To Be Argued By:
Michael P. Kenny, Esq.
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APL-2023-00096

Court of Appeals

State of New York

MICHAEL SABINE,

Claimant,

- vs -

THE STATE OF NEW YORK,

Defendant.

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

As set forth in Claimant-Appellant's initial brief, this action was commenced by the filing and service of a Notice of Claim on or about March 12, 2015 in the New York 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, 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.

As also set forth in Claimant-Appellant's initial brief, on or about September 26, 2018, the Claimant-Appellant was granted summary judgment as to the issue of liability by the Decision and Order of the Honorable Diane L. Fitzpatrick. Said Decision and Order was filed on or about November 7, 2018. Said Decision 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.

Thereafter, a trial as to the issue of *damages* was scheduled to take place on November 18, 2019. Said trial was subsequently adjourned to March 16, 2020,

and said date was cancelled as a result of the COVID-19 public health emergency. The parties thereafter agreed to participate in a virtual trial, which was held on January 11th through 14th of 2021.

On October 27, 2021, the Decision of the Hon. Diane L. Fitzpatrick was filed with respect to Claimant-Appellant's damages, which held that the Claimant-Appellant's injury qualified as a "serious injury" as defined by Section 5102(d) of the New York State Insurance Law 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.

Thereafter, on December 23, 2021, Judgment was entered by Eileen F. Fazzone, Chief Clerk of the New York State 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.

Claimant-Appellant respectfully reiterates all statements of fact and legal arguments raised and set forth in his initial brief, and further respectfully reiterates herein that the interest calculation should be modified, as 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, as opposed to the date of finding of "serious injury" on October 27, 2021.

ARGUMENT

POINT I

A FINDING OF PROXIMATE CAUSE AS TO CLAIMANT-APPELLANT'S SERIOUS INJURY PURSUANT TO INSURANCE LAW § 5102(d) IS NOT NECESSARY TO TRIGGER THE COMMENCEMENT OF PREJUDGMENT INTEREST PURSUANT TO CPLR 5002 AS OF THE DATE OF THE COURT'S FINDING ON COMMON-LAW LIABILITY (E.G., NEGLIGENCE).

In their brief in opposition, Defendant-Respondent argues that this Court may affirm the decision of the Fourth Department without reaching Claimant's argument on serious injury because the Court of Claims allegedly "deferred ruling on causation as well as serious injury" in their September 27, 2018 decision regarding negligence and/or common-law liability. In so arguing, Defendant-Respondent is attempting to conflate the issue of proximate causation in relation to a determination of negligence and the issue of proximate cause in relation to the determination as to whether a causally related serious injury (and related damages) exist(s).

In support of their position as to causation as an "additional" element of liability, Defendant-Respondent cites to Sheehan v. City of New York, 40 N.Y.2d 496 (1976) and Pommels v. Perez, 4 N.Y.2d 566 (2005). These citations further illustrate the Defendant-Respondent's confusion as to the issue of proximate cause as it relates to the determination of serious injury and damages, which is the issue before this Court.

In Sheehan, there was an issue as to proximate causation in relation to negligence (fault) principles, as the issue before this Court in that case was whether the conduct of Sheehan (the bus driver) was causally connected to the collision, a question as to negligence and/or common-law liability, not as causation of injuries (or damages) as Defendant-Respondent seemingly attempts to argue herein.

In Pommels, which was discussed extensively in the trial court's decision in this case, the issue before this Court was whether the Plaintiff sustained a serious injury and the questions as to causation were tied to the Court's determination as to whether the Plaintiff sustained a serious injury, *not* as to a question of causation related to negligence and/or common law liability. Though helpful to the trial court in reaching their decision in this case, Pommels did not, however, deal with the precise issue of the intersection of CPLR 5002 and Insurance Law § 5102(d), and involved a case in which the defendant filed a motion for judgment on the "tort threshold" only and, as such, is not instructive in this appeal.

Aside from the two cases discussed above, which Claimant-Appellant contends are wholly inapplicable to the precise issue before the Court herein, Defendant-Respondent only cites to Fourth Department case law, e.g., Manzano v. O'Neil, 208 A.D.2d 829 (4th Dept., 2002), the case law that Claimant-Appellant challenges in this appeal, in support of their *new* argument that causation as to

Claimant-Appellant's injuries must be decided before prejudgment interest begins to run.[1]

Similar to Pommels, *supra*, the "causation" finding that the trial court made in this case was in the context of determining whether the Claimant-Appellant had a serious injury that was causally related to the subject collision (R. at 24, 29), a component of damages, not any "causation" finding relating to any element of negligence. Pommels is therefore not instructive as to the issue of the intersection of CPLR 5002 and Insurance Law § 5102(d).

As such, Defendant-Respondent's argument that the trial court's deferred ruling on "causation" as well as serious injury to the damages phase of trial precludes a finding that prejudgment interest pursuant to CPLR 5002 begins to run when the Court of Claims determined Defendant-Respondent to be negligent is wholly without merit based upon the Court's own decision as to common-law liability in this case, which, by its own verbiage, recognized both the issue of serious injury and causation to be the same, as an element of *damages*, not liability. (R. at 436).

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[1] It is also questionable whether Defendant-Appellant has preserved this legal argument for review, as this is a new theory being raised, and not one that was raised in front of the Appellate Division.

POINT II

DEFENDANT-RESPONDENT'S INTERPRETATION OF THE PRECEDENT SET BY THE FIRST AND THIRD DEPARTMENTS ON THIS ISSUE IS ERRONEOUS.

In their brief in opposition, Defendant-Respondent argues that the majority of the Appellate Divisions agree that serious injury must be found before imposing liability in a bifurcated no-fault case. Defendant-Respondent boldly asserts that only the Second Department has concluded that prejudgment interest may begin to run before a plaintiff has established serious injury, and that the First and Third Departments align with the Fourth Department on this issue. That is, quite simply, erroneous.

In Reid v. Brown, 308 A.D.2d 331, 332 (1st Dept., 2003), the First Department overruled its prior precedent of Porter v. SPD Trucking, 284 A.D.2d 181 (1st Dept., 2001) and Maldonado v. DePalo, 277 A.D.2d 21 (1st Dept., 2000), and held that the issue of serious injury was a *separate* threshold issue from the issue of fault to be decided prior to a determination of damages. (*See also*, Amicus Br. at 13-14).

Similarly, the Third Department, in Ives v. Correll, 211 A.D.2d 899 (3rd Dept., 1995) and Kelley v. Balasco, 226 A.D.2d 880 (3rd Dept., 1996), the defendants had conceded liability and both cases proceeded to a jury on the question of serious injury and damages. Specifically, Kelley, *supra*, solidly held

that "a jury's finding that the plaintiff sustained an injury within any of the categories set forth in Insurance Law § 5102(d) satisfies the no-fault threshold, thereby eliminating the issue from the case and *permitting the plaintiff to recover any damages proximately caused by the accident*." Kelley, 226 A.D.2d at 880 [emphasis added]. (*See also*, Amicus Br. at 9, 14). The precedent set by Ives and Kelley, *supra,* is unchanged by the recent cases of Noor v. Fera, 200 A.D.3d 1366, (3d Dept., 2021) and Jones v. Marshall, 147 A.D.3d 1279 (3d Dept., 2017), also cited to by Defendant-Respondent, as both of these cases involved a motion by defendants to dismiss the complaints therein due to lack of serious injury and neither dealt with the intersection of the serious injury threshold and CPLR 5002.

POINT III

THE CURRENT FOURTH DEPARTMENT RULE SETTING THE DATE OF PREJUDGMENT INTEREST PURSUANT TO CPLR 5002 IN AUTOMOBILE CASES AS OF THE DATE OF THE DECISION ESTABLISHING SERIOUS INJURY AND DAMAGES AS OPPOSED TO THE DATE OF THE DECISION ESTABLISHING COMMON-LAW LIABILITY IS NOT CONSISTENT WITH THE PURPOSES OF THE NO-FAULT LAW.

In their brief in opposition, Defendant-Respondent argues that the Fourth Department's rule on this issue is sound, focusing heavily on the "no right to recovery" verbiage of Insurance Law § 5104(a) and that to find that prejudgment interest begins to run on the date that common-law liability is found would

frustrate the very purposes of the No Fault Law. This, quite simply, is just not the case.

Indeed, even in the Fourth Department, if there is a finding of common-law liability, whether it be by summary judgment, stipulation, default, or bifurcated trial verdict, and the plaintiff fails to meet his or her burden of proving that he or she has a causally related serious injury, the result would be a damages verdict of $0, which would be of no consequence to defendant. Defendant-Respondent argues in opposition that this would defeat the purpose of the No-Fault to reduce the number of automobile personal injury cases in litigation in the courts, citing to Licari v. Elliot, 57 N.Y.2d 230, 236 (1982). This argument is without merit as defendants can, as was the case in Noor and Jones, *supra*, move for summary judgment to dismiss the claim based upon a lack of serious injury in those cases where there is no triable fact on that issue. This tort strategy does not undermine the purposes of the No Fault Law to keep "minor" injuries out of the Courts, as, if successful, said cases would be taken out of the court system at that point and only those with a triable issue of fact as to the existence of a serious injury would be permitted to be taken to trial.

Defendant-Respondent's appeal fails to recognize the threshold requirement of "serious injury" (pursuant to Insurance Law § 5102(d)) or that in cases of "economic loss greater than basic economic loss" (pursuant to Insurance Law §

5104(a)) it is just that, a *threshold* requirement that must be met to permit recovery of any damages proximately caused by the motor vehicle collision, not a requirement to allow a plaintiff to file a suit in the first place.

This position is also consistent with Section 5104 of the Insurance Law which states, in pertinent part, that "there shall be no right of *recovery* for non-economic loss, *except in the case of a serious injury*" [emphasis added] and this Court's prior precedent of Love v. State of New York, 78 N.Y.2d 540, 541 (1991), which 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 Love, another case *involving an automobile collision,* 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 and/or common-law liability. Love v. State of New York, 164 A.D.2d 155, 561 N.Y.S.2d 945, 946 (4th Dept., 1990). Approximately fifteen (15) years after the Love decision, this Court, in Denio v. State of New York, 7 N.Y.2d 159, 167 further explained that CPLR 5002 "[i]nterest is designed to compensate for the loss that results when a claimant is 'deprived of the use of

money to which he or she was entitled from the moment that liability was determined.'"

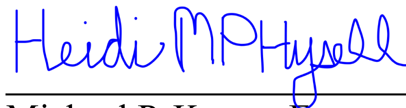
To follow the Defendant-Respondent's argument and suggested trial strategies would not only increase expenses, both to plaintiffs and defendants alike, in trying those cases that do not fall under one of the more "clear cut" categories of serious injury enumerated in Insurance Law § 5102(d) (e.g., death, dismemberment, fracture, loss of a fetus, etc.), which do not lend themselves to resolution by summary judgment on the issue of serious injury and would essentially force the parties to incur expert fees on multiple occasions in those jurisdictions where unified trials are not scheduled as a matter of practice (e.g., like in the Court of Claims), a potential difference of months or, more likely, years. These proposed trial strategies would also decrease judicial efficiency and increase the strain on the court system by requiring multiple motions and/or trials, which the No Fault Law was designed to avoid. (*See*, Amicus Br. at pp. 5-7).

CONCLUSION

Accordingly, it is respectfully submitted that this Court should 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.

Dated: March 22, 2024
Syracuse, New York

Respectfully Submitted,



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I hereby certify, pursuant to 22 NYCRR § 500.1, that the foregoing brief was prepared on a computer as follows:

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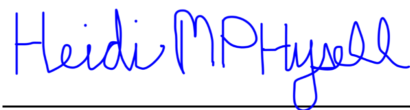

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