NEW YORK SUPREME COURT
APPELLATE DIVISION – FOURTH DEPARTMENT

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MICHAEL SABINE,

Claimant-Appellant,

- against –

THE STATE OF NEW YORK,

Defendant-Respondent.

Docket No.: CA 22-00092

Originating Court Claim No: 125759

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affirmation of Michael P. Kenny, Esq., sworn to on April 7, 2023, Claimant-Appellant will move this Court at the M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York on the 1st day of May, 2023, for an Order pursuant to the Civil Practice Law and Rules § 5602 and the Statewide Rules of Practice of the Appellate Division Rule 1250.16(d)(3) for leave to appeal to the Court of Appeals the Memorandum and Order of the Appellate Division, Fourth Judicial Department, entered March 17, 2023.

PLEASE TAKE FURTHER NOTICE that pursuant to the Rules of Practice of the Appellate Division Rule 1250.4(a)(7) the within motion will be submitted on the papers herein.

PLEASE TAKE FURTHER NOTICE that pursuant to the Rules of Practice of the Appellate Division Rule 1250.4(a)(8) your personal appearance in opposition to the motion, if any, is neither required nor permitted; and that pursuant to the Rules of Practice of the Appellate Division 1250.4(a)(5) responding papers in opposition to the within motion, if any, are required to be filed with the Court and served upon the undersigned attorneys by 4:00 p.m. on April 28, 2023

Dated: April 7, 2023
Syracuse, New York

Michael P. Kenny

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TO: STATE OF NEW YORK, OFFICE OF THE ATTORNEY GENERAL
Letitia James, Attorney General of the State of New York
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NEW YORK SUPREME COURT
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ATTORNEY AFFIRMATION IN SUPPORT OF CLAIMANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

MICHAEL P. KENNY, ESQ., an attorney duly admitted to practice before all Courts of the State of New York, affirms the truth of the following under penalty of perjury:

1. I am an attorney duly admitted to practice law in the State of New York, and I am the managing attorney with the law firm of Kenny & Kenny, PLLC, attorneys of record for the Claimant herein, **MICHAEL SABINE,** and as such, I am fully familiar with the facts and circumstances of this action.

2. I submit this affirmation in support of Claimant-Appellant's Motion for Leave to Appeal the Memorandum and Order of the Appellate Division, Fourth Judicial Department, entered March 17, 2023, in the above-captioned matter.

BRIEF PROCEDURAL HISTORY

3. By way of brief procedural history, this action was commenced by the Claimant-Appellant's filing and service of a Notice of Claim on or about March 12, 2015 in the NY State Court of Claims by Claimant-Appellant, Michael Sabine, with respect to injuries he sustained as a result of a motor vehicle collision which occurred on December 17, 2013 while he was driving northbound on State Route 96A in the Town of Waterloo, County of Seneca, and another driver, Linzy Patrick, an office manager at Seneca Lake State Park and an employee of Defendant, **THE STATE OF NEW YORK**, chose to pass the Claimant-Appellant's vehicle on his left hand side, subsequently losing control of her vehicle, and crossing into Claimant-Appellant's lane of travel, causing the subject collision.

4. On November 7, 2018, the Decision and Order of the Honorable Diane L. Fitzpatrick, dated September 26, 2018, was filed. Said Decision indicated that Claimant-Appellant's Motion to Renew was granted, as was Claimant-Appellant's underlying Motion for Summary Judgment as to the issue of liability. The Judge further indicated that the Court would confer with counsel to determine

when the issue of ***damages*** would be heard at trial and entered interlocutory judgment in favor of Claimant-Appellant.

5. Following a trial on damages that was held before Hon. Diane L. Fitzpatrick January 11th through 14th of 2021, on October 27, 2021, Judge Fitzpatrick filed her decision with respect to Claimant-Appellant's damages, finding that the Claimant-Appellant's injury qualified as a "serious injury" as defined by the Insurance Law Section 5102(d) and awarded the Claimant-Appellant $375,000.00 for past pain and suffering and $175,000.00 for future pain and suffering for a total award of $550,000.00.

6. Thereafter, on December 23, 2021, Judgment was entered by Eileen F. Fazzone, Chief Clerk of the NY Court of Claims in the amount of $556,187.50, plus recovery of the Claimant-Appellant's filing fee in the amount of $50.00. In computing the amount of the Judgment, the Chief Clerk found that prejudgment interest at the rate of nine percent per annum is owed from October 27, 2021, the date of decision establishing serious injury and damages, to December 22, 2021, the date of entry of judgment, for a gross sum of $6,187.50.

7. It is from this judgment that Claimant-Appellant appeals, arguing that the Court's determination that prejudgment interest runs from the date of decision establishing serious injuries and damages is incorrect. Instead, Claimant-Appellate argues that both the record and law establish that prejudgment interest should

properly run from the date that common-law liability attached by summary judgment in Claimant-Appellant's favor, that being September 26, 2018. Claimant-Appellant asked this Court to modify the Judgment filed and entered by Eileen F. Fazzone, the Chief Clerk of the Court of Claims pursuant to the Decision signed by Hon. Diane L. Fitzpatrick on October 27, 2021 and filed by the Clerk of the Court of Claims on November 29, 2021 to establish that prejudgment interest pursuant to CPLR § 5002 begins on the date that common-law liability attached by summary judgment in Claimant-Appellant's favor (that being September 26, 2018) and all other findings as the interest of justice may require.

8. Following briefing by the parties, this matter was heard at the oral argument term of the Appellate Division, Fourth Judicial Department on December 7, 2022.

9. Thereafter, on March 17, 2023, the Memorandum and Order of the Fourth Judicial Department was entered, affirming the judgment appealed from, without costs, and rejecting Claimant-Appellant's contentions.

10. It is from this Memorandum and Order that Claimant-Appellant now submits this motion for leave to appeal to the Court of Appeals and urges this Court to grant said motion for the reasons that follow and in the interests of equity and to resolve a split between the judicial departments.

11. As an initial matter, we must address the Court's discussion as to whether or not the "preservation exception" applies to this case. We agree with the majority in that, under the facts and posture presented, particularly the fact that the appealable issue was one of pure law that did not relate to the merits of the underlying decision of the lower court, but rather one regarding the computation of prejudgment interest by the Clerk of Court ***after*** the Decision was rendered by the trial judge (see, CPLR § 5002) , it fits squarely within this exception as this issue "could[n't] have been obviated or cured by factual showings or legal countersteps" in the trial court. Oram v. Capone, 206 A.D.2d 839, 840, 615 N.Y.S.2d 799 (1994) (*citing* Telaro v Telaro*,* 25 NY2d 433, 439, *rearg denied,* 26 NY2d 751). In this case, it is clear that this issue would not have been cured at the trial court level as when the issue was raised with the Court, the trial judge, through her clerk, advised counsel that "you may want to have the Fourth Department revisit this issue," relying on Ruzycki and reiterating the trial court's belief that "interest begins to run when liability is established and liability is not established until serious injury has been demonstrated." (R. at 466.) Moreover, the concurring justices herein do not appear to necessarily disagree that the "preservation exception" may apply, stating that "we see no reason to reach claimant's unpreserved contention merely to reinstate our settled precedent." (Memorandum and Order, Mar. 17, 2023, p. 3) Moreover, Telaro, *supra* at 439, cited by the concurring justices, supports the

liberal application of the "preservation exception," and allowed the plaintiff-appellant in that case to raise an issue that had not been raised at either the trial or at the intermediate appellate court.

QUESTION OF LAW TO BE PRESENTED TO THE COURT OF APPEALS:

12. Whether the Court of Claims (Eileen F. Fazzone, Chief Clerk), relying on the 4th Department Decision of Ruzycki v. Baker, 301 AD2d 48 (4th Dept., 2002), erred in setting the date upon which prejudgment interest begins to run as the date of decision establishing serious injury and damages (that being October 27, 2021) instead of the date on which common-law liability was found (that being September 26, 2018), the date upon which prejudgment interest starts to run in automobile cases in the 1st, 2nd and 3rd judicial departments.

LEGAL ARGUMENT

13. As the Claimant-Appellant argued before this Court, it is Claimant-Appellant's continued position that the Chief Clerk of the Court of Claims erred in setting the computation date for prejudgment interest as the date of decision establishing serious injury and damages (that being October 27, 2021). The Court improperly relied upon the decision of Ruzycki v. Baker, 301 AD2d 48 (4th Dept., 2002), which this brief will demonstrate is no longer good law give the more recent decision of Van Nostrand v. Froelich, 44 AD3d 54, 59, 61-62 (2d Dept., 2007) that found that serious injury is a decidedly an issue of damages, and not liability, and

that prejudgment interest runs from the date on which common-law liability (e.g., negligence) was established. This 2nd Department rule is in line with the rule on this issue in the 1st and 3rd Departments. *See, e.g.*, Kelley v Balasco, 226 AD2d 880 (3d Dept., 1996); Ives v Correll, 211 AD2d 899 (3d Dept., 1995); Reid v. Brown, 308 AD2d 331 (1st Dept., 2003). Therefore, prejudgment interest in this case should run from the date of that common-law liability was found; to wit, the date of the liability decision (of September 26, 2018) of the Court of Claims (Hon. Diane L. Fitzpatrick, Syracuse) in this matter.

14. In affirming the lower Court's decision, the Fourth Department, relying on Ruznicki, *supra*, Manzano v. O'Neil, 298 AD2d 829 (4th Dept., 2002), and its progeny, found that the Court were bound to apply the law as promulgated by this Court. The Court also, interestingly given their decision, referenced Love v. State of New York, 78 NY2d 540 (1991), a Court of Appeals case that arose out of the 4th Department, in support of their decision.

15. As argued by Claimant-Appellant on appeal, in Love v. State of New York, 78 NY2d 540, 541 (1991), the Court of Appeals held that, "[i]n a bifurcated personal injury action prejudgment interest under CPLR 5002 should be calculated from the date of the liability determination, rather than the date of the verdict fixing damages." In the appellate decision in Love, which the Court of Appeals affirmed, **this** Court explained that "[o]nce a judicial determination has been made

that a party has been wrongfully injured by another, it will, except in rare cases, trigger the commencement of the period for which interest is awarded as a matter of law," linking the commencement of this interest period to a determination of fault. Love v. State of New York, 164 AD2d 155, 561 NYS2d 945, 946 (4th Dept., 1990). The Love Court also commented that "[t]he fact that damages are not yet liquidated is of no moment." Love, 164 AD2d at 544 (internal citations omitted). The Love Court further discussed that "there is no logical objection to permitting the plaintiff to recover interest "retroactive[ly]", after damages are computed." Id. (internal citations omitted). Similar, *and critical*, to the case herein, Love was also a case involving an automobile collision, rendering the arguments raised by Defendant-Respondent, and discussed in this Court's Memorandum and Order, regarding the purposes and limitations of the No-Fault Law on "liability" (e.g., obligation to pay) moot.

16. Despite this procedural history, subsequent to the Court of Appeals' decision in Love v. State of New York, *supra*, there emerged a split of authority between the judicial departments as to when prejudgment interest begins to run in automobile cases, specifically in "threshold" cases where plaintiffs are required to prove and sustain the "serious injury" threshold to become entitled to damages.

17. In Manzano v. O'Neil, 747 NYS2d 813, 814 (4th Dept., 2002), the 4th Department held that prejudgment interest begins to run when defendant's

obligation to pay plaintiff is established, which this Court determined was not until the issue of causation as to plaintiff's injuries was resolved and the plaintiff proved that he or she suffered a serious injury. Manzano has since been declined to be followed by Van Nostrand v. Froelich, 44 AD3d 54, 59, 61-62 (2d Dept., 2007), a more recent case out of the Second Department, which held that the serious injury threshold is "decidedly an issue of damages, not liability" and, as such, "the calculation of interest can be made against the jury's determination of damages measured from the court's earlier finding of common law liability." The First and Third Departments also follow this rule, leaving the Fourth Department standing on its own regarding this issue. *See, e.g.*, Kelley v Balasco*,* 226 AD2d 880 (3d Dept., 1996); Ives v Correll*,* 211 AD2d 899 (3d Dept., 1995); Reid v. Brown, 308 AD2d 331 (1st Dept., 2003).

18. As the 2nd Department discussed in Van Nostrand, *supra,* the question of law presented herein raises a question of fairness, as the current "Fourth Department rule" places motor vehicle plaintiffs whose cases arise within this department on unequal footing from all other plaintiffs who seek damages for injuries not involving motor vehicle collisions and are awarded liability either by summary judgment, verdict or default (and therefore who can avail themselves to the computation of interest from the date of the liability determination). Further, the current "Fourth Department rule" creates additional "subclasses" of motor

vehicle collision plaintiffs whose serious injuries are clearly-defined and those that are not and that require more development of the record. *See*, Van Nostrand, 44 AD3d at 64-65.

19. Due to the present departmental split on this issue, there is an additional arbitrary level of inequity between motor vehicle plaintiffs whose claims accrue within the Fourth Department and those whose claims accrue elsewhere in the state within the First, Second and Third Departments. To illustrate this inequity, imagine a motor vehicle collision that accrues along Route 92 in Manlius, New York (within the 4th Department) to an Onondaga County resident and another that accrues five minutes away also on Route 92 in Cazenovia, New York (within the 3rd Department) to a Madison County resident. In the first situation, the plaintiff would not be entitled to interest until he or she proves both serious injury and damages, while in the latter situation, the plaintiff becomes entitled to interest when common-law liability is established, a potential difference of months or, more likely, years.

20. This case is well postured for review by the Court of Appeals. The issue raised is solely a question of interpretation of the law and involves a departmental split as to said interpretation. This was not an issue for the trial court to resolve, but an issue for, ultimately, the Court of Appeals to resolve so that there

may (again) be uniformity in the application of the CPLR § 5002 statewide interest rule in automobile cases as a matter of public policy and fairness.

CONCLUSION

21. Accordingly, it is respectfully submitted that this Court should **GRANT** Claimant-Appellant's Motion for Leave to Appeal the Memorandum and Order of the Appellate Division, Fourth Judicial Department, entered March 17, 2023 that affirmed the Judgment filed and entered by Eileen F. Fazzone, the Chief Clerk of the Court of Claims pursuant to the Decision signed by Hon. Diane L. Fitzpatrick on October 27, 2021 and filed by the Clerk of the Court of Claims on November 29, 2021 and all other findings as the interest of justice may require.

Dated: April 7, 2023
Syracuse, New York

Respectfully Submitted,

Michael P. Kenny

Michael P. Kenny, Esq.
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TO: STATE OF NEW YORK, OFFICE OF THE ATTORNEY GENERAL
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PRINTING SPECIFICATIONS STATEMENT

I hereby certify, pursuant to 22 NYCRR § 1250.8(j), that the foregoing brief was prepared on a computer as follows:

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to 22 NYCRR 1250.8(k) is 2363, as calculated by the word processing system used to prepare the brief.

Dated: April 7, 2023
Syracuse, New York

Respectfully Submitted,

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CERTIFICATE OF SERVICE

HEIDI M. P. HYSELL, an attorney duly admitted to practice law in the State of New York, affirms and states that I am not a party to the action, that I am over 18 years of age, and that I reside in Onondaga County, State of New York. That, on the 7th day of April, 2023, Affirmant served true copies of a Notice of Motion for Leave to Appeal to Court of Appeals together with the Attorney Affirmation of Michael P. Kenny, Esq. in Support of Said Motion (both dated April 7, 2023) upon the following:

STATE OF NEW YORK, OFFICE OF THE ATTORNEY GENERAL
Letitia James, Attorney General of the State of New York
By: Frederick A. Brodie, Esq., AAG
Attorneys for Defendant-Respondent
Appeals & Opinions Bureau
The Capitol
Albany, New York 12224-0341
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by electronically filing the same via NYSCEF which notifies the above referenced individuals at the e-mail address maintained through the system and constitutes service under 22 NYCRR 1245.1(f) and Rules of Practice – Fourth Department 1000.4 and published to be the email address of the above listed attorneys: Frederick Brodie, Esq. – Frederick.Brodie@ag.ny.gov.

Heidi M P Hysell

HEIDI M. P. HYSELL