

# EXHIBIT H

## APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

## Form A – Request for Appellate Division Intervention – Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3)

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.	For Court Original Instance
CHARLES SIMON and CHARLES SIMON, as Administrator of the Estate of JULIE SIMON, deceased	Date Notice of Appeal Filed <b>PAID</b> For Appellate Division JUN 23 2016 NASSAU COUNTY COUNTY CLERK'S OFFICE
Plaintiffs,	
-against-	
GRANITE BUILDING 2, LLC, KULKA CONTRACTING, LLC, and FXR CONSTRUCTION CORP. d/b/a DEV CONSTRUCTION,	
Defendants.	

Case Type	<input type="checkbox"/> CPLR Article 78 Proceeding	Filing Type	
<input checked="" type="checkbox"/> Civil Action	<input type="checkbox"/> Special Proceeding Other	<input checked="" type="checkbox"/> Appeal	<input type="checkbox"/> Transferred Proceeding
<input type="checkbox"/> CPLR Article 75 Arbitration	<input type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Original Proceeding	<input type="checkbox"/> CPLR § 5704 Review
Nature of Suite: Check up to five of the following categories which best reflect the nature of the case.			
<b>A. Administrative Review</b>	<b>D. Domestic Relations</b>	<b>F. Prisoners</b>	<b>I. Torts</b>
<input type="checkbox"/> 1. Freedom of Information Law <input type="checkbox"/> 2. Human Rights <input type="checkbox"/> 3. Licenses <input type="checkbox"/> 4. Public Employment <input type="checkbox"/> 5. Social Services <input type="checkbox"/> 6. Other	<input type="checkbox"/> 1. Adoption <input type="checkbox"/> 2. Attorney's Fees <input type="checkbox"/> 3. Children- Support <input type="checkbox"/> 4. Children – Custody/Visitation <input type="checkbox"/> 5. Children- Terminate Parental Rights <input type="checkbox"/> 6. Children – Abuse/Neglect <input type="checkbox"/> 7. Children – JD/PINS <input type="checkbox"/> 8. Equitable Distribution <input type="checkbox"/> 9. Exclusive Occupancy of Residence <input type="checkbox"/> 10. Expert's Fees <input type="checkbox"/> 11. Maintenance/Alimony <input type="checkbox"/> 12. Marital Status <input type="checkbox"/> 13. Paternity <input type="checkbox"/> 14. Spousal Support <input type="checkbox"/> 15. Other	<input type="checkbox"/> 1. Discipline <input type="checkbox"/> 2. Jail Time Calculation <input type="checkbox"/> 3. Parole <input type="checkbox"/> 4. Other <b>G. Real Property</b> <input type="checkbox"/> 1. Condemnation <input type="checkbox"/> 2. Determine Title <input type="checkbox"/> 3. Easements <input type="checkbox"/> 4. Environmental <input type="checkbox"/> 5. Liens <input type="checkbox"/> 6. Mortgages <input type="checkbox"/> 7. Partition <input type="checkbox"/> 8. Rent <input type="checkbox"/> 9. Taxation <input type="checkbox"/> 10. Zoning <input type="checkbox"/> 11. Other	<input type="checkbox"/> 1. Assault, Battery, False Imprisonment <input type="checkbox"/> 2. Conversion <input type="checkbox"/> 3. Defamation <input type="checkbox"/> 4. Fraud <input type="checkbox"/> 5. Intentional Infliction of Emotional Distress <input type="checkbox"/> 6. Interference with Contract <input type="checkbox"/> 7. Malicious Prosecution/Abuse of Process <input type="checkbox"/> 8. Malpractice <input checked="" type="checkbox"/> 9. Negligence <input type="checkbox"/> 10. Nuisance <input type="checkbox"/> 11. Products Liability <input type="checkbox"/> 12. Strict Liability <input type="checkbox"/> 13. Trespass and/or Waste <input type="checkbox"/> 14. Other
<b>B. Business &amp; Other Relationship</b>			
<input type="checkbox"/> 1. Partnership/Join Venture <input type="checkbox"/> 2. Business <input type="checkbox"/> 3. Religious <input type="checkbox"/> 4. Not-for-Profit <input type="checkbox"/> 5. Other			
<b>C. Contracts</b>	<b>E. Miscellaneous</b>	<b>H. Statutory</b>	<b>J. Wills &amp; Estates</b>
<input type="checkbox"/> 1. Brokerage <input type="checkbox"/> 2. Commercial Paper <input type="checkbox"/> 3. Construction <input type="checkbox"/> 4. Employment <input type="checkbox"/> 5. Insurance <input type="checkbox"/> 6. Real Property <input type="checkbox"/> 7. Sales	<input type="checkbox"/> 1. Constructive Trust <input type="checkbox"/> 2. Debtor & Creditor <input type="checkbox"/> 3. Declaratory Judgment <input type="checkbox"/> 4. Election Law <input type="checkbox"/> 5. Notice of Claim <input type="checkbox"/> 6. Other	<input type="checkbox"/> 1. City of Mount Vernon Charter §§ 120, 127-f, or 129 <input type="checkbox"/> 2. Eminent Domain Procedure Law § 207 <input type="checkbox"/> 3. General Municipal Law § 712 <input type="checkbox"/> 4. Labor Law § 220 <input type="checkbox"/> 5. Public Service Law §§ 128 or 170	<input type="checkbox"/> 1. Accounting <input type="checkbox"/> 2. Discovery <input type="checkbox"/> 3. Probate/Administration <input type="checkbox"/> 4. Trusts <input type="checkbox"/> 5. Other

## Appeal

## Paper Appealed From (check one only)

- |   |   |   |  |
|---|---|---|--|
| <input type="checkbox"/> Amended Decree   | <input type="checkbox"/> Determination          | <input checked="" type="checkbox"/> Order   | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding                | <input type="checkbox"/> Order & Judgment   | <input type="checkbox"/> Ruling          |
| <input type="checkbox"/> Amended Order    | <input type="checkbox"/> Interlocutory Decree   | <input type="checkbox"/> Partial Decree     | <input type="checkbox"/> Other (Specify) |
| <input type="checkbox"/> Decision         | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree   |  |
| <input type="checkbox"/> Decree           | <input type="checkbox"/> Judgment               | <input type="checkbox"/> Resettled Judgment |  |

Court: Supreme

County: Nassau

Dated: April 22, 2016

Entered: April 26, 2016

Judge (Name in full) Honorable Jeffrey S. Brown

Index No.: 22101/2008

Stage: ☐ Interlocutory ☒ Final ☐ Post-FinalTrial: ☒ Yes ☐ No If Yes: ☒ Jury ☐ Non-Jury

## Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? ☐ Yes ☒ No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? ☐ Yes ☐ No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals. Unknown

## Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus-Final Dated File:

Statute authorizing commencement of proceeding in the Appellate Division:

## Proceeding Transferred Pursuant to CPLR § 7804(g)

Court:

County:

Judge (name in full):

Order of Transfer Date:

## CPLR § 5704 Review of Ex Parte Order

Court:

County:

Judge (name in full):

Dated:

## Description of Appeal, Proceeding or Application and Statement of Issues

**Description:** If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR § 7804(g), briefly describe the object of the proceeding. If an application under CPLR § 5704, briefly describe the nature of the *ex parte* order to be reviewed.

The appeal is from an Order of the court below which granted in part and denied in part the motions of defendants Kulka Contracting LLC and Granite Building 2 LLC to set aside the verdict and for a new trial on liability and damages. The court below denied the motion to set aside the verdict as to liability *in toto*, but did not address any of the arguments that had been raised by the defendants in support thereof. As to damages, the court below denied the motion to set aside the verdict *in toto* as pertained to the award to the Estate of Julie Simon for pre-impact terror. As to the other elements of claimed damages, the court below granted the motions to set aside the verdict unless plaintiff stipulated to a reduction of the award to the Estate of Julie Simon for pecuniary loss, and a reduction of the entire damages award as to plaintiff Charles Simon, individually.

**Amount:** If an appeal is from a money judgment, specify the amount awarded.

**Issues:** Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR § 5704 review.

The issues proposed to be raised on appeal include but are not limited to (1) the court below erred in failing to set aside the verdict in favor of the Estate of Julie Simon for pre-impact terror in the amount of \$500,000 which was unsupported by the record and excessive. Such award for a duration of, at most

(2) the court below erred in failing to vacate the award to plaintiff Charles Simon for past and future "pain and suffering" allegedly consequent to plaintiff Charles Simon having been in the "zone of danger" at the time of his wife's demise, since, once plaintiff Charles Simon exited the subject motor vehicle he was no longer in the "zone of danger" and therefore no recovery was warranted on his individual claim. Moreover, even assuming *arguendo*, plaintiff Charles Simon was in the "zone of danger", nevertheless the court below erred in conditionally setting aside the verdict as the proposed *remittitur* was insufficient; (3) that the court below erred in failing to vacate in *toto* or to set aside the wrongful death award for the purported pecuniary loss to the Estate of Julie Simon as such award was wholly speculative. Moreover, even assuming *arguendo*, pecuniary loss was sustained to the Estate of Julie Simon by reason of her death, nevertheless the court below erred in conditionally setting aside the verdict as the proposed *remittitur* was insufficient; (4) that the court below erred in failing to vacate in *toto* or set aside the award to plaintiff Charles Simon individually for past and future economic loss as such award was wholly speculative. Moreover, even assuming *arguendo*, economic loss was sustained by Charles Simon nevertheless the court below erred in conditionally setting aside the verdict as the proposed *remittitur* was insufficient; (5) that the court below erred in failing to set aside the liability verdict by reason of numerous errors committed by the trial court including improper jury instructions, an improper verdict sheet, and other erroneous evidentiary rulings in the court below which either singularly or cumulatively deprived defendant Kulka Contracting LLC of a fair trial; (6) that defendant Kulka Contracting LLC did not owe a duty of care to the plaintiff and therefore as a matter of law plaintiff's claims and cross-claims should have been dismissed against Kulka Contracting LLC; and (7) any such and other further argument as may become apparent from a review of the record.

### Use Form B for Additional Appeal Information

#### Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name, and his, her or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1.	Charles Simon	Plaintiff	Respondent
2.	Charles Simon, as Administrator of Estate of Julie Simon	Plaintiff	Respondent
3.	Granite Building 2, LLC	Defendant	Respondent
4.	Kulka Contracting, LLC	Defendant	Appellant
5.	FXR Construction, Inc.	Defendant	Respondent
6.	Estate of Julie Simon	Plaintiff (on counter claim)	Respondent

## ATTORNEY INFORMATION

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself, or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney Name: Rosenberg & Gluck, LLP

Address: 1176 Portion Road

City: Holtsville State: NY Zip: 11742 Telephone Number: (631) 451-7900

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C: 1 2

Attorney Name: Quirk and Bakalor, P.C.

Address: 1325 Franklin Avenue Plaza, Suite 250

City: Garden City State: NY Zip: 11530 Telephone Number: (212) 319-1000

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C: 3

Attorney Name: Armienti, DeBellis, Guglielmo & Rhoden, LLP

Address: 39 Broadway, Suite 520

City: New York State: NY Zip: 10006 Telephone No.: (212) 809-7074

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C: 4

Attorney Name: White Fleischner & Fino

Address: 61 Broadway, 18<sup>th</sup> Floor

City: New York State: NY Zip: 10006 Telephone No.: (212) 487-9700

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C: 5

Attorney Name: Cartiglia Connolly & Russo

Address: 1050 Franklin Ave. Suite # 308

City: Garden City State: NY Zip: 11530 Telephone Number: (516) 877-0800

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above or from Form C: 6



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