No. APL- 2023-00096

To be argued by:
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10 minutes requested

State of New York
Court of Appeals

MICHAEL SABINE,

Claimant-Appellant,

v.

STATE OF NEW YORK,

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT

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Dated: March 8, 2024

Court of Claims, Claim No. 125759
Fourth Department No. CA-22-00092

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PRELIMINARY STATEMENT

This appeal concerns the issue of when prejudgment interest begins to run in automobile-accident cases. The Court of Claims (Fitzpatrick, J.) granted summary judgment to claimant Michael Sabine, holding that the defendant (the State) was negligent. The court subsequently held a trial to determine (1) whether claimant had sustained a "serious injury" under Insurance Law § 5104(a); (2) whether the automobile accident had caused that injury; and (3) what damages claimant had suffered. After trial, in a decision and order dated October 27, 2021, the court found that claimant had sustained a serious injury; found that the automobile accident had caused the injury; and awarded claimant $550,000 for past and future pain and suffering.

The final judgment assessed interest at the statutory rate of 9% per annum from October 27, 2021 (the date of the post-trial order finding serious injury, causation, and damages) to December 22, 2021 (the date final judgment was entered). On appeal to the Appellate Division, Fourth Department, claimant argued that he

was entitled to interest from September 26, 2018 (the date of the order granting summary judgment on negligence).

Under section 5002 of the Civil Practice Law and Rules (C.P.L.R.), prejudgment interest on an award of damages in any action shall be recovered "from the date the verdict was rendered" to the date of entry of final judgment. Claimant equates the "verdict" with the summary judgment order on negligence, even though the issues of causation and serious injury had yet to be decided. And claimant further argues that prejudgment interest should run from the time that defendant's "common-law" liability is determined, without regard to when the presence of a "serious injury" is determined, because the latter is not an element of negligence under the common law.

As shown below, this Court should not consider claimant's argument because, even setting aside the question of serious injury, *causation* is an element of liability under the common law and *that* issue also was not decided until the October 27, 2021 order. Accordingly, the State's liability for claimant's injuries was not established until October 27, 2021. If the Court reaches the issue

claimant raises, it should still affirm. The Court of Claims and the Appellate Division each correctly held that interest on claimant's award for non-economic losses began to run on the date of the post-trial order finding that claimant had suffered serious injury.

Claimant's arguments implicate two statutory regimes: article 50 of the C.P.L.R., which provides for interest on awards; and article 51 of the Insurance Law, which contains New York's no-fault law for automobile-accident cases (the No-Fault Law). Under C.P.L.R. article 50, when trial has been bifurcated, the defendant's obligation to pay interest becomes fixed as of the date of the liability verdict, even though the amount of damages has yet to be determined. Under Insurance Law § 5104(a), however, claimants in automobile-accident cases have "no right of recovery" for non-economic losses such as pain and suffering unless they prove they have suffered a "serious injury" as defined in the statute.

When claimants have no right of recovery, the defendants cannot be held liable. Therefore, in a no-fault case that has been bifurcated for trial where the claimant seeks to recover non-economic losses, prejudgment interest should not commence

running until the element of "serious injury" under Insurance Law § 5104(a) has been proven.

QUESTIONS PRESENTED

1. Whether the judgment below, including its calculation of prejudgment interest, should be affirmed without considering the issue raised by claimant because the Court of Claims deferred for trial not only the issue of serious injury but also the issue of causation, a finding that was also necessary before liability could be imposed.

The Court of Claims did not expressly address this point, but it did in fact defer both serious injury and causation for decision after trial. The Appellate Division expressly stated that defendant's obligation to pay damages to claimant was not established until both causation and serious injury were established at trial. (R499.)

2. Whether the courts below correctly determined that prejudgment interest does not commence running in an automobile accident case until negligence and serious injury have both been found in the claimant's favor.

The Court of Claims (Record on Appeal [R] 32, 466) and the Appellate Division (R498-499), both answered this question in the affirmative.

STATEMENT OF THE CASE

A. New York's No-Fault Law and Prejudgment Interest

Enacted in 1973, New York's No-Fault Law provides a plan for compensating automobile-accident victims for their economic losses without regard to fault or negligence. *Oberly v. Bangs Ambulance, Inc.,* 96 N.Y.2d 295, 296-97 (2001). The statute requires that every automobile owner's liability-insurance policy provide first-party benefits for losses arising out of the use or operation of the insured vehicle, regardless of who was at fault in the accident. Insurance Law § 5103(a)(1). "First party benefits" are payments to reimburse a person for "basic economic loss" from personal injury. Insurance Law § 5102(b). "Basic economic loss" is defined as up to $50,000 in damages, with various limitations. Insurance Law § 5102(a).

At the same time, the No-Fault Law significantly limits the ability of automobile-accident plaintiffs to bring tort litigation. *See*

Walton v. Lumbermens Mut. Cas. Co., 88 N.Y.2d 211, 214 (1996). In particular, the No-Fault Law provides that "there shall be no right of recovery for non-economic loss, except in the case of a serious injury." Insurance Law § 5104(a). Non-economic loss includes "pain and suffering and similar non-monetary detriment." *Id.* § 5102(c). Serious injury is defined as one of a list of nine specific categories of physical injury. *Id.* § 5102(d).

The No-Fault Law thus embodies a legislative compromise: injured persons receive prompt payment for basic economic loss "in exchange for a limitation on litigation." *Pommells v. Perez,* 4 N.Y.3d 566, 571 (2005).

The right to recover interest on a sum awarded by a court in New York is purely statutory. *Mfrs. & Traders Trust Co. v. Reliance Ins. Co.,* 8 N.Y.3d 583, 588 (2007); *Matter of Bello v. Roswell Park Cancer Inst.,* 5 N.Y.3d 170, 172 (2005). Under C.P.L.R. 5002, pre-judgment interest on an award of damages in any action shall be recovered "from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment." Applying that provision, this Court has held that if the issues of liability and

damages are bifurcated for trial, the defendant's obligation to pay interest under C.P.L.R. 5002 becomes fixed "as of the date of the liability verdict." *Rohring v. City of Niagara Falls,* 84 N.Y.2d 60, 70 (1994); *see also Gunnarson v. State,* 70 N.Y.2d 923, 924-25 (1987) (applying rule to the State).

Consistent with Insurance Law § 5104(a), the Fourth Department has held that in a no-fault case, liability for non-economic loss will not attach until "serious injury" has been found, either as a matter of law or by the trier of fact. *Ruzycki v. Baker,* 301 A.D.2d 48, 52 (4th Dep't 2002); *DePetres v. Kaiser,* 244 A.D.2d 851, 852 (4th Dep't 1997). Consequently, applying C.P.L.R. 5002, the Fourth Department has held that prejudgment interest in a no-fault case did not commence running until serious injury was found to exist. *Manzano v. O'Neil,* 298 A.D.2d 829, 830 (4th Dep't 2002). The Fourth Department adhered to those holdings in this case. (R499.)

B. The Accident

Claimant was injured in an automobile accident while driving his pickup truck in Waterloo, New York. (R7, 330-331.) The other driver involved in the collision, Linzy Patrick, was driving a State-owned pickup truck on State business. (R374.) While in the passing lane, attempting to pass claimant's truck, Patrick lost control of her vehicle and spun into claimant's lane, where claimant's truck collided with it. (R7, 167-168, 283-286, 332.) Patrick had tried to pass claimant's vehicle because claimant was transporting bales of hay and pieces of hay were blowing off the back of his truck and distracting Patrick. (R232, 271, 275, 276-277, 301.)

After speaking with Patrick briefly, claimant called the State Police to the scene. (R9, 170.) Claimant did not report any injuries at the scene of the accident (R9, 174) or go to the emergency room (R176-177). Although claimant's truck was damaged, he was able to drive it home and park it. (R9, 174.) When he got inside and sat down to rest, claimant's wrist and shoulder hurt and he called his doctor for an appointment. (R9, 175.) Claimant later underwent physical therapy and medical treatment. (R9-14, 178, 191.)

C. Proceedings in the Court of Claims

Claimant commenced this action in the Court of Claims, alleging that he sustained "physical, economic and emotional damages" as a result of the accident. (R53.) To recover non-economic loss under New York's No-Fault Law, loss, claimant alleged that he had sustained a "serious injury" as defined in Insurance Law § 5102(d). (*See* R52.) The State answered, asserting among other things that claimant had not suffered a serious injury. (*See* R60; *see also* R83-84 [response to claimant's demand for bill of particulars].)

Claimant moved for summary judgment "on the issue of liability" but did not raise the issue of serious injury. (R63.) The State opposed the motion. (R333-347.) Among other things, the State pointed out that claimant had submitted no proof that he suffered a serious physical injury and the court "cannot find liability of the Defendant without determining the issue of serious physical injury." (R334.) Therefore, the State argued, although the court could rule on the limited issue of negligence, the court could

not rule on liability "until it determines if Claimant suffered a serious physical injury." (R340.)

In a decision and order dated November 8, 2017 (R373-380), the Court of Claims denied claimant's motion. The court held that whether Patrick was negligent under the circumstances, and whether claimant was partially negligent, were questions of fact that precluded summary judgment. (R379.)

Claimant moved for leave to renew on June 27, 2018 (R381), arguing that under the recently issued decision in *Rodriguez v. City of New York,* 31 N.Y.3d 312 (2018), claimant could obtain partial summary judgment on the issue of the State's negligence without establishing his own lack of comparative negligence. (R385-389, 391.) The State opposed the renewal motion. (R409-412.) In a decision and order dated September 26, 2018 (R432-436), the Court of Claims concluded that it had erred in denying summary judgment based on claimant's comparative negligence (R434). The court also "sua sponte" reconsidered its prior determination that there were triable issues of fact regarding the State's negligence and concluded that claimant had met his burden on his summary

judgment motion. (R434-435 & n.1.) Accordingly, the court granted the motion to renew and granted partial summary judgment to claimant. (R436.)[1]

In January 2021, the court conducted a trial on the issues of serious injury and damages. (R7.) In a decision and order dated October 27, 2021 (R7-30), the court found that claimant had suffered a serious injury within the meaning of the No-Fault Law, *see* Insurance Law § 5102(d) (R24, 28-29), and that claimant had "proven to a degree of medical certainty that his injuries are causally related to the accident" (R29). The court, however, found that claimant had not submitted evidence of unpaid past medical expenses and that claimant's request for future medical expenses was speculative. (R29.) Consequently, the court awarded claimant

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[1] Although the court ordered that an interlocutory judgment be entered in claimant's favor (R436), no separate interlocutory judgment was entered. While the court's opinion granted claimant's motion for leave to renew his earlier motion for partial summary judgment on liability (*see* R381, 432, 436), the court (through an email from its law clerk) later clarified that the grant of partial summary judgment addressed the issue of negligence only (*see* R466).

$550,000 solely for his non-economic losses: $375,000 for past pain and suffering and $175,000 for future pain and suffering. (R29.)

D. The Computation of Interest

On December 22, 2021, the Court of Claims issued a judgment awarding claimant damages in the amount of $550,000 plus interest at the statutory rate of 9% per annum from October 27, 2021 (the date of the post-trial order finding serious injury) to December 22, 2021 (the date final judgment was entered). (R31-33.)

Following the entry of judgment, claimant's counsel questioned why the court had computed prejudgment interest from the date of the post-trial order finding serious injury rather than the date of the September 26, 2018 order granting partial summary judgment. (*See* R437.)

Judge Fitzpatrick, through her law clerk, advised that the award was consistent with *Ruzycki v. Baker,* 301 A.D.2d 48 (4th Dep't 2002). (R437, 466.) In *Ruzycki*, the Fourth Department held that in a no-fault case seeking to recover for non-economic injury, a court may not grant summary judgment to a plaintiff on liability

(as opposed to the more limited issue of negligence) until it has addressed the issue of serious injury. *See id.*, 301 A.D.2d at 52.

In a letter (R437-438), claimant urged the court to follow *Van Nostrand v. Froehlich,* 44 A.D.3d 54 (2d Dep't 2007), *app. dismissed,* 10 N.Y.3d 837 (2008), where a divided panel of the Second Department held, 3-2, that prejudgment interest may commence running in a no-fault case before serious injury is found. Nonetheless, the Court of Claims adhered to *Ruzycki,* which was controlling precedent in the Fourth Department where the claim arose. (R466.) Claimant did not move to alter, amend, or vacate the judgment.

Claimant appealed to the Fourth Department. (R3.) Claimant limited his appeal to the portion of the judgment under which prejudgment interest commenced running on October 27, 2021, the date of the post-trial order finding serious injury, rather than September 26, 2018, the date when claimant was awarded partial summary judgment on negligence. (R3.)

E. The Appellate Division's Order

The Appellate Division, Fourth Department, unanimously affirmed the judgment. (R498-499.) Although claimant had not preserved the issue by moving for relief from the judgment, three Justices found that the timing of prejudgment interest fell within an exception to the preservation requirement for a "question of law appearing on the face of the record" that could not have been avoided by the opposing party if brought to that party's attention in a timely manner. (R499.) Two justices concurred in the result on the ground that the claimant's challenge to the accrual date used by the trial court for calculating prejudgment interest had not been preserved for appellate review. (R499-500.)

The Appellate Division rejected claimant's contention that interest began to run when the Court of Claims entered summary judgment on negligence. Citing *Ruzycki*, the court wrote that in a bifurcated no-fault case, before a defendant can be held liable for the plaintiff's non-economic loss, the issue of serious injury must be decided, either by a trier of fact or by the court as a matter of law. (R499.)

Although claimant had sought summary judgment on "liability," he had not addressed serious injury and the Court of Claims therefore properly granted summary judgment on negligence alone. (R499.) The Appellate Division held that the State's obligation to pay damages to claimant "was not established until the issue of causation with respect to claimant's injuries was resolved and claimant proved at trial that claimant sustained a serious injury." (R499 [internal quotation marks, brackets, ellipses, and citation omitted].) The Court of Claims therefore had correctly calculated the award of prejudgment interest from the date of the decision finding that claimant had sustained a serious injury caused by the accident. (R499.)

Two Justices concurred in the result, opining that claimant's sole contention on appeal was unpreserved. (R499-500.) The Appellate Division subsequently granted claimant's motion for leave to appeal. (6/9/23 Order, NYSCEF #27.) This Court received a letter-brief from each side but then, by letter dated December 12, 2023, directed that the appeal proceed in the normal course of briefing and argument.

ARGUMENT

Respondent agrees with the majority opinion from the Fourth Department that the issue of when prejudgment interest began to accrue was properly reached by the Appellate Division and is preserved for this Court's review. As the majority concluded (R499), the question is one that appears on the face of the record and could not have been avoided or cured by the opposing party if it had been brought to that party's attention in a timely manner. Under such circumstances, this Court has recognized an exception to the general rule that questions not properly raised below are unpreserved for this Court's review. *See Matter of Rivera v. Smith,* 63 N.Y.2d 501, 516 n.5 (1984); *American Sugar Refining Co. v. Waterfront Comm'n of New York Harbor,* 55 N.Y.2d 11, 25 (1982); *Telaro v. Telaro,* 25 N.Y.2d 433, 439 (1969); Arthur Karger, The Powers of the New York Court of Appeals § 17:1 at 591-92 (3d ed. 2005).[2]

[2] This line of authority also supports this Court's consideration of respondent's argument in Point I, below.

Nevertheless, the Court need not reach the question of whether prejudgment interest begins to accrue before serious injury has been established because, as explained below in Point I, the trial held in the Court of Claims decided not only serious injury but also causation—an essential element of liability. If the Court does consider whether prejudgment interest does not commence until a finding of serious injury, it should affirm for the reasons set forth below in Point II.

POINT I

THIS COURT MAY AFFIRM WITHOUT REACHING CLAIMANT'S ARGUMENT ON SERIOUS INJURY BECAUSE THE COURT OF CLAIMS DEFERRED RULING ON CAUSATION AS WELL AS SERIOUS INJURY

This Court need not reach claimant's argument that prejudgment interest began to run when the Court of Claims found the defendant to be negligent, even though that court had not yet decided whether there was serious injury. That is because when the Court of Claims determined negligence, it had also not yet decided whether Claimant's asserted injuries were caused by the accident. In its subsequent October 27, 2021 decision, the Court of Claims

determined not only that there was serious injury, but also that the injury was "causally related to the accident." (*See* R29.) The Court of Claims rejected the State's argument that claimant would have required neck surgery even if the accident had not occurred (R28-29), and instead found that claimant had proven causation "to a degree of medical certainty" (R29).

The element of causation must be established before liability may be imposed for negligence. *See Sheehan v. City of New York,* 40 N.Y.2d 496, 501-02 (1976); *see, e.g., Pommells v. Perez,* 4 N.Y.3d 566, 580 (2005) (in no-fault case, absent evidence of causation, defendant was entitled to summary dismissal of complaint). (*See also* Amicus Br. at 3 [recognizing causation as an element of liability].) Prejudgment interest therefore does not begin to run "until the issue of causation with respect to plaintiff's injuries [i]s resolved." *Manzano*, 298 A.D.2d at 830.

Thus, even if prejudgment interest were to commence upon a finding of "common-law liability" as claimant urges (Br. at 6, 13, 21), such liability was not established until October 27, 2021, when the Court of Claims found that claimant's injuries were "causally

related to the accident." (R29.) The Fourth Department's majority opinion observed that the State's obligation to pay damages to claimant was not established until the issues of causation *and* serious injury were both established. (R499.) The Court of Claims therefore started prejudgment interest on the correct date, and this Court can affirm on that alternative ground.

POINT II

THIS COURT SHOULD AFFIRM THE DECISION BELOW AND HOLD THAT PREJUDGMENT INTEREST DOES NOT COMMENCE RUNNING UNTIL SERIOUS INJURY IS FOUND

If this Court reaches claimant's challenge to the Fourth Department rule for commencing prejudgment interest in cases like this, it should affirm the Fourth Department's holding that prejudgment interest on an award for non-economic losses under the No-Fault Law does not commence running unless and until "serious injury" has been found. (R499.)

A. Under the No-Fault Law, Serious Injury Must Be Found Before a Defendant May Be Held Liable for Non-Economic Damages.

By enacting the No-Fault Law, the Legislature "modified the common-law rights of persons injured in automobile accidents." *Licari v. Elliott,* 57 N.Y.2d 230, 237 (1982). In particular, under the No-Fault Law, "there shall be no right of recovery" for non-economic loss in a motor-vehicle negligence action unless claimants can prove they sustained a "serious injury." Insurance Law § 5104(a). That requirement is intended "to separate 'serious injury' cases, which may proceed in court, from the mountains of other auto accident claims, which may not." *Pommells*, 4 N.Y.3d at 571.

Based on the plain language of Insurance Law § 5104(a), the Fourth Department has held that "the term 'liability' in motor vehicle accident cases encompasses both negligence and serious injury." *Ruzycki,* 301 A.D.2d at 51-52. As a result, defendants in such cases "are not liable unless plaintiff proves at trial that she sustained a serious injury." *DePetres,* 244 A.D.2d at 852.

The Fourth Department's analysis is sound. A defendant can be "liable" to a claimant only if the claimant has a "right of recovery"

against the defendant. *See, e.g., Wehringer v. Standard Sec. Life Ins. Co.,* 57 N.Y.2d 757, 759 (1982) ("absent a duty upon which liability can be based, there is no right of recovery" for mental distress from breach of contract). A "right of recovery" is synonymous with a claim. *See Fields v. Western Millers Mut. Fire Ins. Co.*, 290 N.Y. 209, 216 (1943), *mtn. to amend remittitur granted,* 290 N.Y. 872 (1943).

Where a statute like Insurance Law § 5104(a) expressly forecloses a "right of recovery," there can be no liability. The word "liable" itself means "legally obligated." *See* Black's Law Dictionary 1099 (11th ed. 2019); *see also id.* at 1097 (defining "liability" as "the quality, state, or condition of being legally obligated or accountable"). When the claimant has no right of recovery for an alleged injury, the defendant is not legally obligated to pay the claimant anything on account of that injury.

Under the No-Fault Law, therefore, serious injury is a "threshold" issue and defendants in a no-fault case cannot be held liable for non-economic losses unless and until serious injury has been proven. *See Raffellini v. State Farm Mut. Auto Ins. Co.,*

9 N.Y.3d 196, 205 (2007). "While it is clear that the Legislature intended to allow plaintiffs to recover for non-economic injuries in appropriate cases," this Court has explained, the Legislature "also intended that the court first determine whether or not a prima facie case of serious injury has been established which would permit a plaintiff to maintain a common-law cause of action in tort" in such cases. *Licari,* 57 N.Y.2d at 237.

Because the phrase "there shall be no right of recovery" in Insurance Law § 5104(a) is unambiguous, the Court should decline the amicus's invitation to examine a prior draft of the No-Fault Law that was not enacted (Amicus Br. at 14). *See Matter of Walsh v. New York State Comptroller,* 34 N.Y.3d 520, 524 (2019) ("Where the statutory language is unambiguous, a court need not resort to legislative history[.]"). To the extent legislative history is considered, it shows the Governor expected that enactment of the No-Fault Law would "eliminate the vast majority of auto accident negligence suits." Governor's Approval Memorandum (Feb. 13, 1973), included in Bill Jacket for L.1973, ch. 13, at 31 (ADD42).

Contrary to claimant's suggestion (Br. at 8-9, 12-13, 17-18), the Appellate Division's order does not conflict with this Court's decision in *Love v. State,* 78 N.Y.2d 540 (1991). As claimant acknowledges (*see* Br. at 17-18), *Love* did not address the No-Fault Law's provision that "there shall be no right of recovery" for non-economic loss absent serious injury. *See* Insurance Law § 5104(a). Instead, this Court recognized generally that prejudgment interest does not run until "the defendant's obligation to pay the plaintiff is established, and the only remaining question is the precise amount that is due." *Love,* 78 N.Y.2d at 544. In no-fault cases, a defendant's obligation to pay for non-economic losses is not established until serious injury has been proven.

Also not germane to the issue before this Court is *Denio v. State,* 7 N.Y.3d 159 (2006) (*see* Br. at 18). In *Denio*, this Court held that the Court of Claims did not abuse its discretion in applying a 9% interest rate to a judgment against the State. *Id.*, 7 N.Y.3d at 171. Although this Court observed that liability and damages had been bifurcated, *id.* at 163, it did not say when serious injury was

determined to exist.[3] Nor did the Court consider whether prejudgment interest should have commenced running before serious injury was found.

Finally, claimant is not assisted by this Court's decision in *Rodriguez* (*see* Br. at 18-19.) As the Court of Claims recognized (*see* R466), *Rodriguez* did not discuss the issue of serious injury. Rather, *Rodriguez* held that a plaintiff may obtain partial summary judgment on the defendant's negligence without having to prove the absence of comparative fault. *Rodriguez,* 31 N.Y.3d at 315, 323. *Rodriguez*'s holding stemmed directly from C.P.L.R. 1411, which provided that a claimant's negligence "shall not bar recovery." *See Rodriguez* at 317-18. Here, in contrast, the No-Fault Law establishes such a bar: absent serious injury, a claimant shall have "no right of recovery" for non-economic loss. Insurance Law § 5104(a).

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[3] Due to the grave injuries that the claimant's daughter incurred, *see* 7 N.Y.3d at 163, the existence of "serious injury" appears to have been uncontested. *See Denio v. State,* Claim No. 88215 (Ct. Cl. Dec. 15, 2001) (submitted in the separate addendum filed herewith as ADD1 through ADD41). The Court of Claims observed that "[t]here was no dispute that Ms. Denio suffered extensive neurologic, orthopedic, and facial damage as a result of this accident." (ADD2.)

B. The Majority of Appellate Division Departments Agree that Serious Injury Must Be Found Before Imposing Liability in a Bifurcated No-Fault Case.

The conflict that claimant and the amicus purport to find among the Appellate Division's departments (Br. at 19-21; Amicus Br. at 12) is exaggerated. Only the Second Department has concluded that prejudgment interest may begin to run before a plaintiff has established serious injury, and the court's rationale for this rule is unpersuasive.

Like the Fourth Department, the First Department treats serious injury as a threshold issue that must be satisfied separately before a claimant may recover non-economic losses and other damages beyond the basic economic loss defined in Insurance Law § 5102(a). *See Reid v. Brown,* 308 A.D.2d 331, 332 (1st Dep't 2003); *Shinn v. Catanzaro,* 1 A.D.3d 195, 199 (1st Dep't 2003).

The Third Department's approach is similar; under No-Fault Law, "an injured party's right to bring a personal injury action for non-economic losses" in an automobile-accident case "is limited to those instances where such individual has incurred a serious injury." *Noor v. Fera,* 200 A.D.3d 1366, 1367 (3d Dep't 2021)

(internal quotation marks and citation omitted); *Jones v. Marshall,* 147 A.D.3d 1279, 1283 (3d Dep't 2017) (similar); *see also Kelley v. Balasco,* 226 A.D.2d 880, 880 (3d Dep't 1996) (finding of serious injury "satisfies the no-fault threshold, thereby eliminating that issue from the case and permitting the plaintiff to recover any damages proximately caused by the accident").

Thus, in the First and Third Departments, consistent with Insurance Law § 5104(a), the absence of serious injury bars claims for non-economic loss. *See, e.g., Sooknanan v. Pinales,* 215 A.D.3d 608, 608-09 (1st Dep't 2023); *Lemieux v. Horn,* 209 A.D.3d 1100, 1101 (3d Dep't 2022), *aff'd,* 39 N.Y.3d 1108 (2023); *Ubozoh v. Mueller,* 204 A.D.3d 485, 485-86 (1st Dep't 2022); *Scarincio v. Cerillo,* 195 A.D.3d 1266, 1269 (3d Dep't 2021).

Indeed, even the Second Department treats serious injury as a "threshold issue" that can defeat a claim if not established. *See, e.g., McLoud v. Reyes,* 82 A.D.3d 848, 849 (2d Dep't 2011); *see also Brun v. Farningham,* 149 A.D.3d 686, 687 (2d Dep't 2017) (affirming grant of summary judgment and dismissal of complaint where plaintiff failed to raise triable issues of fact on "the threshold

issue of serious injury") (internal quotation marks and citation omitted); *Palumbo v. Carey,* 90 A.D.3d 627, 628 (2d Dep't 2011) (serious injury is a "threshold requirement").

Although the Second Department expressed disagreement with the Fourth Department on the commencement of prejudgment interest, it mistakenly focused on terminology: whether serious injury should be characterized as an issue of "liability" or one of "damages." *See Van Nostrand,* 44 A.D.3d at 58-59. (*See also* Amicus Br. at 2, 3 [stating question similarly].)

The outcome of such cases should not be determined by labeling. Regardless of what label is applied, the No-Fault Law requires that serious injury be established before liability for non-economic damages may be imposed in motor-vehicle accident cases. Insurance Law § 5104(a). Thus, the Fourth Department views serious injury as a prerequisite for the running of prejudgment interest *not* because serious injury is inherently an element of "liability," but instead because serious injury must be proven before the court can assign liability for non-economic losses in a no-fault

case, "[r]egardless of whether serious injury is viewed as an element of liability or an element of damages." *Ruzycki,* 301 A.D.2d at 51.

C. The Policy Arguments of Claimant and the Amicus Do Not Override the Legislature's Express Provision Making Serious Injury a Separate Element in No-Fault Cases.

This Court should reject the policy arguments advanced by claimant and the amicus for commencing interest accrual before serious injury has been found. None of those arguments can override the Legislature's policy determination, stated expressly in the No-Fault Law, that claimants who do not suffer "serious injury" shall have "no right of recovery" for non-economic losses. Insurance Law § 5104(a).

First, claimant and the amicus argue that commencing interest accrual upon a finding of serious injury places automobile-accident claimants on an "unequal footing" with other injured parties (Br. at 19-20, 20-21; *see also* Amicus Br. at 15-16). That, however, was precisely the Legislature's plan. In passing the No-Fault Law, the Legislature intended to treat automobile-accident claimants differently and "draw a line between motor vehicle

accidents and all other types of torts." *Walton,* 88 N.Y.2d at 214. The No-Fault Law was intended to "remove the vast majority of claims arising from vehicular accidents from the sphere of common-law tort litigation." *Id.* The Legislature sought "to weed out frivolous claims and limit recovery to significant injuries" in automobile-accident cases. *Dufel v. Green,* 84 N.Y.2d 795, 798 (1995). Thus, the No-Fault Law required automobile-accident claimants to prove serious injury before they could recover non-economic damages, *see* Insurance Law § 5104(a), whereas other tort claimants faced no such requirement.

Second, claimant asserts that juries in liability trials are frequently instructed to apportion fault without considering the extent of the plaintiff's injuries, while the question of serious injury is left for the damages phase of the trial (Br. at 16). *See Perez v. State,* 215 A.D.2d 740, 741-42 (2d Dep't 1995). To be sure, when that happens, the running of prejudgment interest must await a finding of serious injury, because under Insurance Law § 5104(a) liability for non-economic losses cannot be assigned in no-fault cases until serious injury is found. But the No-Fault Law does not *require* that

the issue of serious injury be deferred to the damages phase of trial. If plaintiffs' counsel wish to have prejudgment interest accrue earlier, they may still achieve that goal by (a) seeking summary judgment on the existence of serious injury, *see Zecca v. Riccardelli,* 293 A.D.2d 31, 35 (2d Dep't 2002); (b) including the existence of serious injury among the issues to be addressed in the first trial; or (c) opting for a traditional unified trial of all issues together.

Third, quoting *Van Nostrand,* the amicus suggests that the issue of serious injury will overlap with damages or the defenses thereto (Amicus Br. at 16). The No-Fault Law's definition of "serious injury," however, sets forth nine categories of injury that it defines as "serious"—for example, death, dismemberment, a fracture, or loss of a fetus. *See* Insurance Law § 5102(d). Those injuries may be found to have occurred without assessing the degree of monetary compensation required to remedy them.

To the extent that evidence of serious injury and damages is likely to overlap in a particular case, that consideration would weigh against bifurcating the trial in the first place. *See* C.P.L.R. 603 (court may bifurcate trials "[i]n furtherance of

convenience"); 22 N.Y.C.R.R. § 202.42(a) (bifurcation appropriate where it "may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action"). Whether to seek bifurcation is a matter of trial strategy, *see, e.g., People v. Sweeney,* 30 A.D.2d 1035, 1035 (4th Dep't 1968), and parties and counsel must consider a variety of factors, including overlap.

Finally, claimant points out that if there were insufficient proof of serious injury, the award at trial would be $0 and "there would be no consequence to defendant" (Br. at 18). But the Legislature did not intend no-fault cases with $0 damages to go to trial; rather, the No-Fault Law was designed to "'significantly reduce the number of automobile personal injury accident cases litigated in the courts.'" *Licari,* 57 N.Y.2d at 236 (quoting statutory history). In fact, when non-economic injuries are alleged, the Legislature "intended that *the court first determine* whether or not a prima facie case of serious injury has been established." *Id.* at 237 (emphasis added).

CONCLUSION

The Memorandum and Order of the Appellate Division, Fourth Department entered March 17, 2023, should be affirmed.

Dated: Albany, New York
March 8, 2024

Respectfully submitted,

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Frederick A. Brodie, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains **5,570** words, which complies with the limitations stated in § 500.13(c)(1).

Frederick A Brodie

FREDERICK A. BRODIE