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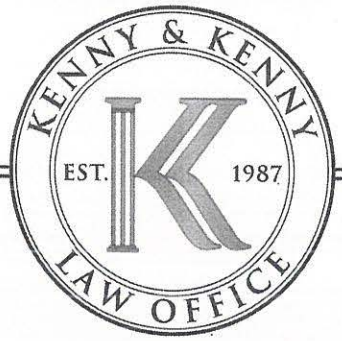

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August 10, 2023

Clerk of Court
State of New York
Court of Appeals
20 Eagle Street
Albany, New York 12207

RE: Sabine v. State of New York
APL-2023-00096
Appellate Docket No.: CA 22-00092 (4th Department)
Originating Court No.: 125759 (NYS Court of Claims)

Dear Clerk:

Please accept this correspondence as and for Appellant's written comments and arguments pursuant to Section 500.11 of the Court of Appeals Rules of Practice in support of his position on the merits.

As the Court is aware, the intermediate Appellate Court granted Appellant leave to appeal this matter to the Court of Appeals, as there is a question of law that has arisen that ought to be reviewed by the Court.

Enclosed herewith please find three (3) copies of the Appellate Division briefs of all parties and three (3) copies of the Appellate Division record which are incorporated by reference herein.

In sum, the purpose of the appeal in this case involves the narrow issue of which is the appropriate date, event, or point in time from which prejudgment interest (per CPLR §5002) begins to run. It is the Appellant's position that prejudgment interest begins to run as of the date of the decision determining that common-law liability (e.g., negligence) is established as a matter of law, which aligns with the current holding on this issue in the Appellate Divisions of the 1st, 2nd, and 3rd Departments. It is the Appellant's continued position that this rule is also in line with precedent of this Court in Love v. State of New York, 78 NY2d 540, 541 (1991) and Denio v. State of New York, 7 NY2d 159, 163 (2006), both cases which, notably, originated within the Fourth Department.

The question that has been certified by the intermediate Appellate Court (Appellate Division, 4th Department) is as follows: Was the order of this Court entered March 17, 2023, properly made?

The intermediate Appellate Court made two determinations in rendering their decision of March 17, 2023. Appellant's position as to each of those determinations will be set forth below.

POINT I

THE INTERMEDIATE APPELLATE COURT CORRECTLY FOUND THAT THE APPELLANT'S CONTENTION FELL UNDER A RECOGNIZED "EXCEPTION TO THE PRESERVATION RULE" AS IT SOLELY INVOLVES AN ISSUE OF LAW.

The Appellate Division, Fourth Department, in its decision of March 17, 2023, correctly held that the question being raised by Appellant on appeal involved a question of law in the Fourth Department with respect to the calculation of prejudgment interest in automobile accident cases that could not "have been obviated or cured by factual showings or legal countersteps in the trial court." Oram v. Capone, 206 A.D.2d 839, 840 (4th Dept., 1994) [internal quotation marks omitted].

In this case, the majority of the intermediate Appellate Court panel correctly found 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 related to the computation of prejudgment interest by the Clerk of Court ***after*** the Decision was rendered by the trial judge (see, CPLR § 5002), this case fits squarely within this exception to the preservation rule.

Moreover, despite Respondent's arguments in the motion for leave to appeal to this Court, 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, ***invited*** counsel to proceed directly to an appeal, advising that counsel "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.) As such, it was apparent to Appellant that taking that "legal counterstep," (e.g. a post-trial motion), would have served only to delay this matter further and result in the same need to proceed with the appellate process.

Moreover, Telaro v. Telaro, 25 N.Y.2d 433, 439, *rearg denied,* 26 N.Y.2d 751, 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.

Based on all of the foregoing, again, it is Appellant's contention that the Appellate Division, Fourth Department, correctly found that the issue raised by Appellant on appeal (that of whether interest under CPLR §5002 should run from the date of the decision determining the liability as opposed to the date that serious injury is established), is an issue solely involving a matter of law, which is a recognized exception to the "preservation rule, " and therefore the same is properly before this Court.

POINT II

THE INTERMEDIATE APPELLATE COURT INCORRECTLY AFFIRMED THE DECISION OF THE LOWER COURT WHERIN IT RULED THAT PREJUDGMENT INTEREST RUNS FROM THE DATE OF THE DECISION ESTABLISHING SERIOUS INJURY AND DAMAGES AS OPPOSED TO THE DATE OF THE DECISION ESTABLISHING COMMON-LAW LIABILITY, A DETERMINATION THAT IS AT ODDS WITH COURT OF APPEALS PRECEDENT AND WITH ALL OTHER JUDICIAL DEPARTMENTS, AND UNDERMINES THE PURPOSES OF THE NO-FAULT LAW.

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 affirming the Fourth Department decision in Love, *a 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. Love v. State of New York, 164 A.D.2d 155, 561 N.Y.S.2d 945, 946 (4th Dept., 1990).

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

establish the existence of a "serious injury" as defined by the New York State Insurance Law, in order to become entitled to damages. The Appellate Divisions of the 1st, 2nd, and 3rd Departments have all held that prejudgment interest attaches at the time that a decision is rendered establishing the existence of common-law liability (e.g. negligence), and the Fourth Department Appellate Division is left standing alone in declining to attach such prejudgment interest until the date that "serious injury" is established. See, *e.g*, Ruzycki v. Baker, 301 A.D.2d 48 (4th Dept., 2002); Manzano v. O'Neil, 747 N.Y.S.2d 813, 814 (4th Dept., 2002); Van Nostrand v. Froelich, 44 A.D.3d 54, 59, 61-62 (2nd Dept., 2007); Kelley v Balasco, 226 A.D.2d 880 (3rd Dept., 1996); Ives v Corell, 211 A.D.2d 899 (3rd Dept., 1995); Reid v. Brown, 308 A.D.2d 331 (1st Dept., 2003).

The case that the trial court relies upon in setting the date upon which prejudgment interest is fixed, Ruzycki v. Baker, *supra*, was heavily based upon the existing precedent of all of the other departments **at the time that is was decided**. *See,* Ruzycki, 301 A.D.2d at 51-52. All of the other Appellate Division courts in every other judicial district have since changed their position to align with what Appellant believes to have been the controlling rule established by this Court in Love v. New York, *supra*, on this issue of law.

It is also notable that Ruzycki, *supra*, acknowledged that the Second and Third Departments did not include the issue of serious injury within the term of

"liability," but sided with the First Department that did include the issue of serious injury in the term "liability." Id. Notably, Ruzycki is **not** a case dealing with pre-judgment interest under the CPLR, or the issue of when said interest attaches, and found only that "[i]f a plaintiff moves for summary judgment on liability and establishes negligence or fault by the defendant as a matter of law, but the issue of serious injury is either not raised or not established as a matter of law, then the court should grant summary judgment on the issue of *negligence*," agreeing with the Second Department that serious injury will not be "presumed" if not raised in the motion. Id. at 52 (emphasis added).

The decisions of the Appellate Division, Second Department, in Van Nostrand v. Froelich, 44 A.D.3d 54, 59 (2nd Dept., 2007), Perez v. State of New York, 215 A.D.2d 740 (2nd Dept., 1995) and Zecca v. Riccardelli, 293 A.D.2d 31 (2nd Dept., 2002), are helpful in explaining why the serious injury threshold is decidedly an issue of damages, not liability. Referencing the Pattern Jury Instructions, in Perez, *supra*, the Second Department explained that "juries in liability trials are routinely instructed to apportion fault among parties and to determine proximate cause without regard to injuries or medical treatment." Perez, 215 A.D.2d at 741. The Perez decision was also discussed in Zecca, *supra*, which further held that "by holding that the issue of serious injury is 'necessarily' resolved in favor of the plaintiff [as part of liability] even where no evidence of

such injury is presented, the courts may be authorizing recovery for minor injuries, which is contrary to the purpose of the No-Fault Law [Insurance Law § 5102(d)]." Zecca, 742 N.Y.S.2d at 79. In addition, as a practical matter, the Zecca court reasoned that "[t]he practical effect of the [then] First and [current] Fourth Department rulings is that more unnecessary motions will occur" (e.g., in cases where there is no real dispute regarding fault such as in a rear-end collision as defendants will be forced to cross-move on the issue of serious injury even if not raised in the summary judgment motion). Id.

The holdings and current positions of the First, Second and Third Departments are consistent with the history and intent of the Court of Appeals which, in Love v. State of New York, *supra*, reasoned that CPLR 5002 interest is not a penalty but is, rather, "intended to indemnify successful plaintiffs 'for the nonpayment of what is due to them.'" Love, 78 N.Y.2d at 544 [additional citations omitted]. In a bifurcated trial, Love establishes that the point of attachment of such interest is to be the point at which liability is established. Id. While Love does not deal with the precise exception that has developed here, e.g., the interplay of CPLR 5002 and Insurance Law §5102(d), in Denio v. State of New York, 7 N.Y.2d 159, 163 (2006), another Fourth Department case arising out of the Court of Claims, and also a case involving an automobile collision, the Court endorsed the decision to impose interest starting on the date of the liability determination, citing to Love,

and stating that "[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.'" Id. at 167. Notably, in the alternative, should the plaintiff be *unsuccessful* at proving serious injury at trial, or a plaintiff in another type of case (such as a case under the Labor Law) be *unsuccessful* at proving causation, the Court and/or a jury would be entitled to make an award of $0, and therefore there would be no consequence to defendant as to the previous attachment of interest at the determination of liability, as there would of course be no interest on a "no cause" or $0 verdict.

In the instant case, the lower Court's decision awarding summary judgment to Claimant-Appellant, which was postured as a motion to renew a prior motion for summary judgment on the issue of liability after the Court of Appeals decision of Rodriguez v. City of New York, 311 N.Y.2d 312 (2018), stated that the case would be conferenced with counsel as to when the ***issue of damages*** would be heard. (R. at 432-436.) Further, as set forth in Rodriguez, "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault," thereby reducing the issues that must be proven for a finding of ***liability***. Rodriguez, 311 N.Y.2d at 324-325. The Rodriguez court further explained that "[i]f it appears that the only triable issues of fact arising on a motion for summary

judgment relate to the ***amount or extent of damages*** . . . the court may, when appropriate for expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion." Id. at 318 (*citing* CPLR §3212(c)) [emphasis added].

Lastly, it is further imperative that this Court revisit this issue as a matter of public policy and fairness and find that prejudgment interest becomes due as of the date that common-law liability is established, whether it be by summary judgment, verdict, or default.

The current "Fourth Department rule" places motor vehicle plaintiffs on unequal footing from all other plaintiffs who seek damages for injuries that do ***not*** involve a motor vehicle collision and are awarded liability either by summary judgment, verdict or default, (and who are therefore able to avail themselves of the attachment of prejudgment interest at the time of that finding of liability, simply because their injury(ies) were caused by some incident other than a motor vehicle collision). Even more specifically, the Fourth Department's holding 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 A.D.3d at 64-65.

There is an additional arbitrary level of inequity between motor vehicle plaintiffs whose claims accrue within the Fourth Department and those whose

claims accrue within the First, Second and Third Departments, as well as between motor vehicle plaintiffs in the Fourth Department and plaintiffs in other types of action in the Fourth Department whose verdicts are reversed on appeal due to damages not established at trial.

The current "Fourth Department rule" also undermines the origin and role of the "serious injury threshold requirement" of the "No-Fault Law," discussed at length in the Amicus Curiae Brief submitted on behalf of the New York State Academy of Trial Lawyers to the Appellate Division, Fourth Department, to which Claimant-Appellant refers this Court, in the interests of efficiency and avoiding duplicity.

CONCLUSION

Accordingly, it is respectfully submitted that this Court should (1) **AFFIRM** the decision of the intermediate appellate court that the exception to the preservation rule was properly applied in this case and (2) **REVERSE** the decision of the Appellate Division, Fourth Department and therefore **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 the "serious injury threshold" requirement in negligence actions governed by New York's No-Fault Law is an issue of damages and 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.

Should you have any questions or require additional information, please do not hesitate to contact my office. Thank you for your time and consideration of this matter.

Respectfully Submitted,
KENNY & KENNY, PLLC

Heidi M. P. Hysell, Esq.
Michael P. Kenny, Esq.

Enclosures

Cc: Frederick Brodie, Esq.

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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Dated: August 10, 2023
Syracuse, New York

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New York State Court of Appeals

MICHAEL SABINE,

AFFIDAVIT OF SERVICE

Claimant-Appellant,

-vs-

THE STATE OF NEW YORK,

Defendant-Respondent.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:

The Undersigned hereby swears that he is a person of such age and discretion as to be competent to serve papers.

That on Friday, August 11, 2023, he did file one (1) original and one (2) copies of the *Letter Brief,* three (3) copies of the *Amicus Curiae Brief, Appellants AD Brief, AD Order, Appellants AD Record, Appellants AD Reply Brief, Appellants Motion, Notice of Entry, Respondent's AD Brief, Respondents AD Motion, the filing fee check and the Original Affidavit of Service* with the New York State Court of Appeals. In addition, he did serve one (1) copy of the *Letter Brief,* one (1) copy of the *Amicus Curiae Brief, Appellants AD Brief, AD Order, Appellants AD Record, Appellants AD Reply Brief, Appellants Motion, Notice of Entry, Respondent's AD Brief, Respondents AD Motion and a copy of the Affidavit of Service* upon the person(s) hereinafter named by placing in a sealed envelope in the exclusive care of the Federal Express (FedEx) for overnight delivery to the place and address stated below, which is the last known address.

Addressee:

Frederick A. Brodie, Esq., AAG
New York State Attorney General's Office
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Steven White

Sworn to before me this
11 day of August, 2023

Notary

JANE COLACINO PIERCE
Notary Public, State of New York
No. 01CO0010196
Qualified In Ontario County
Commission Expires June 26, 2027