APL-2023-00096

Claim No. 125759
Appellate Division, Fourth Department Docket No. CA 22-00092

Court of Appeals

STATE OF NEW YORK

MICHAEL SABINE,

Claimant-Appellant,

against

THE STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE ACADEMY OF TRIAL LAWYERS IN SUPPORT OF CLAIMANT-APPELLANT

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STATEMENT PURSUANT TO RULE 500.23(a)(4)(iii)
OF THE RULES OF PRACTICE OF
THE COURT OF APPEALS

The proposed *Amicus Curiae* – New York State Academy of Trial Lawyers – states that no party to the appeal or a party's counsel has contributed content to the Brief or participated in the preparation of the Brief in any other manner; no party to the appeal or a party's counsel has contributed money that was intended to fund preparation or submission of the proposed Brief of *Amicus Curiae*; and no person or entity, other than movant, has contributed money that was intended to fund preparation or submission of the proposed Brief of *Amicus Curiae*.

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INTEREST OF THE AMICUS

The Academy was formed in 2004. Its current members number approximately 4,900, and include plaintiff and defense attorneys, members of the judiciary, non-judicial government employees, law professors, law clerks, law secretaries, and law students. The Mission Statement of the Academy provides that it "maintains a strong commitment to protect, preserve and enhance the civil justice system, while working to rebuild and improve the image of our profession." The Academy believes its membership's collective responsibility as attorneys is to work to protect, preserve, and enhance the civil justice system and provide equal access to justice for all, in accordance with our mission.

It's the Academy's position that the civil justice system will be enhanced and greater justice will be done should this Court decide that a plaintiff in an action subject to the No-Fault Law's serious injury threshold requirement is entitled to prejudgment interest pursuant to CPLR 5002 from a finding of liability, *i.e.*, negligence and causation, decided in favor of plaintiff even though at that time the serious injury threshold requirement has not been decided.

SUMMARY OF ARGUMENT

The overarching issue raised on claimant's appeal is whether claimant in his underlying common law action alleging a negligence cause of action arising from the use or operation of a motor vehicle is entitled to prejudgment interest under

CPLR 5002 computed from the time a finding of liability in favor of claimant was made or from the time both liability and the No-Fault Law's serious injury threshold requirement have been found in favor of claimant. Resolution of this issue requires a determination as to whether the serious injury threshold requirement is properly characterized as an element of liability or damages. The Academy argues herein that the serious injury threshold requirement is an element of damages, not liability, and thus pre-judgment interest should be computed from the time liability is found even though at that time the serious injury requirement has not been addressed. This conclusion is reached upon an examination of the serious injury threshold requirement, including its origin and the role the Legislature intended for that requirement in motor vehicle negligence actions.

The second issue is whether this issue has been preserved for review by this Court, an issue raised and addressed *sua sponte* by both the majority and the concurring Justices in the Appellate Division below. Amicus agrees with the arguments raised by claimant in his Rule 500.11 submission to this Court that the issue may properly be addressed by this Court as it was sufficiently raised by claimant before the Court of Claims; and in any event, as the majority below held, to the extent it can be concluded the issue was not sufficiently raised before the Court of Claims, claimant's argument falls within a well-established exception to the preservation rule, namely, claimant's argument is a purely legal one that could not

have been obviated or cured by factual showings or legal counter steps had the argument been raised before the Court of Claims.

ARGUMENT

POINT I

THIS COURT SHOULD HOLD THE SERIOUS INJURY THRESHOLD REQUIREMENT IN MOTOR VEHICLE NEGLIGENCE ACTIONS GOVERNED BY NEW YORK'S NO FAULT LAW IS AN ISSUE OF DAMAGES

A. Origin And Role Of The Serious Injury Threshold Requirement

Analysis of the issue of whether the serious injury threshold requirement is an issue of liability or damages starts with a discussion of the origin and role of the serious injury requirement. Understanding this background is necessary to resolve the issue in a manner which does not undermine the policies underlying the enactment of New Yorks' No-Fault law.

Prior to the enactment of the comprehensive Automobile Insurance Reparations Act, colloquially known as the "No-Fault Law", a plaintiff injured in a motor vehicle accident was treated no differently form a plaintiff in any other negligence case. To recover damages for his or her injuries allegedly sustained in a motor vehicle accident, the plaintiff was required to establish the defendant's liability for negligence, *i.e*., a duty of due care owed to the plaintiff and a breach of that duty of care; and causation, *i.e*., the breach was a proximate cause of a legally cognizable injury sustained by plaintiff. (*Pfaffenbach v. White Plains Express Corp*.,

17 NY2d 132, 135 [1966]; *Comstock v. Wilson*, 257 NY 231, 234-235 [1931]). Upon establishing liability, plaintiffs would then proceed to the issue of damages, *i.e.*, the monetary amount to be awarded plaintiff as compensation for his or her proximately caused legally cognizable injuries. (*Robinson v. Lockridge*, 230 App. Div. 389, 390-391 [4th Dept. 1930]). Damages could be awarded for plaintiff's pain and suffering, loss of wages, and medical and related expenses. (*Id.*).

The No-Fault Law, formerly Insurance Law §§670-677 and now codified as Article 51 of the Insurance Law, §§5101-5109, became effective on February 1, 1974. (L. 1973, ch. 13, §11). It altered the existing motor vehicle liability landscape discussed above.

The No-Fault Law was enacted by the Legislature to overcome certain deficiencies perceived to exist under the common law system of compensating persons injured in a motor vehicle accident. (See, Governor's Memorandum of Approval, 1973 McKinney's Session Laws of NY, p. 2335; *Montgomery v. Daniels*, 38 NY2d 41, 49-50 [1976]). The tort system was perceived to be unnecessarily expensive and inefficient, and in addition, was thought to be imposing an intolerable burden on the courts of the state. (*See*, Report of the Joint Legislative Committee on Insurance Rates, Regulation and Recodification of the Insurance Law, NY Legis. Doc. 1973, No. 18). Accordingly, the Legislature sought to permit recovery of moneys actually expended, regardless of fault, by accident victims in the course of

treatment of accident-related injuries, and to deter the filing of tort actions by only allowing recovery of pain and suffering by those who were in fact seriously injured. (*Licari v. Elliott*, 57 NY2d 230, 235 [1982] ["Tacit in this legislative enactment is that any injury not falling within the new definition of serious injury is minor and a trial by jury [to assess damages] is not permitted under the no-fault system."]).

As observed by this Court, the No-Fault Law established "a two-pronged, partial modification of the pre-existing system of reparation for personal injuries suffered in automobile accidents under which system liability was grounded in negligence under classic principles of tort law. One prong deals with compensation; the other with limitation of tort actions." (*Montgomery v. Daniels*, 38 NY2d 41, 46 [1976]).

As to the second prong, the No-Fault Law did not change or otherwise modify the rules governing the establishment of liability from negligence. Rather, it was directed to the recovery of damages, specifically pain and suffering. The operative section of the No-Fault Law is Insurance Law §5104(a), formerly Insurance Law §673(1). It provides, as pertinent here, that, except in unusual circumstances, not here present, *i.e.*, action is not against a "covered person" as defined, or does not arise out of the use or operation of a motor vehicle, "there should be no right of recovery for non-economic loss, except in the case of a serious injury." Non-economic loss is defined as "pain and suffering and similar non-monetary

detriment." (Insurance Law §5102[c]), and "serious injury" is statutorily defined in Insurance Law §5101(d).

The No-Fault Law has in effect established a "threshold" requirement for the recovery of damages for pain and suffering. (*Licari v. Elliott*, 57 NY2d 230, 235 [1982]). Thus, in an action seeking recovery of damages for pain and suffering, a plaintiff must establish a serious injury has been sustained to be able to recover such damages, and a failure to establish serious injury will preclude recovery on such damages even if common law liability is established.

As made clear by Insurance Law §5104(a), the serious injury threshold requirement can only be established under the statutory definition for "serious injury." (*Coon v. Brown*, 192 AD2d 908 [3d Dept. 1993]). The mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained. (*Jones v. Sharpe*, 98 AD2d 859 [3d Dept. 1989], *affd*. 63 NY2d 645 [1984]). Rather, a plaintiff must show that he or she sustained a personal injury that falls within one of the nine serious injury categories. As noted by the Second Department in *Abbas v. Cole* (44 AD3d 31, 33-34 [2d Dept. 2007]), while the injury sustained by a plaintiff as a result of the motor vehicle accident is part of the negligence inquiry, "it is the 'serious' nature of those injuries which must be established before there can be recovery for the plaintiff's pain and suffering."

In sum, under the No-Fault Law, a plaintiff to recover damages for his or her pain and suffering as a result of an accident arising out of the use or operation of a motor vehicle must establish common law liability, *i.e.*, negligence and proximate cause, a serious injury, and the monetary value of the proven pain and suffering.

B. Conflict Among The Departments As To Whether The Serious Injury Threshold Is An Element Of Liability Or Damages

The issue as to whether the serious injury requirement is an element to be proven to establish a defendant's liability or is an issue to be determined separate from liability at the damages stage of an action has been the subject of decisions from all four of the Appellate Division departments. It has been raised in cases where liability has been found at a bifurcated trial, on summary judgment, and by default. The posture in which the issue is raised is not dispositive of how the issue should be resolved. What is to be noted is that there is no unanimity among the four Appellate Division departments on the issue (*see* 1A NY PJI[3d] [2022 ed.] 562-563; Dillon, Practice Commentaries to CPLR §5002, McKinney's Cons. Laws C:5002.7), there are conflicting views of Justices within the same department, and there has been a change of position on the issue by the First Department. This landscape can be shown as follows.

1. Chronological Development

The issue was first fully addressed by the Second Department in *Perez v. State* (215 AD2d 740 [2d Dept. 1995]). In *Perez*, the trial court (Court of Claims)

dismissed the claimant's complaint at the conclusion of the claimant's evidence at a bifurcated liability trial on the ground that the claimant failed to prove that he had sustained a serious injury. The Second Department reversed, holding that "the liability phase of a bifurcated trial is not the proper juncture at which to adjudicate issues regarding the severity of … injuries." (*Id*. at 741). Rather, "[i]ssues which pertain to the extent of the injuries suffered by a plaintiff, including whether a plaintiff suffered a serious injury …, should generally be left for the damages phase of the trial." (*Id*. at 741-742).

The Third Department had prior to *Perez* held in *Ives v. Correll* (211 AD2d 899 [3d Dept. 1995]) that the trial court upon defendant's concession of liability properly charged the jury at the damages trial that it must first determine whether plaintiff sustained a serious injury before it could award any damages. However, it does not appear that plaintiff contended the liability concession did include a concession of serious injury, and proceeded on the basis that serious injury was an issue for the damages trial. (*See also, Kelly v. Balasco*, 226 AD2d 880 [3d Dept. 1996]).

The Fourth Department two (2) years after *Perez* addressed the issue in *DePetres v. Kaiser* (244 AD2d 851 [4th Dept. 1997]). In *DePetres*, the trial court granted plaintiff's motion for summary judgment on the issue of liability. The Court held that the trial court erred in granting the motion, and modified by instead granting

partial summary judgment on the issue of negligence. It held: "Summary judgment on the issue of liability is not appropriate at this juncture; whether plaintiff sustained a serious injury remains an issue of fact, and defendants are not liable unless plaintiff proves at trial that she sustained a serious injury." (*Id*. at 852). No basis for this holding was expressed.

The First Department subsequently addressed the issue three (3) years later in *Maldonado v. DePaulo* (277 AD2d 21 [1st Dept. 2000]) and then a year later in *Porter v. SPD Trucking* (284 AD2d 181 [1st Dept. 2001]). In *Maldonado*, the trial court granted plaintiff's motion for partial summary judgment on liability and directed an inquest. The ruling was based on defendant's failure to come forward with evidence raising a triable issue of fact as to their negligence, without mentioning the issue of serious injury. The First Department held that the granting of the motion "necessarily" included a finding that plaintiff sustained a serious injury. (*Id*. at 22). In *Porter*, the First Department, citing *Maldonado*, held the default judgment entered in favor of plaintiffs "necessarily" decided that they sustained a serious injury. (*Id*. at 181). The apparent rationale of these decisions is that since the sustaining of a serious injury must be pleaded in the complaint (CPLR 3016[g]), a serious injury is necessary to establish a *prima facie* case of liability. Notably, the First Department did not discuss or otherwise mention the conflicting decisions in *Perez* or *DePetres*.

The Second Department revisited its decision in *Perez* in *Zecca v. Riccardelli* (293 AD2d 31 [2d Dept. 2002]), after the decisions by the First Department and the Fourth Department. In *Zecca*, the Second Department "disagree[d]" with those decisions. In its view, their holdings that serious injury is a liability issue "is inconsistent with the intent of the No-Fault Law, as well as basic summary judgment principles, and has the practical effect of increasing motion practice." (*Id*. at 34). Accordingly, the Court adhered to its holding in *Perez*.

Seven months after *Zecca* was decided, the Fourth Department once again addressed the issue in *Ruzycki v. Baker* (301 AD2d 48 [4th Dept. 2002]). The Court, in a signed opinion by Justice Hayes, adhered to its prior holding in *DePetres*. (*Id*. at 51-52). It expressly recognized that the Second Department, and the Third Department held to the contrary. Nonetheless, the Court "agree[d] with the First Department that a finding of 'liability' includes the issue of 'serious injury,'" citing *Maldonado*. (*Id*. at 52). No other rationale for its conclusion was expressed.

A year after the Fourth Department's decision in *Ruzycki* the First Department revisited its liability holding as set forth in *Maldonado* and *Porter* in *Reid v. Brown* (308 AD2d 331 [1st Dept. 2003]). In *Reid*, the trial court construed defendants' default on plaintiff's motion for summary judgment on liability, which only raised the issue of defendants' negligence, as resolving the issue of serious injury as well. In a brief decision rejecting the ruling, the Court held: "[B]efore a plaintiff may

proceed to damages under Insurance Law §5104(a), both fault and serious injury must be established. To the extent our holdings in *Maldonado* and *Porter* are to the contrary, we overrule them. In the instant case, plaintiffs established fault by virtue of defendant's default on the summary judgment motion, but never raised the issue of serious injury, which is a threshold matter separate from the issue of fault." (*Id*. at 332). Of note, the Court made no mention of either the views of the Second Department, which it was embracing or the views of the Fourth Department which had adopted that view as expressed in *Maldonado* and *Porter*.

The Second Department once again jumped into the issue in *Van Nostrand v. Froehlich* (44 AD3d 54 [2d Dept. 2007]). In *Van Nostrand*, the trial court granted summary judgment on the issue of defendants' liability, and directed a trial on damages. After the damages trial with the jury awarding damages for plaintiff's pain and suffering, the trial court entered judgment awarding plaintiff prejudgment interest calculated from the date of the jury verdict on the issue of damages. Relying upon its prior holdings in *Perez* and *Zecca*, the Court, in a signed opinion by Justice Dillon, held 3-2 that serious injury is "quintessentially" an issue of damages, not liability (*Id*. at 62), and that the judgment should reflect prejudgment interest calculated from the date of the liability finding. In so ruling, the majority noted the contrary holding of the Fourth Department in *Ruzycki*, but adhered to its prior rulings on policy grounds, discussed *infra*. (Id. at 62-63). The two dissenting Justices, in a

signed opinion by Justice Spolzino, rejected the Court's prior precedent, finding it to be unsupported in the explicit language of the No-Fault Law. (*Id*. at 68 [dissenting opinion]). Notably, the dissenters cited favorably to the Fourth Department's decision in *Ruzycki*. (*Id*. at 73 [dissenting opinion]).[1]

2. Present State of the Law

In sum, the First, Second and Third Departments treat the serious injury threshold as an issue of damages, and hold pre-judgment interest relates back to and is measured from a court's finding of common law liability in favor of the plaintiff, whether determined after a trial, upon summary judgment or by default. The Fourth Department, on the other hand, measures pre-judgment interest as running from plaintiff's establishment of liability, *i.e*., negligence and causation, and serious injury. In other words, in the Fourth Department the existence of a serious injury is an element of liability.

C. Upon A Consideration Of The Origin And Role Of The Serious Injury Threshold Requirement And The Conclusions Of The First, Second, And Third Appellate Divisions, This Court Should Hold That The Serious Injury Threshold Is An Issue Of Damages And Not Liability

Analysis of the issue of whether the serious injury threshold requirement is an issue of liability or of damages starts with recognition that the enactment of the No-

[1] The New York federal courts in diversity cases consistently follow the Second Department's decision in *Van Nostrand* and hold serious injury is "quintessentially an issue of damages, no liability." (*See, e.g., Comba v. United States*, 535 F.Supp.3d 97, 106-107 [SDNY 2021] [Hurley, J.]; *Moscato v. United States*, 2-18 WL 783127, *12 [WDNY] [Scott, M.J.]).

Fault Law's serious injury threshold requirement did not change the substantive law of a negligence cause of action relating to the liability of a tortfeasor and only affects the rules concerning the recovery of damages for pain and suffering, as previously discussed. This becomes clear upon a consideration of the express language of Insurance Law §5104(a) which sets forth the serious injury threshold requirement. That language is "there should be no right of recovery for non-economic loss [pain and suffering], except in the case of a serious injury." (Insurance Law §5104[a]). Properly construed, that language makes clear that the serious injury threshold requirement was not an element for establishing liability, a conclusion confirmed by the No-Fault Law's legislative history.

There is nothing in that language which modifies the common law negligence cause of action relating to liability. As a commentator has observed, discussing Insurance Law §673(1), later recodified as Insurance Law §5104(a), the statute "does not even declare that such suit is unavailable unless plaintiff has injuries or damages within the threshold [serious injury]." (Schwartz, No-Fault Insurance: Litigation Of Threshold Questions Under The New York Statute – The Neglected Procedural Dimension, 41 Brooklyn L. Rev. 37, 42 [1974]). What it actually provides, as previously noted, is that if a plaintiff commences a negligence action subject to the No-Fault Law, damages the plaintiff can recover cannot include plain

and suffering, *i.e.*, non-economic loss, unless plaintiff can establish that he or she has sustained a serious injury. (*Id*.).

Of note, under earlier proposed No-Fault Law legislature, the predecessor of Insurance Law §5104(a), Insurance Law §673(1), did include a modification of the common law negligence liability cause of action in the context of the imposition of the serious injury threshold requirement. In that regard, the proposed legislation expressly provided that "liability for personal injury or property damage based on negligence . . . is abolished except . . . (b) for non-economic loss in the case of serious injury (thereafter defined)." (*See*, New York Law Journal, March 22, 1972, at p. 1, cited in the Schwartz article. (Schwartz, *supra*, p. 41, n. 13). The language aimed directly at the liability state of the negligence action was, obviously, not carried over into the No-Fault Law as enacted, indicating the Legislature was not establishing the serious injury threshold to be part of the liability issue.

In sum, the express language of Insurance Law §5104(a) and its underlying legislative history fully supports the position advocated by claimant and *Amicus* Curiae that the serious injury threshold requirement is not, and was not imposed, as an issue of liability. For separate analytical reasons the issue of serious injury is a matter of damages, not liability, as noted by Justice Dillon in his thoughtful opinion in *Van Nostrand v. Froehlich* (44 AD3d 54 [2d Dept. 2007]), previously mentioned. One reason is that the serious injury threshold is an issue that quintessentially

involves the nature and extent of injuries and damages. (*Van Nostrand*, 44 AD3d at 60-61). As stated by Justice Dillon:

> The well-accepted reasons for the enactment of the No-Fault Law were to promote the prompt resolution of injury claims, limit costs to insurers, and alleviate unnecessary burdens on the courts. To control the pressing volume of automobile litigation within the state, the Legislature divided the universe of claims arising out of the use and operation of motor vehicles into two broad categories objectively defined in Insurance Law § 5102(d); namely, plaintiffs whose injuries qualify as "serious," and hence, are compensable, and plaintiffs whose injuries fall short of being "serious" and which are not compensable. The determination of whether a particular plaintiff establishes a serious injury, or fails to do so, necessarily involves an examination of the parties' evidence on damages. Such evidence is independent of the fault-based issues present in a bifurcated liability context such as duty, breach of duty, and proximate causality between acts or omissions on the one hand and an accident on the other. In other words, a plaintiff's injuries meet or fall short of the established threshold regardless of who is at fault behind the wheel.

(*Id*. at 60-61 [citations omitted]).

It must also be noted that if the serious injury issue is an issue of liability resulting in prejudgment interest not being awarded until the serious injury threshold is established, an untenable dichotomy would be created. As noted by Justice Dillon:

> [A]n untenable dichotomy would exist between those plaintiffs and all non-automobile plaintiffs whose interest computations commence upon receiving a liability finding in their favor either as a result of default, summary judgment, or verdict from a trier of fact. If this Court were to accept the defendants' interpretation of CPLR 5002, it would be placing motor vehicle personal injury plaintiffs on an unequal footing from all other plaintiffs who seek damages for personal injuries not involving automobile accidents. Indeed, the defendant's interpretation of CPLR 5002

> would create two unequal classes of automobile plaintiffs, where those incurring clearly-defined serious injuries would be entitled to interest earlier in their litigations than other plaintiffs whose injuries are more questionable. The better practice, in our view, is to treat all plaintiffs equally, by measuring prejudgment interest to which they are entitled from the same bright line event of established liability in their favor, whether upon default of the defendant, summary judgment, or verdict in a bifurcated liability trial.

(*Id*. at 64-65).

A third reason supporting claimant's and Amici's argument is recognition of the existence of various defenses to damages within and without the motor vehicle context which if established may preclude an award of damages for a plaintiff who establishes the defendant's common law liability for negligence. Again, as noted by Justice Dillon in *Van Nostrand*:

> One such defense is the plaintiff's nonuse of available seatbelts (*see* Vehicle and Traffic Law § 1229-c [8]), which is strictly limited to the jury's determination of damages and is not considered in resolving issues of liability. Another common defense presented at damages trials concerns allegations that the plaintiff's injuries pre-existed the subject accident, so as to negate proximate cause. Either of these defenses can reduce or even eliminate a plaintiff's entitlement to damages, yet the practice is to compute prejudgment interest from the liability finding and not to compute the interest award from the damages trial where seatbelt and preexisting injury defenses are litigated. There is no persuasive reason to treat threshold injury issues any differently.

(*Id*. at 64 [citations omitted]).

To be sure, if a plaintiff required to establish a serious injury does not do so, the action will be dismissed instead of a reduction of damages to $0.00. (*See, e.g*.,

Rodriguez v. Varga, 24 AD3d 650, 651-652 [2d Dept. 2005]). But that dismissal is not one based on a failure to establish liability nor can it be viewed as a liability dismissal as the negligence cause of action remains intact. It is the absence of any recoverable damages that requires dismissal. Such result is consistent with case law where an action or cause of action is dismissed notwithstanding the establishment of liability because of the plaintiff's failure to establish damages. (*See, e.g.*, *Pattison-Bolson Rug Serv. v. Sloane*, 45 AD2d 862 [2d Dept. 1974]; *Gomez v. Bicknell*, 302 AD2d 107, 115, 117 [2d Dept. 2002]; *see also* Siegel and Connors, New York Practice [6th ed] §34, p. 51 ["The theory of the statute of limitations generally followed in New York is that the passing of the applicable period does not wipe out the substantive right; it merely suspends the remedy."]). Arguing otherwise is nothing more than a "distinction without a difference." (*Id*. at 63).

POINT II

THE LIABILITY/DAMAGES ISSUE IS AN ISSUE OF LAW WHICH IS REVIEWABLE BY THIS COURT

The Fourth Department in both the majority and concurring opinions raised *sua sponte*, without the assistance of any briefing by the parties, the issue as to whether the liability/damages issue was preserved for its review. The concern was that the issue had not been raised before the Court of Claims and thus the claimant was raising a new question on appeal, creating a preservation issue which could

preclude review of the issue by the Court. In this regard, as a general matter appellate courts, including this Court, do not review issues which were not raised at the trial level. (*See, Bingham v. New York City Trans. Auth*., 99 NY2d 355, 359 [2003]; Karger, The Powers of the Court of Appeals §17:1 [August 2022 Update]). The majority below held the issue, while not raised before Court of Claims, would still be reviewable by the Court under a "recognized exception to the preservation rule." (*Sabine*, 214 AD3d at 1415). On the other hand, the concurring opinion expressed the view that the relied-upon exception should not be invoked. (*Id*. at 1416-1417).

As argued by claimant, there is no preservation bar present here. Two alternative arguments support this contention.

First, the issue was sufficiently raised before Court of Claims, albeit not by motion. The record shows claimant broached the issue with Court of Claims asking that the judgment provide for prejudgment interest running from the date Court of Claims determined liability, but Court of Claims did not accept that request indicating the request was barred by the Fourth Department's decision in *Ruzycki*, and any judicial change in view would have to come from the Fourth Department itself. (R466; 47-467). Court of Claims was, of course, correct in its observation that it was bound by the *Ruzycki* decision. (*See* 1 Carmody-Wait [2nd ed] §2:34 [collecting cases]). In these circumstances, it is reasonable to conclude that the issue

was raised before Court of Claims, especially since Court of Claims could not have reviewed on the merits claimant's argument.

Alternatively, the issue, if it is deemed not to have been preserved, falls within a well-established exception to the preservation rule. That exception permits review of an issue of law that was not raised at the trial level where the issue could not have been obviated or cured by factual showings or legal countersteps had the arguments been raised below. (*Karger, supra*, §17:2). Invocation of this exception is especially appropriate here as the liability/damages issue is a pure question of law which appears upon the face of the record and could not have been avoided or countered by the State through any factual showing or legal countersteps. (*Telaro v. Telaro*, 25 NY2d 433, 439 [1969]).

The view expressed in the concurring opinion below that this Court would not invoke the exception, citing *Telaro*, is not, of course, binding on this Court. (*Sabine*, 214 AD3d at 1417). Nor is the purported policy reason advanced in the concurring opinion a reason to not invoke the exception. (Id. at 1416-1417). In that regard, claimant is not asking this Court to revisit past precedent, but instead reaises an issue of first impression for this Court, an issue which is a purely legal one and which has been fully briefed.

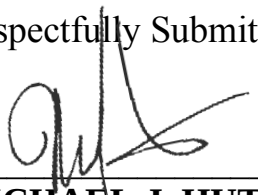
Accordingly, the liability/damages issue is an issue of law which is reviewable by this Court.

CONCLUSION

For the reasons stated herein, this Court should hold that serious injury is an element of liability and hold that serious injury is an element of damages, separate and apart from liability.

Dated: August 17, 2023
Albany, NY

Respectfully Submitted



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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to the Practice Rules of the Court of Appeals 22 NYCRR § 500.13 (c) that the foregoing *Amicus Curiae* Brief was prepared on a computer using Microsoft Word.

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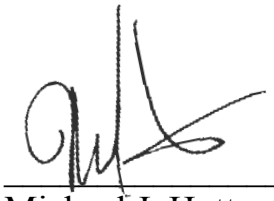

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