *See* R. III:1283-84; VII:3315. Accordingly, although Radder’s counsel also coincidentally represented Pauley in his independent suit, as an agent of CSXT Pauley was represented by CSXT’s counsel for purposes of Radder’s suit.

Because of the obligations imposed by New York’s no-contact rule (DR 7-104), CSXT’s counsel arranged to interview Pauley about Radder’s case through K&G and agreed to discuss only Radder’s case during the interview, which took place on February 27, 2008, five days before trial. R. III:1276-77. It became apparent, however, that K&G had not followed similar protocols, but had been freely discussing Radder’s case with Pauley without any notice to CSXT’s counsel. *See* R. III:1283-85, 1424. More seriously still, K&G met with Pauley three days *after* CSXT’s interview (and two days before trial), without any notice to CSXT, and convinced him to disclose his privileged trial-preparation conversations with CSXT’s counsel. *See* R. III:1295-96, 1303.

During CSXT’s interview, Pauley claimed to have fabricated the inspection report for the fork truck at issue in this litigation. *See* R. III:1287-88. Plaintiff’s counsel represented that *they* had first learned of this alleged forgery during their undisclosed meeting with Pauley two days before trial. *See* R. III:1295-96, 1303. It was undisputed, however, that they had previously met with Pauley “at least two, but [maybe] three” times to discuss Radder’s case. R. III:1422. Yet plaintiff (i) never noticed Pauley for a

deposition or informal interview (*see* R. VII:3356-61; *see also* R. III:1274-75); (ii) never disclosed to CSXT any statements by Pauley that he intended to use at trial, even though CSXT had made an omnibus demand for “all statements signed or otherwise of CSX and/or principals, agents, servants or employees of CSX” (*compare* R. II:984-86 with R. III:1286-97, 1350-54); and (iii) never told CSXT about Pauley’s alleged role in the events surrounding Radder’s accident, including Pauley’s alleged failure to ensure timely inspections of the fork truck, despite plaintiff’s promise to “disclose the names of [CSXT employees who caused or contributed to his injury] as they are uncovered through discovery” (*see* R. I:28, 36).

Even though it was undisputed that plaintiff’s counsel had been repeatedly discussing Radder’s case with Pauley without any notice to CSXT’s counsel, the trial court found that there was no violation of New York’s no-contact rule and allowed plaintiff to present Pauley’s testimony. *See* R. III:1271-1317.

C. The Trial

The dispute at trial centered on whether CSXT acted negligently by allowing a defective fork truck to remain in service and whether plaintiff was contributorily negligent for placing himself too close to the truck at the time of the accident.

As to CSXT’s alleged negligence, plaintiff did not present an engineer, industrial hygienist, or other expert to opine that the fork truck was defective or unsafe. Instead, he relied exclusively on testimony from Pajak and Pauley that the truck was missing a flat shield or cage, called a “load backrest” or “backrest extension,” that normally sits above the forks in front of the driver’s seat. R. II:901-03; R. III:1380-81. *See generally* R.

VII:2988, 3008-09. Pauley testified that the load backrest on this fork truck had been removed in conjunction with the capping of certain superfluous hydraulic lines that moved the forks left and right (a function, he testified, that was unnecessary). R. III:1380-83; *but see* R. V:1981-82 (testimony of another employee, Thomas Alf, that Pauley or another supervisor had removed the load backrest for repairs because Alf reported that it was damaged). Although it was undisputed that the load backrest was missing, the evidence on whether the missing backrest had anything to do with plaintiff's injury was conflicting, to say the least. *Compare* R. II:901-03 (Pajak) *with* R. III:1379 (Pauley), R. IV:1888-89 (Murphey), *and* R. V:1977 (Alf).

Thus, the turning point at trial came when Pauley was improperly allowed to testify that he had forged the inspection report for the fork truck in question after plaintiff's accident, supposedly at the direction of Don Murphy, who was the "ultimate boss" at the CSXT shops. *See* R. III:1353. Pauley testified that, after he returned from the hospital with plaintiff, he spoke with Murphy, who "told me that there better be an inspection form for this piece of equipment turned in before I went home." R. III:1354. When Pauley discovered that the inspection report had not been completed for that day—because the person charged with completing it did not report for work until the afternoon shift (*see* R. III:1365-70)—he interpreted Murphy's prior statement as an implicit instruction to fabricate the report (R. III:1355-79). He then proceeded to fill out the report without actually inspecting the fork truck and to forge Pajak's initials on the report. R. III:1377-79. Murphy later testified that he was simply asking Pauley to help him gather information about the accident, that he did not even know the report had been

falsified until Pauley's testimony at trial, and that "[t]here's no way that I would tell him to falsify a document." R. IV:1786-96. By that time, however, Pauley's testimony that (in his mind) the man in charge of the shops had instructed him to falsify the inspection report for the fork truck had already created the impression that there must have been something seriously wrong with the truck.

Pauley's testimony was similarly critical to plaintiff's argument that he did not contribute to his own injuries by negligently remaining too close to the fork truck at the time of the accident. It was undisputed at trial that a railroad employee is personally responsible for removing himself from the "red zone," the area in which an injury might occur, before engaging in any dangerous activity. *See, e.g.*, R. II:893-94, 924-25; R. IV:1817; R. V:1983-84, 2013-14. Although Pauley's supervisor, Michael Walczak, testified that there was no reason for plaintiff to be on his hands and knees next to the fork truck at the time of the accident (R. V:2012-21), plaintiff claimed that he needed to know whether the chain under the freight car would come loose when Pajak put the truck into reverse (R. II:960-62); *see also* R. II:922-24 (Pajak's ironic testimony that plaintiff needed to be next to the fork truck, and thus in range of the chain, so that he could see whether the chain had come loose and thereby avoid being hit).

Assuming that it was not negligent for plaintiff to be on the ground near the fork truck at the time of the accident, the question was whether plaintiff was *too close* to the truck. Plaintiff testified that he was at least 10 feet from the truck (R. II:960), Pajak testified that plaintiff was 10-15 feet from the truck (R. II:891-92), and Pauley testified that he found plaintiff 8-10 feet from the truck when he responded to plaintiff's injury (R.

III:1333). Alf, on the other hand, testified that he later observed the fork that had fallen on plaintiff to be only 4-5 feet from the truck. R. V:1974-75. Murphy confirmed that, when he responded to plaintiff's injury, he found that the fork was "very close" and "right alongside the fork truck," lying "between the cab [of the fork truck] and the [freight] car," a distance of "approximately 5 feet" (R. IV:1776-85), and that plaintiff, whose hand had been trapped under the fork, was "too close" and "in the red zone" (R. IV:1817). By casting aspersions on Murphy's honesty, Pauley's testimony undermined CSXT's argument that plaintiff negligently placed himself too close to the fork truck and thus should bear some responsibility for his injury even if CSXT was found to have acted negligently.

Finally, plaintiff relied on Pauley's confession that he had forged the report to paint CSXT as a bad actor that should not be trusted and that deserved the jury's scorn. Unsurprisingly, Pauley's alleged forgery was a central theme of plaintiff's summation, to which he returned again and again. *See* R. V:2272-73, 2278-81, 2282-83, 2285-86, 2289-91; *cf.* R. V:2303 (arguing that "[i]t is [CSXT's] job to confuse you" and that "[CSXT's counsel] is very good at it"—which prompted a rebuke by the trial court).

D. The Verdict

The jury found that CSXT was negligent and that its negligence played a part in causing plaintiff's injuries. It also found that plaintiff was not contributorily negligent during the events leading up to the accident. Plaintiff was awarded \$193,266 for past lost wages, \$350,822.25 for future lost wages, \$16,800 for lost household services, \$77,779

for lost health-insurance benefits, \$550,000 for past pain and suffering, and \$1,000,000 for future pain and suffering. *See* R. V:2386-90.

The trial court denied CSXT’s post-trial motion for a new trial based on the admission of Pauley’s testimony. The court did set off various amounts from the awards for lost wages and reduced the future pain and suffering award to \$650,000, but otherwise it did not disturb the verdict. The total resulting award was \$1,876,415.75—\$550,000 for past pain and suffering and \$650,000 for future pain and suffering; \$457,650.75 in lost wages; \$77,779 for lost health-insurance benefits; and \$16,800 for lost household services. *See* R. VIII:4026-28.

ARGUMENT

I. THE TRIAL COURT’S ERRONEOUS ADMISSION OF IMPROPERLY OBTAINED AND HIGHLY PREJUDICIAL EVIDENCE WARRANTS A NEW TRIAL.

The judgment below cannot stand, because plaintiff was allowed to present critical evidence that K&G obtained by violating the standards of professional ethics—repeatedly contacting an agent of a represented party outside the presence of its attorney, in contravention of New York’s “no-contact” rule, DR 7-104(A)(1). Because the trial court failed to suppress the evidence arising from these improper contacts, and because that evidence had a potentially significant effect on the verdict and the size of the damages award, this Court should reverse the judgment and remand for a new trial.

In *Niesig v. Team I*, 76 N.Y.2d 363 (1990), the Court of Appeals held that the protections of the “no-contact” rule extend, not only to individual parties, but to the key employees of corporate parties, including those whose actions are imputed to the

corporation. That rule prohibited ex parte contacts between plaintiff's counsel, K&G, and William Pauley. *See infra* Point I.A. Without seeking consent from or even informing CSXT's attorneys, K&G nonetheless contacted Pauley multiple times, including by meeting with Pauley on the eve of trial, when counsel claim to have first elicited explosive statements that Pauley had forged a crucial document in the case—allegedly at the instruction of his superior. To help obtain these statements, K&G exploited their preexisting relationship of trust between Pauley and themselves, thereby generating a conflict of interest between two of their clients. Plaintiff's counsel used this improperly obtained information as the core of Radder's affirmative case, to attack the credibility of CSXT's witnesses, and to cast CSXT in a negative light before the jury.

In the trial court, CSXT moved to suppress this information under CPLR § 3103(c), which authorizes courts to order “that the information be suppressed” if it “has been improperly or irregularly obtained so that a substantial right of a party is prejudiced.” R. III:1271-1317. CSXT renewed this request in a post-trial motion, which also asked that the court “order a new trial * * * in the interest of justice” under Section 4404(a), because the admission of the improperly obtained information was so highly prejudicial as to have a strong likelihood of affecting the verdict. R. VII:3100-23.

The trial court's denial of these requests would ordinarily be reviewed for abuse of discretion. *See Kennedy v. Children's Hosp.*, 288 A.D.2d 918, 919 (4th Dep't 2001) (mem. op.) (admission of evidence); *see also Straub v. Yalamanchili*, 58 A.D.3d 1050, 1052 (3d Dep't 2009) (new trial). Here, however, the trial court declined to *exercise* its discretion, because it found no violation of DR 7-104. Instead, the court held that

(1) FELA grants plaintiffs’ attorneys “access rights” to employee-parties (R. VIII:3866); (2) K&G’s representation of both Pauley and Radder in separate matters gave the firm’s lawyers the right to contact Pauley with regard to Radder’s suit (*id.*); (3) a current but “inactive” employee is not a represented party under DR 7-104 and *Niesig (id.)*; and (4) ex parte contacts with a represented party are permissible so long as that party’s lawyers “had access” to their client and could cross-examine him at trial (R. VIII:3864).

All four of the trial court’s grounds are legally erroneous. *See infra* Point I.B. Because “the trial judge was under a misapprehension [of the law] * * * and failed to exercise the requisite discretion,” the court thereby committed “reversible error.” *People v. Luciano*, 10 N.Y.3d 499, 506 (2008); *accord People v. Florestal*, 53 A.D.3d 164, 170 (1st Dep’t 2008); *People v. Becraft*, 198 A.D.2d 868, 869 (4th Dep’t 1993); *Franck v. Minisink Valley Sch. Dist.*, 136 A.D.2d 588, 589 (2d Dep’t 1988). As we do not know what remedy the trial court would have imposed if the court had found a violation of DR 7-104, it ordinarily would be appropriate for this Court to remand the case for a new determination of the remedy.

Such a remand is unnecessary, however, where “it is clear from the record” that the court’s discretion must “be exercised with [a particular] result.” *Kennard v. Welded Tank & Constr. Co.*, 25 N.Y.2d 324, 328 (1969). Here, the only appropriate remedy for the conduct of plaintiff’s counsel is the suppression of Pauley’s testimony. Because the failure to suppress Pauley’s testimony prejudiced CSXT, this Court should reach the remedial issue, reverse the trial court, and remand the case for a new trial at which Pauley’s testimony is suppressed. *See infra* Point I.C.

Moreover, this Court, “as a branch of the Supreme Court, is vested with the same discretionary power and may exercise that power, even when there has been no abuse of discretion as a matter of law by the nisi prius court.” *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 52-53 (1999) (citation omitted); *see also People v. Washington*, 71 N.Y.2d 916, 918 (1988); *Kennedy*, 288 A.D.2d at 919. CSXT thus requests the same relief on the basis of this Court’s own discretionary powers as well as “on the law.” *Stewart v. Olean Med. Group, P.C.*, 17 A.D.3d 1094, 1095, 1097 (4th Dep’t 2005).

A. K&G’s Contacts With Pauley Violated DR 7-104.

New York’s “no-contact rule” forbids attorneys from contacting a represented party without the consent of that party’s counsel. Specifically, the rule forbids any lawyer from “[c]ommunicat[ing] * * * on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.” DR 7-104(A)(1). For corporate parties like CSXT, this protection extends not only to senior management, but to all employees “whose acts or omissions in the matter under inquiry are * * * imputed to the corporation for purposes of its liability.” *Niesig*, 76 N.Y.2d at 374. Because plaintiff’s counsel imputed Pauley’s actions to CSXT for purposes of its alleged liability for Radder’s injury, unannounced ex parte communications with Pauley on the subject of Radder’s suit violated DR 7-104.

(While K&G’s conduct should be judged in light of the disciplinary rules in force at the time, we note that the requirements of DR 7-104 under the Code of Professional Responsibility have been preserved in the new Rules of Professional Conduct, effective

April 1, 2009. Compare, e.g., DR 7-104(A)(1) with Rule 4.2(a) (2009). The wording of the two provisions is largely identical, and the introduction to the new rules states that any changes are “not intended to change the meaning of the rule.” Comm. on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct at xxi (2005), available at [http:// www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentID=4786](http://www.nysba.org/AM/Template.cfm?Section=Committee_on_Standards_of_Attorney_Conduct_Home&Template=/CM/ContentDisplay.cfm&ContentID=4786). The commentary to the new no-contact provision also indicates that it incorporates existing law regarding the treatment of corporate parties. See *id.* at 328 (“As amended, [this comment] is consistent with [Niesig].”); see also *id.* (Rule 4.2 cmt. 7) (“In the case of a represented organization, Rule 4.2(a) prohibits communications with a constituent of the organization * * * whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”). Citations to the ethics rules herein will follow the numbering and text of the pre-2009 provisions, which counsel for both parties were obliged to follow at the time of trial.)

1. Pauley was a covered employee of CSXT for purposes of the “no-contact” rule.

Throughout the relevant period, Pauley was an employee of CSXT, and plaintiff’s counsel unambiguously imputed Pauley’s alleged actions and omissions to CSXT in order to establish its liability. Counsel argued that Pauley failed to properly supervise Radder’s and Pajak’s use of the fork truck, as well as the employees assigned to inspect the fork truck before its use. R. III:1336-37, 1345-47. Pauley also claimed on the witness stand to have been involved in the decision to remove the load backrest from the

fork truck in conjunction with the capping of superfluous hydraulic lines. R. III:1380-83; *see also* R. V:2279-80 (during closing, plaintiff’s counsel misrepresented this testimony, stating: “Their supervisor even told you why they took this off. He told you they took it off because of money.”). These decisions constituted the precise conduct that plaintiff alleged to be negligent and attributed to CSXT. *See* R. IV:1738-40. Counsel’s closing arguments emphasized that Pauley “violat[ed] all of [CSXT’s] rules. He’s their supervisor. He’s their agent. He’s their employee. He is the one that is in charge of everybody * * *.” R. V:2272-73.

Pauley’s role as the relevant supervisor and agent of CSXT was well known to plaintiff’s counsel. As long ago as December 30, 2005—more than two years before trial—counsel had identified Pauley as a CSXT employee with notice of defects in the fork truck “when it was negligently placed into service.” R. VII:3331. Moreover, Pauley had “at least two, but [maybe] three” undisclosed interviews with K&G about Radder’s suit (*see* R. III:1422), eventually (according to them) revealing his role in the alleged forgery of the inspection report shortly before trial (R III:1295-96, 1303). As a result, Radder’s counsel obviously knew prior to some of these contacts—and certainly long before the crucial eve-of-trial meeting—that their trial strategy would involve imputing Pauley’s acts to CSXT. Pauley was not merely a bystander or “witness[] to an event for which the corporate employer is sued,” *Niesig*, 76 N.Y.2d at 375, but allegedly was one of the primary actors. Counsel surely “knew or should have known that the person interviewed [was] an employee-party and [was] represented by counsel.” *Schmidt v. State*, 279 A.D.2d 62, 68 (4th Dep’t 2000).

In the trial court, plaintiff argued that the statements he elicited from Pauley were not improper because they did not involve his primary theory of negligence. *See* R. VIII:3560-61. But plaintiff acknowledges that Pauley's statements were admitted at trial to show that "equipment was being allowed into service without proper safety protocols being in place." *Id.* That, of course, is precisely the basis on which he argued that CSXT should be found negligent.

In any event, it would be no excuse (even if it were plausible) that the improperly elicited statements from Pauley did not concern plaintiff's primary theory of negligence. Neither DR 7-104 nor *Niesig* permits counsel to contact represented employee-parties so long as they elicit statements that are only indirectly related to the allegations of negligence. Instead, subject to the exceptions listed in DR 7-104(A)(1), the disciplinary rules prohibit *all* ex parte contacts with employees whose acts or omissions are imputed to the corporation. Pauley's actions and omissions with regard to maintaining the fork truck and supervising its inspection (not to mention forging the inspection report) were directly imputed to CSXT; therefore, DR 7-104 barred K&G from contacting Pauley on any subject relating to Radder's suit, just as much as if Pauley had been an individual defendant in the case.

2. K&G was not permitted to discuss Radder's case with Pauley ex parte.

Under DR 7-104, K&G was forbidden to contact Pauley on the subject of Radder's case without first seeking permission from CSXT's attorneys. CSXT bore a similar obligation with respect to Pauley's lawsuit against the railroad. Indeed, when the

railroad arranged a pretrial interview with Pauley regarding Radder's claims, it did so through Pauley's counsel and strictly limited the discussion to the facts related to Radder's suit. *See* R. III:1276-77. Likewise, although DR 7-104 did not restrict Pauley and his counsel from discussing Pauley's own lawsuit, K&G was forbidden from discussing Radder's suit with Pauley without first contacting CSXT's counsel.

Nonetheless, K&G elicited information from Pauley in regard to Radder's case, including at an *ex parte* meeting the Saturday before trial. R. III:1295-96, 1303. Indeed, according to plaintiff's counsel, the *only* information obtained from Pauley was obtained through such undisclosed *ex parte* meetings: without those meetings, K&G would never have known what information Pauley possessed or could testify to on the stand.

Moreover, despite their repeated meetings with Pauley, plaintiff's counsel never noticed Pauley for a deposition or informal interview (*see* R. VII:3256-61; *see also* R. III:1274-75) and never disclosed to CSXT any statements by Pauley that they intended to use at trial—even though CSXT made an omnibus demand for “all statements signed or otherwise of CSX and/or principals, agents, servants or employees of CSX” (*compare* R. II:984-86 *with* R. III:1286-97, 1350-54). Rather, K&G sought to keep its contacts with Pauley secret, the better to sandbag CSXT at trial. Indeed, although plaintiff had represented that he would “disclose the names of [CSXT employees who caused or contributed to his injury] as they are uncovered through discovery” (*see* R. I:28, 36), he never disclosed the name of Pauley in response to this demand, even while K&G was learning from Pauley of Pauley's own alleged misfeasance (R. III:1422). This pattern of

conduct reflects a deliberate and considered breach of the ethical rules governing attorneys.

B. The Trial Court Erred As A Matter Of Law In Finding That DR 7-104 Had Not Been Violated.

The trial court nonetheless concluded that K&G did not violate DR 7-104. All four grounds on which the court rested its holding are erroneous as a matter of law.

1. FELA does not license the violation of New York’s professional ethics rules.

The trial court’s first ground for finding that K&G did not violate DR 7-104 was that Section 10 of FELA, codified at 45 U.S.C. § 60, grants plaintiffs’ attorneys “access rights” to contact represented employees of defendant railroads. Although the court correctly rejected plaintiff’s argument that Section 60 trumps the disciplinary rules—concluding that “section 60 of FELA is subject to and subordinate to Disciplinary Rules section 7-107” (R. VIII:3865)—it nevertheless relied on “access rights pursuant to FELA section 60” in finding that plaintiff’s counsel did not violate DR 7-104 (R. VIII:3866). The trial court’s reliance on Section 60 was error.

The full text of the relevant paragraph of FELA reads:

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than \$1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense:

Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

45 U.S.C. § 60 (emphasis omitted).

That text says nothing about an ethical rule that requires attorneys to contact railroad employees through their counsel. It addresses an entirely separate subject, namely, the retaliation by railroads against employee-witnesses. And it does not provide any positive authorization to the plaintiffs' bar to violate state ethics rules.

As the Seventh Circuit has held, Section 60 “is a prohibition on certain conduct by railroads and maritime employers: these employers are forbidden from enacting rules or regulations that prevent employees from disclosing information to FELA * * * plaintiffs.” *Weibrecht v. S. Ill. Transfer, Inc.*, 241 F.3d 875, 881 (7th Cir. 2001). The statutory phrase “rule, regulation, or device,” as “read in context, appears to refer only to internal rules or regulations promulgated by employers.” *Id.* Moreover, “[e]ven if [Section 60] could have a broader application to other prohibitory rules * * *, ***there is still nothing to suggest that it was designed to authorize conduct that would otherwise violate general ethical rules.***” *Id.* (emphasis added). Indeed, “by its terms, [Section 60] does not authorize anything,” but is purely a negative and proscriptive criminal statute. *Id.* at 880. Thus, plaintiff’s counsel cannot claim to be “authorized by law” to violate otherwise-applicable provisions of DR 7-104(A)(1).

This reading accords with the traditional interpretation of Section 60. The Fourth and Fifth Circuits have described the statute as “prohibit[ing] a railroad from disciplining or attempting to discipline an employee for furnishing information to an FELA plaintiff,”

Hendley v. Cent. of Ga. R.R., 609 F.2d 1146, 1150-51 (5th Cir. 1980); accord *Cavanaugh v. W. Md. Ry.*, 729 F.2d 289, 293 (4th Cir. 1984) (quoting *Hendley*), and the Eighth Circuit has similarly noted that “[f]ederal cases interpreting § 60 have recognized that some form of coercion or threat is required to establish a violation,” *Sheet Metal Workers Int’l Ass’n v. Burlington N. R.R.*, 736 F.2d 1250, 1253 (8th Cir. 1984).

The legislative history of Section 60 equally confirms that its drafters understood it as a prohibition on railroads, not on state ethics committees. “Substantially all of the discussion in the legislative history of § 60 and its predecessor bills revolved around railroad company rules that absolutely prohibited employees from talking to an injured employee’s representative on pain of punishment by dismissal or suspension.” John E. Tyler III, *FELA § 60 v. Ethical Rule 4.2: More than Meets the Eye in a Conflict Between States’ Rights and Federal Law*, 69 UMKC L. Rev. 791, 801 (2001). As the Senate Report explained,

[A] substantial number of the railroads subject to [FELA] have promulgated rules which prohibit employees from giving information concerning an accident to anyone excepting certain specified company officials and claim agents. The purpose of the amendment under consideration is to prohibit the enforcement of such rules and permit those who have information concerning the facts and circumstances of a personal injury to give statements to the injured employee or his dependents, or to someone authorized to represent him or them.

S. Rep. No. 661, 76th Cong., 1st Sess. 5 (1939), *quoted in State ex rel. Atchison, Topeka & Santa Fe R.R. v. O’Malley*, 888 S.W.2d 760, 762 (Mo. Ct. App. 1994).

At the time of Section 60’s enactment, moreover, rules like DR 7-104 were already considered “an ingrained part of the legal system.” *Weibrecht*, 241 F.3d at 880.

Had Congress desired “to override such a long-standing rule of legal ethics,” it surely would have said so; yet there is “no evidence of such a radical move” in the statute, which was “concerned specifically with rules * * * concocted by the railroads to stifle employees’ contacts * * *, and not with altering long-standing norms of litigation.” *Id.*

Indeed, a State’s ethics rules could not be displaced without the clearest manifestation of congressional intent. As the Supreme Court has recently reaffirmed, courts must “assum[e] that the historic police powers of the States [are] not to be superseded * * * unless that was the clear and manifest purpose of Congress.” *Altria Group v. Good*, 129 S. Ct. 538, 543 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). “Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States,” *Fla. Bar. v. Went For It, Inc.*, 515 U.S. 618, 635 (1995), courts should expect an explicit statement from Congress that it has chosen to upend this traditional rule and interfere with state ethics rules. No such statement exists here.

It is therefore unsurprising that the majority of courts—and the only federal circuit court to consider the question—have held that disciplinary rules analogous to DR 7-104 are not preempted by Section 60. *See Weibrecht*, 241 F.3d 875; *Hornick v. Am. Commercial Barge Line*, 2008 WL 2168893 (W.D. Ky. May 23, 2008); *Groppo v. Zappa, Inc.*, 2005 WL 768652 (D. Mass. Mar. 30, 2005); *Woodard v. Nabors Offshore Corp.*, 2001 WL 13339 (E.D. La. Jan. 4, 2001); *Belote v. Maritrans Operating Partners, L.P.*, 1998 WL 136523 (E.D. Pa. Mar. 20, 1998); *White v. Ill. Cent. R.R.*, 162 F.R.D. 118 (S.D. Miss. 1995); *Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096 (E.D. Va. 1994); *Branham v.*

Norfolk & W. Ry., 151 F.R.D. 67 (S.D.W.V. 1993); *Queensberry v. Norfolk & W. Ry.*, 157 F.R.D. 21 (E.D. Va. 1993); *Garrett v. Nat'l R.R. Passenger Corp.*, 1990 WL 122911 (E.D. Pa. Aug. 14, 1990); *O'Malley*, 888 S.W.2d 760.

Those courts that have found a conflict between Section 60 and state no-contact rules have done so only at the most abstract levels of policy. For example, in *United Transportation Union Local Unions 385 & 77 v. Metro-North Commuter R.R.*, 1995 WL 634906 (S.D.N.Y. Oct. 30, 1995), on which plaintiff relied heavily below, the district judge recognized that Section 60, “as a matter of policy, seeks to place the fact-gathering capabilities of plaintiffs on a par with those of their employers by shielding the voluntary communications of fellow workers from * * * acts *on the part of the company* that might interfere with furnishing a full account of facts relevant to an accident.” *Id.* at *6 (emphasis added). Despite recognizing that limitation, the court announced that, because of FELA’s “broad remedial purposes,” “any policy which tends to inhibit employees from coming forward * * * violates the statute,” *id.* at *7, and that state ethics rules such as DR 7-104 were mere “matter[s] of courtesy” and thus lacked “the same weight as those [policies] behind the substantive protections of § 60,” *id.* at *6. But as the Supreme Court has recognized, “it frustrates, rather than effectuates, legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) (emphasis omitted). To suspend important state ethics rules merely in the hope of achieving some other policy goal is to ignore the precise wording chosen by Congress, as well as the background against which § 60 was enacted.

The best interpretation of Section 60, in short, is that the statute relates only to internal discipline policies of railroads and has nothing to do with the state rules governing the professional ethics of attorneys. Indeed, it would be illogical for attorneys to face different sets of ethical rules depending on the substance of the cause of action they bring, *see O'Malley*, 888 S.W.2d at 763, and it would be absurd for the judges of state courts or the officers of state bar associations to be prosecuted for their attempts to discipline attorneys engaging in unethical behavior. This Court accordingly should follow the rule adopted by the majority of courts and hold that Section 60 does not preempt the requirements of DR 7-104.

2. K&G's joint representation of Radder and Pauley only heightened the ethical violation.

The trial court's second ground for finding that K&G did not violate DR 7-104 was the existence of a professional relationship between Pauley and K&G. But K&G's violation of the disciplinary rules was made worse, not better, by the firm's conflicting dual representation of Pauley and Radder. In the abstract, Pauley's and Radder's separate suits against CSXT might have posed no conflict. But by relying on Pauley as Radder's star witness, K&G put one of its clients forward as the primary source of liability for another client's injury.

A central part of Radder's case involved the allegation that Pauley "violat[ed] all of [CSXT's] rules. He's their supervisor. He's their agent. He's their employee. He is the one that is in charge of everybody * * *." R. V:2273. The fact that K&G was making such allegations about its own client creates an obvious conflict of interest. At a

minimum, the alleged forgery could have subjected Pauley to suspension or termination from his job. *See* R. IV:1802 (consequences of falsifying report are “[l]oss of job and possible [criminal proceedings]”).

This Court has previously made clear that, precisely because of concerns about conflicts of interest, the no-contact rule applies even when the represented party has an attorney-client relationship with the attorney engaged in the contact. In *LaCava v. New York State Bar Association*, 53 A.D.2d 204 (4th Dep’t 1976) (per curiam), the Court found that an attorney for one party had improperly contacted another party known to be represented by opposing counsel in the case. Although the attorney asserted an “implied right to take such statement by virtue of his representation of both parties in varying [other] matters,” the Court found this assertion to be “groundless.” *Id.* at 206. “To the contrary,” the Court held, “respondent’s dual representation, even on separate matters, imposes *a most stringent responsibility* on respondent’s conduct.” *Id.* (emphasis added; citation omitted).

K&G failed to meet this stringent standard. In its capacity as Radder’s counsel, K&G sought to establish Pauley’s negligence at trial—and thus CSXT’s negligence by imputation—on the basis of information obtained through improper contacts with Pauley that K&G justified by its separate attorney-client relationship with him. Indeed, K&G scheduled the crucial secret meeting with Pauley on the Saturday before trial in order to prepare Pauley to testify to his own tortious actions. *See* R. III:1295-96, 1303. K&G used its position of trust with Pauley to obtain information about his alleged forgery as well as privileged information about CSXT’s defense preparations—convincing Pauley

to tell them, inter alia, what “Pauley told [CSXT’s counsel] in their interviews.” *Id.* As plaintiff’s counsel admitted, Pauley revealed the forgery *solely* as a result of their attorney-client relationship: “It has to do with his credibility in his case [*i.e.*, Pauley’s separate case against CSXT], so he had to bring it up and speak with me about it.” R. III:1405-06.

As the trial court recognized, K&G’s conduct created a conflict of interest “[i]n all of its dimensions.” R. III:1303. Under DR 5-105(B)-(D), neither an individual lawyer nor a single firm may continue representing a client if “it would be likely to involve the lawyer in representing differing interests.” DR 5-105(B). The Ethical Considerations of the Code of Professional Responsibility also state that “[a] lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client.” EC 4-5. Even if the conflict between Pauley and Radder had been fully disclosed and Pauley had granted his informed consent to the joint representation—facts that are not established in this record (and that would not have remedied the underlying end-run around CSXT’s counsel)—a situation in which one client seeks to prove another client’s negligence is not one in which “a disinterested lawyer would believe that the lawyer can competently represent the interest of each.” DR 5-105(C); *accord* Rule 1.7(b)(1) (2009).

Under the disciplinary rules, “an attorney must avoid not only the fact, but even the appearance, of representing conflicting interests.” *Cardinale v. Golinello*, 43 N.Y.2d 288, 296 (1977). Such considerations should have barred K&G from generating a new conflict between two of its existing clients. And, more to the point for present purposes,

K&G's deliberate generation of this improper conflict between existing clients could hardly *excuse* its violation of *another* disciplinary rule, namely DR 7-104.

3. Pauley's employment status of "long-term illness" did not put him outside the scope of DR 7-104.

The trial court's third ground for finding that K&G did not violate DR 7-104 was that CSXT deemed Pauley to be an "inactive" employee due to his disability at the time of the improper contact. This ground constituted an error of law. In interpreting DR 7-104, the Court of Appeals has distinguished only between "current" and "former" employees, not between "active" and "inactive" current employees. *See Niesig*, 76 N.Y.2d at 369; *see also Muriel Siebert & Co. v. Intuit Inc.*, 8 N.Y.3d 506, 511 (2007). And at the time of the improper contact, Pauley was clearly a current rather than a former employee.

As undisputed evidence in the record reflects, Pauley was on "long-term illness" status during the relevant period. *See* R. VII:3315. Thus, he still was listed as an employee in CSXT's records. *Id.* He also was a member of the Transport Workers Union and, under the terms of the collective-bargaining agreement, still was considered an employee by both CSXT and his union. *Id.* Moreover, while on "long-term illness" status, Pauley was required to report to work (or "mark up") in the event of any later recovery, and maintained his seniority as a current employee on the seniority roster. *Id.* None of these benefits or obligations—including a contingent obligation to report to work—would have been applicable to a former employee who had severed his ties with CSXT.

The Second Circuit has reached a similar conclusion under FELA with regard to a railroad employee on “disability status.” See *Rostocki v. Consol. Rail Corp.*, 19 F.3d 104, 105 (2d Cir. 1994). The employee in *Rostocki* was no longer required to come to work because of his disability, but was further injured by the railroad’s negligence while visiting the premises to retrieve a paycheck for work performed prior to his disability. FELA could provide him a cause of action for that further injury only if it occurred “while he [was] employed by” the railroad. *Id.* at 106 (alteration in original; internal quotation marks omitted). The Second Circuit held that he not only was still employed by the railroad at the time of this subsequent injury, but was engaged in “activities necessarily incidental to employment.” *Id.*

The same result should apply to Pauley, who was still a current employee of CSXT at the time of the improper contact even though he was categorized as on “long-term illness” status. Because he had not severed his ties with CSXT, Pauley was still “considered [an] organizational member[] possessing a stake in the representation,” and remained a current employee for purposes of DR 7-104. *Siebert*, 8 N.Y.3d at 511.

4. The fact that CSXT had opportunities to interview Pauley did not license K&G to engage in ex parte contacts.

The trial court’s final ground for holding that there was no violation of DR 7-104 was that CSXT “had access” to Pauley, including the “opportunity” to depose or interview him before trial or to cross-examine him at trial. This reasoning is a non sequitur, and if adopted would undermine all enforcement of the no-contact rule.

In *any* case in which opposing counsel improperly contacts a represented party (say, an individual plaintiff or defendant), that party will have been “available” at all times to his or her own attorney for interviews. The no-contact rule is designed, not to ensure that both sides have adequate opportunities for discovery, but to restrict opposing counsel’s ability to extract information from a represented party, “preventing lawyers from deliberately dodging adversary counsel to reach—and exploit—the client alone.” *Niesig*, 76 N.Y.2d at 370. If the availability of a represented party to his own counsel were a defense to the no-contact rule, there would be no rule left.

For the same reason, it is no defense that a represented party might be cross-examined by his or her own lawyer once an improper contact has taken place. That excuse for improper contacts also would create an exception that swallows the rule, as a party always is subject to cross-examination.

The trial court’s reasoning is particularly inapposite in the case at hand. Even if CSXT could have deposed Pauley about the inspection report at any time, it would have had no reason to do so, because the inspection report did not bear Pauley’s signature and Pauley never claimed to have forged it until CSXT’s interview with him a week before trial. The inequity of the trial court’s ruling is exacerbated by the fact that plaintiff’s counsel—by his own admission—was aware that the inspection report allegedly had been forged a year before trial (although he claimed not to have learned that Pauley was the forger until his secret eve-of-trial meeting), but never disclosed to CSXT that a document it had produced in discovery allegedly was fraudulent. R. III:1299-1300.

C. This Court Should Order Suppression And A New Trial.

The trial court's denial of CSXT's motion for a new trial rested on the erroneous legal conclusion that DR 7-104 had not been violated. As explained above, the undisputed facts establish a violation of DR 7-104 as a matter of law. Because the appropriate remedy for that violation is suppression of Pauley's testimony, and because the trial court's failure to suppress prejudiced CSXT's substantial rights, this Court should vacate the judgment below and remand for a new trial.

1. Suppression of Pauley's testimony is the only proper remedy for the violation.

The only proper remedy for K&G's violation of the disciplinary rules was the suppression of the evidence obtained through that violation, namely Pauley's testimony. This Court may order appropriate remedies to enforce attorneys' ethical obligations; and as the Court of Appeals, the Appellate Division, and the federal courts have recognized, suppression is the appropriate remedy when it is necessary to prevent an attorney from benefiting from his own wrongdoing. K&G's decision to create a conflict of interest among its clients and to repeatedly violate DR 7-104 tainted the integrity of the proceedings, and the only way to remove that taint is to order the fruits of the disciplinary violation suppressed.

a. A court possesses the discretion to enforce the ethical rules governing attorney conduct in an equitable fashion. As the Court of Appeals has held, when a disciplinary rule ““applies in an equitable manner to a matter before us, we should not hesitate to enforce it with vigor.”” *Niesig*, 76 N.Y.2d at 370 (quoting *S & S Hotel*

Ventures Ltd. P'ship v. 777 S.H. Corp., 69 N.Y.2d 437, 443 (1987)). Under CPLR § 3103(c), moreover, if any evidence “has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.” This statute “confers broad discretion upon a court to fashion appropriate remedies both where abuses are threatened and where they have already occurred.” *Lipin v. Bender*, 84 N.Y.2d 562, 570 (1994) (citations omitted). This Court already has approved of such remedies in similar situations, such as where an attorney improperly obtained medical records without authorization. *See Kennedy*, 288 A.D.2d 919.

Suppression of improperly obtained evidence is the appropriate remedy when it is necessary to prevent a party from materially benefiting from its improper conduct. As the First Department has held, “[t]here is no reason why a civil litigant should receive any benefit from information acquired in a manner both deliberate and wrongful.” *In re Weinberg*, 129 A.D.2d 126, 136 (1st Dep’t 1987) (per curium). In such circumstances, “it is not unduly harsh to expect and indeed to require that civil litigants gather * * * information * * * in conformity with” applicable rules of professional conduct. *Id.* at 137. When information is obtained in a “highly improper manner” and “use[d] by [plaintiff’s] counsel to the [opposing party’s] detriment,” the conduct “constitute[s] a sufficient basis for suppression.” *Id.* at 138.

The Court of Appeals has previously employed this reasoning, suggesting that suppression is appropriate when necessary to cure a disciplinary violation. In *Lipin*, a plaintiff and her attorney improperly obtained and duplicated documents belonging to the

defendants. In light of that misconduct, the Court affirmed the dismissal of the complaint, after finding that “neither suppression of the documents nor suppression of the information was a realistic alternative” and that an order requiring the plaintiff to derive “an independent source for any information that may have also been discoverable” would have been insufficient to cure the violation. 84 N.Y.2d at 572-73.

The Court of Appeals has also suggested that suppression is an appropriate remedy specifically with reference to DR 7-104. *See People v. Skinner*, 52 N.Y.2d 24 (1980). In *Skinner*, the Court suppressed evidence arising from contacts with a criminal defendant who was represented by counsel, reasoning that its “vigilance in protecting the right to counsel finds additional support even in the ethical responsibility of attorneys in civil matters not to communicate on the subject of the representation with an individual known to be represented by an attorney on the matter.” *Id.* at 29 (citing DR 7-104). Nor was the Court’s decision to suppress limited to the criminal context; as the Court added, it “would be hard pressed logically to proscribe such conduct in the civil context yet blithely overlook it in the criminal sphere.” *Id.* at 30.

Consistent with these Court of Appeals precedents, the lower courts have recognized suppression as an appropriate remedy for violations of DR 7-104. *See Campolongo v. Campolongo*, 2 A.D.3d 476 (2d Dep’t 2003) (affirming the preclusion of a psychiatrist’s report generated through ex parte contacts in violation of DR 7-104); *see also In re Marvin Q.*, 45 A.D.3d 852, 853 (2d Dep’t 2007); *cf. 135 W. 36th LLC v. World City Am. Inc.*, 34 A.D.3d 317, 317 (1st Dep’t 2006) (describing suppression as among “the likely remedies” for a no-contact violation). Federal courts in New York have done

likewise. *See United States v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993) (recognizing that “suppression may be ordered * * * based upon a DR 7-104(A)(1) violation”); *cf. United States v. Sabri*, 973 F. Supp. 134, 143-44 (W.D.N.Y. 1996) (suppressing evidence arising from a related violation of DR 7-101). *See generally* David D. Siegel, N.Y. Prac. § 353 (4th ed. updated 2009).

These decisions correctly recognize that a rule discouraging suppression as a remedy under DR 7-104 would have perverse consequences: rather than seek permission for ex parte contacts from the court—as the plaintiff did in *Niesig*—and run the risk that such a motion would be denied, attorneys would simply attempt to conduct their ex parte contacts in secret, secure in the knowledge that any information thus obtained would remain admissible even if discovered. A practice that makes it more profitable to ask forgiveness than permission is one that affirmatively encourages violations of New York’s ethical standards.

b. In *Schmidt*, although the majority did not reach the issue, two Justices of this Court suggested that the suppression of evidence is appropriate when there is “significant taint or unfairness.” 279 A.D.2d at 71 (Wisner, J., dissenting, joined by Hurlbutt, J.) (citing *S&S Hotel Ventures*, 69 N.Y.2d at 445). This case presents the sort of “significant taint or unfairness” to which exclusion of Pauley’s testimony is the only proper response.

K&G knowingly exploited its role as counsel to both Pauley and Radder to elicit information contrary to one client’s interests in order to help another. Moreover, it did so through repeated ex parte interviews without regard to Pauley’s status as a represented

party under *Niesig*. The premeditated nature of this violation is confirmed by the remarkable facts that K&G never sought to depose Pauley or even to interview him informally in the presence of his CSXT counsel; never disclosed any statements of Pauley in advance of using them at trial, as CSXT had requested; and never even identified Pauley as a CSXT employee who played a role in Radder’s injury. *See supra* pp. 17-18. K&G did everything it could to keep its improper meetings with Pauley secret and to conceal from CSXT the information it had learned through unrepresented contacts with CSXT’s employee. This is the classic situation where counsel intentionally set out to “obtain by stealth that which could not be readily obtained through proper channels.” *Weinberg*, 129 A.D.2d at 133.

The only way to cure the effects of this intentional violation—and to prevent K&G from profiting by its violation of the Code of Professional Responsibility—is to suppress Pauley’s testimony. There is “no harshness to the affected parties, or disservice to the truth-seeking process, in preventing such benefit by means of suppression.” *Weinberg*, 129 A.D.2d at 136.

2. The improper admission of Pauley’s testimony merits a new trial.

Because K&G’s misconduct required the suppression of Pauley’s testimony, the trial court should have granted CSXT’s motion to exclude such testimony at trial. It did not, and this error prejudiced CSXT’s substantial rights. *See* CPLR § 2002. Pauley’s testimony was not only central to plaintiff’s theory of negligence; it also had significant influence on the jury. The forgery revelation—and, in particular, the allegation that

Murphy, Pauley’s supervisor, had ordered the forgery on behalf of CSXT—infected the entire proceeding and was used extensively by plaintiff to attack the credibility of CSXT’s witnesses and to encourage the jury to disregard their testimony.

As this Court has held, a court should order a new trial if “‘improperly admitted evidence could have affected the jury verdict’” (*Musaid v. Mercy Hosp.*, 249 A.D.2d 958, 960 (4th Dep’t 1998) (mem. op.) (quoting *Passino v. DeRosa*, 199 A.D.2d 1017, 1018 (4th Dep’t 1993))), or if “it cannot be said that there is the requisite ‘evidence that substantial justice has been done’” (*Stevens v. Atwal*, 30 A.D.3d 993, 994 (4th Dep’t 2006) (quoting *Gomez v. Park Donuts, Inc.*, 249 A.D.2d 266, 267 (2d Dep’t 1998))). In fact, the Court has stated, a new trial should be granted whenever “‘there is evidence that substantial justice has *not* been done . . . as would occur, for example, where the trial court erred in ruling on the admissibility of evidence.’” *Stevens*, 30 A.D.3d at 994 (emphasis added) (quoting *Butler v. County of Chautauqua*, 277 A.D.2d 964, 964 (4th Dep’t 2000))). In *Stevens*, although enough evidence to support the verdict had already been adduced at trial, the Court ordered a new trial because the evidence improperly admitted was “highly prejudicial” to one side. *Id.* Likewise, in *Carr v. Burnwell Gas of Newark, Inc.*, 23 A.D.3d 998 (4th Dep’t 2005), this Court approved a new trial when the improperly admitted evidence merely bolstered properly admitted testimony, noting that “we cannot say that the error in admitting that statement had *no effect* on the outcome of the case.” *Id.* at 1000 (emphasis added); accord *Mooney v. Osowiecky*, 235 A.D.2d 603, 604 (3d Dep’t 1997) (“Given those disparate versions of the accident, it cannot be said

that [the] improper bolstering of defendant’s in-court assertions * * * constituted harmless error.”).

Here too, it is impossible to say that the admission of Pauley’s testimony had “*no effect* on the outcome of the case.” K&G obtained information through a combination of disciplinary violations, engaging in ex parte contacts with a CSXT employee who was not only a represented party under DR 7-104 and *Niesig*, but also had an open and obvious conflict of interest with the plaintiff. K&G then used the information thus obtained to tar the credibility of CSXT at trial—by, among other things, eliciting gratuitous testimony from Radder that he could not “trust” CSXT’s efforts to find him a new job because he could not trust a company that falsified documents (R. II:1016), and by repeating this very assertion in closing (*see* R. V:2289-90 (asking “why Radder would want to trust this company that tried to cover up his accident”)). The jury could have made the same inference as to the credibility of CSXT’s witnesses generally, including on such crucially disputed issues as (1) whether Pauley’s supervisor Murphy had ordered the forgery (*compare* R. IV:1786-96 (Murphy) *with* R. III:1354-79 (Pauley)); (2) whether Murphy was present after the accident to observe Radder’s location (*compare* R. II:971-72 (Radder) *and* R. III:1341 (Pauley) *with* R. IV:1774-85 (Murphy) *and* R. III:1137-39 (Radder)); (3) whether Radder had been contributorily negligent by remaining in the dangerous “red zone” (*compare* R. III:1333 (Pauley) *with* R. IV:1776-85, 1817 (Murphy)); (4) whether Radder bore a duty to inspect the fork truck before using it (R. V:2008-09 (Walczak)); and (5) whether Radder had made serious efforts to obtain a job after his injury (*compare* R. II:1014-19 (Radder) *with* R. V:2095-2105 (CSXT’s

rehabilitation specialist)). These and other disputes went to the heart of the case, relating to CSXT’s negligence, Radder’s contributory negligence, and the appropriate measure of damages.

In light of these disputes, plaintiff’s central strategy at trial was to diminish the credibility of CSXT’s witnesses—in particular Murphy, CSXT’s main witness on Radder’s contributory negligence—by exploiting the revelation of the forgery. Counsel repeatedly mentioned the forgery during closing arguments, returning to the subject no fewer than six times (*see* R. V:2272-73, 2278-81, 2282-83, 2285-86, 2289-90, 2290-91) and specifically—and inappropriately—emphasizing the defense’s objections to introduction of this improperly obtained evidence (*see* R. V.:2290-91 (“[T]hey fought like heck to make it so that you guys could [not] see the forged report. How many objections were there?”)). Counsel also suggested that the forgery had been ordered by Murphy on behalf of CSXT (R. V:2272-73) and described Murphy as “the company man whose job it is to look out for the company’s best interest” (R. V:2282-83).

Assisted by the improper testimony, plaintiff’s strategy succeeded. Not only did the jury find Radder not to have been contributorily negligent, even in part (*see* R. V:2386-90), it also awarded damages far in excess of what is appropriate on the facts of this case. As a result, Pauley’s improperly obtained testimony was hardly “an isolated improper remark [that] could be deemed harmless” in light of other evidence. *Vassura v. Taylor*, 117 A.D.2d 798, 800 (2d Dep’t 1986).

Pauley served as the plaintiff’s star witness. His allegation that he had received implicit instructions to forge an inspection document was central to plaintiff’s theory of

negligence (*see* R. IV:1738-40), served as indirect proof of a failure of due care, and was highlighted in plaintiff's opening and closing remarks. Because this improperly admitted testimony "bore on the ultimate issue[s] of fact to be decided by the jury," its admission "constituted prejudicial and reversible error, and a new trial is warranted." *Noakes v. Rosa*, 54 A.D.3d 317, 318-19 (2d Dep't 2008).

II. THE PAIN AND SUFFERING AWARDS ARE EXCESSIVE.

If this Court does not order a new trial, then the damages awarded for pain and suffering must be drastically reduced. The jury awarded plaintiff \$550,000 for pain and suffering up until trial (approximately four years from the accident) and \$1,000,000 as compensation for anticipated future pain and suffering over 24.1 years. In ruling on defendant's post-trial motions, the trial court left the award for past damages undisturbed but concluded that "there is a material deviation [from what would be reasonable compensation] on the future pain and suffering in light of the case law" and reduced that award to \$650,000. R. VIII:3877. That reduction was a step in the right direction, but it did not go far enough.

An award for money damages is excessive "if it deviates materially from what would be reasonable compensation." CPLR § 5501(c). When deciding whether an award deviates from reasonable compensation, courts look to prior verdicts in cases involving comparable injuries. *See, e.g., Fried v. New York, New Haven & Hartford R.R.*, 183 A.D. 115 (2d Dep't 1918); *aff'd per curiam*, 230 N.Y. 619 (1921). This comparison to past awards enforces the "goal that persons who endure a similar degree of suffering can expect to receive a roughly similar award of compensation." *Weigl v.*

Quincy Specialties Co., 190 Misc. 2d 1 (Sup. Ct. New York Cty. 2001) (internal quotation marks omitted). It also serves as a check to ensure that damages are not used for the impermissible purpose of punishing a defendant over what is necessary to compensate an injured plaintiff. *See, e.g., McDouald v Garber*, 73 N.Y.2d 246, 254 (1989). The trial court's rationale for allowing Radder to receive \$1.2 million for a significant but still relatively modest injury is contrary to New York policy, inconsistent with prior verdicts, and unfair to other plaintiffs who have been limited to nearly identical or even lesser amounts for much greater suffering.

A. *Araujo* Demonstrates That The Awards Are Excessive.

The trial court allowed both the past and the (reduced) future award in this case because nearly identical amounts were determined to be reasonable compensation for the pain and suffering in *Araujo v. Marion Mixers, Inc.*, 289 A.D.2d 428 (2nd Dep't 2001). *See* R. VIII:3874-77. But this case involves a mild or moderate partial disability in the hand and shoulder, whereas *Araujo* involved a plaintiff whose arm was completely torn off below the shoulder. It is arbitrary and irrational to place the same value on Radder's pain and suffering and that experienced by Araujo.

1. In this case, a fork tine fell on Radder, breaking one bone in his wrist, damaging the soft tissue in his hand, and bruising his shoulder. Radder described the accident as "like somebody hit me with a baseball bat" and testified that he "was in a lot of pain" and "was crying." R. II:967-69. After putting his hand in ice, Radder was driven to the hospital, where he received a shot for the pain and was discharged. R. II:972-74.

Five days later, Radder went to a hand specialist, Dr. Callahan, at which point he still was in “significant discomfort.” R. III:1175. His hand was in a cast for several months, during which time his wife assisted him with many day-to-day tasks and he attended therapy to preserve use of and rebuild strength in his hand. *See* R. II:979-83. Although he continued to experience discomfort and limited use of his left hand, Radder saw improvement over the next eight to nine months (*see* R. III:1208-10, 1217-20) and was discharged to work with a 30-pound lifting restriction on November 5, 2004 (*see* R. II:989-90); *see also* R. III:1195-96 (Radder had “doubled his endurance power in the left-hand,” “had a significant increase in the overall use of the left-hand,” and “could do a fair amount of work,” but “strenuous tool use with a sledge hammer, pry bars, * * * those types of activities would be * * * difficult at best”). Dr. Callahan opined that Radder’s injuries have “significantly improved from when he commenced therapy” but that he has a permanent “restriction in his grip power and ability to use the hand for heavy work activities” (R. III:1197-99), which Dr. Callahan characterized as a permanent moderate partial disability (R. III:1199); *see also* R. V:2121-22 (trial court agreed that the evidence showed a permanent “mild” or “moderate” partial disability).

The accident also injured Radder’s left shoulder, causing “a real heavy bruise” type of pain at the time of the accident. R. II:973. Several months afterwards, Radder was experiencing pain and difficulty moving his shoulder (R. II:995-96) and began a course of physical therapy that “hurt” and caused him to be “very sore” (R. II:996-98). After an MRI showed pinching and swelling of the rotator cuff tendons (R. III:1190-91), Radder had outpatient arthroscopic surgery (R. II:999-1000; R III:1136-37). He was

confined to his “easy chair” for two weeks after the surgery and continued to have soreness and limited range of motion when lifting his arm over his head, but the pain he was experiencing before the surgery “went away.” R. II:1001-04. His shoulder surgeon opined that the surgery and therapy were successful (Tetro, Plaintiff’s Trial Ex. 17, 14:56 to 15:04) and that Radder had a “mild partial disab[ility]” in his shoulder but that his remaining symptoms were “managed easily with * * * ibuprofen” (*id.* at 15:19 to 15:23).

Radder testified that the limitations in his left hand and shoulder have affected his life in various ways: he no longer is able to bow hunt or canoe; he cannot do some chores that require hand strength, such as splitting wood; he has difficulty with hobbies like gun hunting, camping, and riding his 700-pound motorcycle (although he continues to engage in all of those activities); he has difficulty writing; and the injury has adversely affected his intimate relationship with his wife. *See* R. III:1048-56, 1229-30; *see also* R. IV:1487-97.

2. *Araujo* was a very different case. There, the plaintiff’s arm was caught in an industrial mixer, which “cut through his left arm,” “crushed it almost to his shoulder,” and “deglove[d]” the flesh on his arm (*i.e.*, pulled it down and off the bone). Brief for Third-Party Defendants-Appellants, *Araujo v. Marion Mixers, Inc.*, 289 A.D.2d 428 (2d Dep’t 2001), 2001 WL 34929193, at *5, *12. The plaintiff “started screaming” but “remained in the mixer for about one hour until medical and police personnel were able to extricate him,” whereupon his “left arm was found to be virtually amputated” and was removed just below his shoulder. *Id.* at *5. After the amputation, Araujo was forever unable to perform many “ordinary routine tasks * * * which required two arms and

hands.” *Id.* at *13. He was diagnosed with post-traumatic pain syndrome and post-traumatic stress disorder and experienced “phantom pain” in his missing limb. *Id.*

Even taking account of Araujo’s tragic injury and the profound impact on his life, the Second Department reduced the pain and suffering awards to \$500,000 (for the accident and the five years before trial) and \$650,000 (for the next 30 years), indicating that any more than that would “deviate materially from what would be reasonable compensation under the circumstances of this case.” *Araujo*, 289 A.D.2d at 429; *see also* 2001 WL 34929193, at *8-*10.

A comparison between this case and *Araujo* compels the conclusion that the awards here must be substantially lower and must clearly demarcate the difference between a lost arm and moderately reduced function in a hand and shoulder. Indeed, to our knowledge, the highest award ever allowed on appeal in New York for the complete loss of an arm was the \$1.5 million award for past and future harm upheld by this Court in *Doty v. Navistar International Transportation Corp.*, 219 A.D.2d 32 (4th Dep’t 1996). And *Doty* involved a 9-year old boy who was being compensated for a lifetime of pain and suffering (*id.* at 35-36), likely almost three times the 24 years at issue here.

Radder experienced a serious injury that resulted in a permanent but mild or moderate limitation in the use of his hand and shoulder, and (on the assumption that the liability verdict stands) he is entitled to reasonable compensation for that harm. But far from justifying an exorbitant \$1,200,000 award, as the trial court concluded, *Araujo* demonstrates that anything close to that amount “would deviate[] materially from what would be reasonable compensation” on the facts of this case (CPLR § 5501(c)).

B. Other Cases Confirm That The Awards Are Excessive.

The excessiveness of the awards also is demonstrated by recent cases in which the plaintiff's injuries and pain and suffering were more severe (as in *Araujo*) and yet the awards were *smaller*.

1. In *Hotaling v. Corning Inc.*, 12 A.D.3d 1064 (4th Dep't 2004), this Court affirmed awards of \$65,000 for past pain and suffering and \$225,000 for future pain and suffering over 22.5 years for an injury that is similar to, but more severe than, that suffered by Radder. The plaintiff there fell into a pit at work and suffered a "severe elbow fracture" in his dominant arm, causing the end of his ulna to shatter into at least seven separate pieces. Brief of Plaintiffs-Respondents, *Hotaling v. Corning Inc.*, 12 A.D.3d 1064 (4th Dep't 2004), 2004 WL 5468892, at *8. Although Hotaling was in "extreme pain," he could not move from the pit until "emergency service workers arrived and were able to * * * lift him out of the pit on a stretcher." *Id.* He underwent surgery to "put the remaining pieces of bone back together to reassemble the cup [of the joint] as best [as the doctor] could," using wires, a plate, and bone screws. *Id.* at *9. "For an extended period of time, [the] elbow fracture rendered [Hotaling] essentially helpless in dealing with the tasks of his every day life" and his "wife had to dress him, help him eat, [and] help him with his hygiene and grooming." *Id.* at *10. Although the plaintiff "aggressively pursued physical therapy," he remained under a "life time restriction of 15 pounds in the pushing direction" and did not have "full extension, full flexion, and full pronation" in his elbow. *Id.* at *10-*11. Moreover, because of the injury he developed

“early posttraumatic arthritis of the elbow,” a degenerative condition, and recurrent bursitis caused by the permanent metal hardware in the joint. *Id.* at *11-*12.

Whereas Radder has moderately reduced grip strength and mobility in his hand and shoulder, with a 30-pound lifting restriction, Hotaling’s arm “has been greatly weakened, and [he] has been left unable to lift more than 15 pounds, or to stretch out and close his right arm to the degree he can his left arm.” *Id.* Hotaling testified that “any repetitive activity” causes his arm to become “very stiff and achy,” that he “cannot lean his elbow on any hard surface” because the plate in his arm causes “a sharp pain,” and that “[h]is elbow becomes painful when the weather changes.” *Id.* at *11-*12. Like Radder, Hotaling testified that his “active lifestyle” was “dramatically altered” by his injury: he could no longer work out with his upper body, could play golf “only once or twice a year,” could no longer bowl or play softball, and had difficulty performing household chores and repairs. *Id.* at *12. His doctor opined that Hotaling had “a permanent partial loss of use” of his dominant arm, that his “arthritis will continue to progress,” that his bursitis likely will recur, that “he will have difficulty doing repetitive, heavy lifting, particularly pushing,” and that “he will have intermittent flare-ups of pain.” *Id.* at *13.

The injury and pain and suffering experienced by Hotaling and Radder are similar in many ways, although we would submit that Hotaling’s actual injuries (and the associated past pain and suffering) were materially greater than Radder’s. Although Hotaling’s award for future pain and suffering covered a slightly shorter life expectancy (22.5 years as opposed to 24.1), it is noteworthy that he suffers from degenerative injuries

that are likely to get worse over time, whereas there was no evidence of any such progressive injury in this case. All in all, the \$290,000 total damages award to Hotaling for the permanent partial limitations and pain caused by a shattered elbow is a much better reference point for assessing “reasonable compensation” in this case than the \$1,150,000 damages award to Araujo for the complete loss of an arm that was torn from his body. We submit that the awards here should be reduced to an amount that is comparable to, but somewhat lower than, the awards in *Hotaling*.

2. A similar result is suggested by this Court’s decision in *Riolo v. Goggin*, 309 A.D.2d 1199 (4th Dep’t 2003).

Riolo involved a plaintiff who suffered a severe back sprain and other soft-tissue damage to his shoulder and hand during an automobile accident. Brief on Behalf of Plaintiff-Respondent, *Riolo v. Goggin*, 309 A.D.2d 1199 (4th Dep’t 2003), 2003 WL 25654510, at *7. Following the accident, Riolo was removed from the vehicle “on a board” and taken to the hospital for “pain in his head, neck, shoulder and chest and in his knees.” *Id.* at *2. “Immediately after the accident, [he] was unable to sleep in bed” and had to “sleep sitting up until he purchased a special bed.” *Id.* at *4. Even with the special bed, Riolo “woke up stiff and in pain” and his wife often had to “physically pull him out of bed.” *Id.* “His ability to lift heavy objects was severely curtailed as a result of his injury” and “he was unable to work” or “do much in the way of daily activities apart from performing personal hygiene functions.” *Id.* at *4-*5. In fact, because he could not work, Riolo ““was forced to sell off most of his possessions of value in order to support himself and his wife.”” *Id.* at *19 (quoting trial court order). And when his possessions

were gone, he was forced to return to work “out of economic necessity,” despite the fact that he “experienced severe back pain on a daily basis.” *Id.* at *3.

Riolo testified that he experienced “persistent and continuing pain * * * on a daily basis” from the date of the accident “through the date of trial, some three years later.” *Id.* at *30. His physician opined that Riolo’s pain “was permanent,” that his “right shoulder continued to lack full internal rotation,” and that “[h]is grip strength was also affected, although it showed improvement over time.” *Id.* at *10-*11. On appeal, this Court nevertheless concluded that “an award of \$100,000 for plaintiff’s past pain and suffering is the maximum amount the jury could have awarded as a matter of law.” *Riolo*, 309 A.D.2d at 1200.

Like Radder, Riolo experienced reduced grip strength in his hand and reduced movement in his shoulder, but unlike in this case, those harms were merely secondary to severe chronic back pain. Although neither the Court’s opinion nor the plaintiff’s brief provides a great deal of detail regarding Riolo’s injuries, we submit that the award for past pain and suffering here should not be as large as that in *Riolo* given the broader nature of Riolo’s injuries, the constant and unremitting nature of his pain, and, in particular, the suffering implicit in the fact that, in order to save his family from destitution, he was forced to sell off all his worldly possessions and then return to work despite severe pain.

3. Another case involving more severe injuries with smaller damages awards is *Jansen v. C. Raimondo & Son Construction Corp.*, 293 A.D.2d 574 (2nd Dep’t 2002).

In *Jansen*, the plaintiff fell approximately 20 feet from a ladder, striking a mezzanine before landing face down and losing consciousness. Brief for Plaintiff-Respondent, *Jansen v. C. Raimondo & Son Constr. Corp.*, 293 A.D.2d 574 (2nd Dep't 2002), 2001 WL 34688847, at *3-*4. He was “‘in agony’” when he regained consciousness while being transported to the hospital. *Id.* at *4-*5. His left shoulder had to be “‘forcibly’” put back in the socket, because it “‘was completely dislocated and out of its socket,’” a condition that Jansen described as “‘the [w]orst thing I ever felt in my life.’” *Id.* at *5. He also had “‘fractures to his left humerus and his left clavicle’” and a “‘wide separation’” of his right shoulder as well as pain in his neck that radiated down both of his arms.” *Id.*

When Jansen was discharged from the hospital after “‘several days,’” both his arms were in slings. *Id.* at *6. That “‘presented significant problems for * * * Jansen with regard to normal daily activities,’” and his wife “‘had to take care of all of his basic needs, including showering, bathing, shaving and eating.’” *Id.* Because Jansen could not lie on his back, he “‘could not sleep in his bed for 14 months,’” “‘was unable to sleep for more than one or two hours at [a] time,’” and “‘required medication just to allow him to sleep for these brief periods.’” *Id.* He underwent six months of therapy for both shoulders, which he described as “‘murder,’” and he “‘could not even lift a one pound weight’” for a significant period of time. *Id.* at *8. Jansen also developed carpal tunnel syndrome in both his arms and his physician testified that he would “‘require two nerve release surgeries to remedy the carp[a]l tunnel syndrome.’” *Id.* at *12.

Eventually, Jansen had separate surgeries on each of his shoulders, the first of which caused “pain of the same magnitude as he had experienced immediately following the accident.” *Id.* at *9–*10. Approximately five years later, at the time of trial, Jansen still was “in pain most of the day” and “unable to sleep more than a few hours per night.” *Id.* at *12. He was “no longer able to play with his kids like he used to,” could not “play sports like he used to,” could “no longer be a volunteer fireman,” and “was unable to drive a car due to the pain.” *Id.* Even though his treating physician testified that Jansen “suffers from a permanent disability” and was “totally disabled from performing the tasks required of [his former job]” (*id.*), Jansen was forced to return to work “because of the financial hardships that were being experienced by he and his family”—most notably, being forced to sell his family’s home and live in the basement of his in-laws’ house for a year and a half with his wife and two young children (*id.* at *11).

On appeal, the Second Department affirmed Jansen’s past pain and suffering award of \$350,000 for approximately five years since the accident, but reduced the award for future pain and suffering for the next 36.6 years from \$730,000 to \$400,000. *Jansen*, 293 A.D.2d at 575. Thus, while Jansen’s injuries and past suffering over approximately the same amount of time as Radder’s were more severe (and involved both arms), his damages award was substantially lower. And Jansen was limited to a significantly lower amount for more extreme future pain and suffering over a much longer period of time.

4. A significant reduction in the awards also is supported by the Second Department’s decision in *Salmon v. Wendell Terrace Owners Corp.*, 5 A.D.3d 372 (2d Dep’t 2004).

Salmon involved a plaintiff who was trapped in a burning building due to a defective fire door and then fell three stories while trying to exit through a window. Brief for Plaintiffs-Respondents, *Salmon v. Wendell Terrace Owners Corp.*, 5 A.D.3d 372 (2d Dep't 2004), 2004 WL 793889, at *5. Salmon suffered “two linear fractures of the vertebrae,” “four fractures of the transverse processes of the lower back,” “two disk bulges * * * with nerve root impingement and dessication [sic] of the disk,” five broken ribs, “left shoulder rotator cuff tear with impingement syndrome requiring surgery resulting in adhesive capsulitis and partial locking of the shoulder,” and “right pleural effusion” (*i.e.*, partial collapse of the lung). *Id.* at *15. He “was hospitalized * * * for two and one half weeks following the fall” and later “underwent surgery to repair a rotator cuff which was torn as the result of his fall.” *Id.* at *4.

Upon his discharge, Salmon was prescribed Darvocet for pain and “underwent painful intensive physical therapy.” *Id.* at *18. He was bedridden for much of the first ten months following his accident and “required assistance from his wife * * * to perform even routine tasks such as personal hygiene needs (including the use[] of a bedpan for bodily eliminations) dressing and feeding.” *Id.* at *17. Salmon was “unable to walk without assistance (necessitating the use of a tripod cane)” and was “required to wear a ste[e]l back brace to support both sitting and walking.” *Id.* “He could no longer perform the normal household duties which he had previously shared with his wife” and, following the accident, he and his wife “never engaged in * * * intimate marital relations again,” because “[p]hysical intimacy became impossible based on * * * Salmon’s chronic severe pain.” *Id.* Indeed, Salmon’s 35-year marriage eventually ended, when his wife

became “incapable of bearing the emotional burden of coping with the dramatic change in their lives and her perceived inability to comfort her husband.” *Id.*

Like Riolo and Jansen, but unlike Radder, Salmon was forced to return to work after ten months “despite chronic severe pain based on financial need” (*id.* at *15-*16), although he could no longer perform manual labor and instead was assigned to “matron work” (*id.* at *17). Salmon testified that “his form[erly] good humor and joking, playful nature was all but extinguished by his inability to tolerate constant pain and its consequential limitation.” *Id.* At the time of trial, Salmon was experiencing “[c]hronic unabating pain” with “no expectation of relief.” *Id.* at *18. His physician opined that Salmon had a “[p]ermanent partial disability of the back, shoulder and neck with decreasing range of motion” and that his “condition will worsen with time.” *Id.* at *20. Specifically, the doctor testified that Salmon’s “range of motion to his lower back will gradually be lost,” that he already had “lost 25 percent range of motion” in his shoulder, and that Salmon’s “condition is going to get progressively worse, especially with the traumatic arthritis setting in.” *Id.* at *21 (internal quotation marks omitted).

On appeal, the Second Department affirmed the \$500,000 award for Salmon’s past pain and suffering over the six years since his accident but reduced the award for future pain and suffering to \$250,000, for a total pain and suffering award of \$750,000. *Salmon*, 5 A.D.3d at 372–73.

The extent and severity of Salmon’s injuries are plainly much greater than Radder’s. Radder received a pain shot and was discharged from the hospital after his accident, whereas Salmon was hospitalized for two and a half weeks. Radder was

confined to his easy chair for two weeks following his surgery, whereas Salmon was essentially bedridden for ten months. Radder testified that his intimate relationship with his wife was negatively impacted, whereas Salmon's intimate relationship—and ultimately his marriage—ended. Radder is still able to ride his 700-pound motorcycle, whereas Salmon cannot walk without a cane and must wear a steel back brace in order to sit. Radder testified to continuing achiness and occasional pain in his hand and shoulder, whereas Salmon testified to severe constant chronic pain with no hope of improvement. And, notably, Salmon's condition, initially much more severe than Radder's, is degenerative, whereas Radder's has improved over time.


Given New York's requirement for reasonable consistency of damages awards across cases, Radder cannot receive \$450,000 more for his pain and suffering than Salmon was allowed for his. On the contrary, comparison of the two cases compels the conclusion that Radder's pain and suffering awards, both past and future, must be markedly less than those permitted for Salmon and more in line with those for Hotaling.

CONCLUSION

The Court should order a new trial or, failing that, reduce the past pain and suffering award to not more than \$65,000 and the future pain and suffering award to not more than \$225,000.

Respectfully submitted.

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