NEW YORK SUPREME COURT
APPELLATE DIVISION: FOURTH DEPARTMENT

MICHAEL SABINE,

Claimant-Appellant,

v.

THE STATE OF NEW YORK,

Defendant-Respondent.

CA 22-00092

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

FREDERICK A. BRODIE, an attorney admitted to practice in New York State, affirms the following under penalty of perjury pursuant to C.P.L.R. 2106:

1. I am an attorney admitted to practice in the courts of the State of New York. I am not a party to this action. I am employed as an Assistant Solicitor General in the Office of Letitia James, Attorney General of the State of New York, counsel for The State of New York, defendant-respondent in the above-captioned appeal. Except where otherwise noted, this affirmation is based on my personal knowledge and the record on appeal to this Court, with which I am familiar from my work as counsel for the State in this matter.

2. I make this affirmation in opposition to claimant-appellant Michael Sabine's motion (NYSCEF #25) for leave to appeal from this

Court's Memorandum and Order entered March 17, 2023 (the Order). A true and correct copy of the Order is annexed as Exhibit A.

3. As shown below, Sabine's motion should be denied for any of three separate reasons: first, Sabine's proposed appeal would not squarely present the issue he seeks to raise; second, this case is unsuitable for review by the Court of Appeals because Sabine failed to preserve the issue he seeks to appeal; and finally, the four Departments are not truly in conflict on the issue.

Background

4. Prejudgment interest on an award of damages runs "from the date the verdict was rendered or the report or decision was made." C.P.L.R. 5002. When the issues are 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. *Rohring v. City of Niagara Falls,* 84 N.Y.2d 60, 70 (1994). In a motor-vehicle accident case subject to the no-fault law, "there shall be no right of recovery for non-economic loss, except in the case of a serious injury." Insurance Law § 5104(a). Consequently, in a line of precedent going back more than 20 years, this Court has held that until "serious injury" has been found,

liability for non-economic loss does not attach, *see Ruzycki v. Baker,* 301 A.D.2d 48, 51-52 (4th Dep't 2002), and interest does not begin running on such damages, *see Manzano v. O'Neil,* 298 A.D.2d 829, 830 (4th Dep't 2002).

5. Sabine was involved in a motor-vehicle accident with a State employee. On September 26, 2018, the Court of Claims granted partial summary judgment to plaintiff on the issue of negligence. (Record on Appeal [R] 434; *see also* R7.) At a trial on the remaining issues, the State disputed both (a) whether Sabine was seriously injured, and (b) whether the accident caused Sabine's injury. (*See* R15-29.)

6. In a decision dated October 27, 2021, the Court of Claims found that Sabine had suffered "serious injury" as defined in Insurance Law § 5102(d) and also that he had "proven to a degree of medical certainty that his injuries are causally related to the accident." (R29.) The Court of Claims consequently entered judgment against the State for Sabine's non-economic losses and specified that prejudgment interest on those damages would run from October 27, 2021. (R32.)

7. On appeal to this Court, Sabine argued that prejudgment interest instead should have commenced running on September 26, 2018,

when the Court of Claims granted partial summary judgment on negligence. In the Order, this Court affirmed the judgment's calculation of prejudgment interest. All five Justices on the panel voted for affirmance. Justices Curran and Ogden concurred in the result because Sabine's sole contention on appeal was unpreserved. (Ex. A at 2-3.)

8. Sabine now seeks leave to appeal to the New York Court of Appeals. Leave should be denied for the reasons that follow.

A. Sabine's Appeal Does Not Squarely Present the Issue He Seeks to Litigate.

9. Sabine urges that leave be granted to resolve a purported conflict within the Appellate Division over whether prejudgment interest on non-economic damages in a bifurcated motor-vehicle accident case begins running (a) when "common-law liability" is found, or (b) when serious injury has been found. (Affirmation of Michael P. Kenny, NYSCEF #25 [Kenny Aff.] ¶¶7, 12-13.)

10. Even assuming that a conflict exists (and, as shown below, there is none), an appeal in this case would not resolve it. That is because the Court of Claims' October 27, 2021 decision resolved *not only* the issue of serious injury, *but also* the issue of causation: whether Sabine's claimed injuries were "causally related to the accident." (*See* R29.)

11. 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); *accord Gregory v. Cavarello,* 155 A.D.3d 1508, 1510 (4th Dep't 2017), *lv. denied,* 30 N.Y.3d 913 (2018); *Koziol v. Wright,* 26 A.D.3d 793, 794 (4th Dep't 2006). Prejudgment interest therefore does not begin to run "until the issue of causation with respect to plaintiff's injuries [i]s resolved." *Manzano v. O'Neil,* 298 A.D.2d 829, 830 (4th Dep't 2002).

12. Here, even if prejudgment interest were to commence upon a finding of "common-law liability" as Sabine urges (Kenny Aff. ¶¶7, 13), such liability was not established until October 27, 2021, when the Court of Claims first found that Sabine's injuries were "causally related to the accident." (R29.)

B. This Case is Unsuitable for Review in the Court of Appeals Because Sabine Failed to Preserve the Issue He Seeks to Litigate.

13. This Court should also deny leave because Sabine failed to preserve the issue that he seeks to bring to the Court of Appeals. After the judgment was issued, Sabine's counsel made a phone call (*see* R437) and emailed a letter (R437-438, 466) to Judge Fitzpatrick's law clerk

contesting the interest calculation. The law clerk responded by email. (R466.) That response was not an order of the Court of Claims.

14. The law clerk stated that Sabine was "free to make a formal motion on this issue." (R466.) Despite that invitation, Sabine did not file a motion. Instead, he appealed to this Court without having preserved the issue he wished to argue.[1] Two members of the panel concluded that the Court of Appeals likely would not review the issue as a result. (Ex. A at 3.)

15. The three Justices in the majority held that the running of prejudgment interest fell within an exception to the preservation rule. (Ex. A at 2.) The exception encompasses issues that "could not have been obviated or cured by factual showings or legal countersteps in the trial court." (Ex. A at 2 [internal quotation marks and citation omitted].) The issue of when prejudgment interest begins to run, however, could have been obviated in the Court of Claims. Specifically, if Sabine had moved to amend the judgment to commence prejudgment interest on September 26, 2018, the State could have responded that causation was not decided

[1] In his motion papers, Sabine does not claim to have preserved the issue. (*See* Kenny Aff. ¶11.)

until October 27, 2021. As shown above in ¶¶ 10-12, that fact would have obviated the need to determine whether the separate issue of serious injury had to be decided before prejudgment interest could accrue.

C. There Is No True Conflict Among the Appellate Division's Departments.

16. Sabine vastly overstates the supposed conflict among the Departments. Whether serious injury should be tagged as an issue of "liability" or one of "damages," *see Van Nostrand v. Froehlich,* 44 A.D.3d 54, 58-59 (2d Dep't 2007), *app. dismissed,* 10 N.Y.3d 837 (2008), does not change the fact that it must be established before liability for non-economic damages may be imposed in motor-vehicle accident cases. As this Court recognized (Ex. A at 2), and as shown in the State's brief (*see* Resp. Br. at 13-14, 16-17), this Court treats serious injury as a threshold issue that must be proven before liability for non-economic loss can be established, "[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.

17. As the State further demonstrated, the First and Third Departments similarly treat serious injury as a threshold issue separate from negligence. (*See* Resp. Br. at 19-20 and cases cited.) Even the Second Department treats serious injury as a "threshold issue" that can obviate

the need to decide negligence. *See 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) (plaintiff's motion for summary judgment on liability was academic and properly denied where plaintiff failed to establish "the threshold issue of serious injury") (internal quotation marks and citation omitted).

18. Contrary to Sabine's suggestion (Kenny Aff. ¶15), the Order does not conflict with this Court's earlier decision in *Love v. State*, 164 A.D.2d 155 (4th Dep't 1990), or the Court of Appeals' affirmance in that case, *Love v. State,* 78 N.Y.2d 540 (1991). Neither decision addressed the no-fault law's provision that "there shall be no right of recovery" for non-economic loss unless and until serious injury is proven. *See* Insurance Law § 5104(a). Instead, the Court of Appeals 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 is shown. This Court thus *followed* the Court of Appeals' decision in *Love* when it held that interest did not commence

until causation and serious injury were both established. *Manzano,* 298 A.D.2d at 830.

WHEREFORE, defendant respectfully requests that Sabine's motion for leave to appeal to the Court of Appeals be denied.

Dated: Albany, New York
April 28, 2023

FREDERICK A. BRODIE
Assistant Solicitor General

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1057

CA 22-00092

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND OGDEN, JJ.

MICHAEL SABINE, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125759.)

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

POWERS & SANTOLA, LLP, ALBANY (MICHAEL J. HUTTER OF COUNSEL), FOR NEW YORK STATE ACADEMY OF TRIAL LAWYERS, AMICUS CURIAE.

Appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered December 22, 2021. The judgment awarded claimant money damages of $550,000.00 plus interest.

It is hereby ORDERED that the judgment so appealed from is affirmed without costs.

Memorandum: Claimant commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident that occurred when a truck owned by defendant and driven by one of its employees collided with the vehicle that claimant was driving. Claimant moved for, inter alia, partial summary judgment on the issue of "liability." The Court of Claims initially denied the motion insofar as it sought partial summary judgment, because, inter alia, the court concluded that defendant raised a triable issue of fact whether claimant was comparatively negligent. Claimant moved for leave to renew his motion for partial summary judgment, based on the decision of the Court of Appeals in *Rodriguez v City of New York* (31 NY3d 312 [2018]), and the court granted claimant's motion to renew and, on renewal, granted claimant's motion for partial summary judgment on the issue of negligence. Following a bench trial, the court determined, inter alia, that claimant had established that he sustained a serious injury within the meaning of Insurance Law § 5102 (d) and awarded him $550,000.00 in damages. Claimant now appeals from that part of a judgment that calculated the award of prejudgment interest from "the date of [the] decision establishing serious injury and damages . . . instead of the date that common-law liability attached by summary judgment in [c]laimant's favor." We affirm.

Claimant contends that the prejudgment interest in this automobile accident case should have run from the date of a "decision awarding common-law liability." Initially, we note that, even assuming, arguendo, that claimant failed to preserve his contention for our review, his contention falls within a recognized "exception to the preservation rule" and therefore preservation of the contention was not required (*Harriger v State of New York*, 207 AD3d 1045, 1046 [4th Dept 2022]). Specifically, claimant raises "[a] question of law appearing on the face of the record [that] may be raised for the first time on appeal [inasmuch as] it could not have been avoided by the opposing party if brought to that party's attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). The contention represents a purely legal issue that could not "have been obviated or cured by factual showings or legal countersteps in the trial court" (*id.* [internal quotation marks omitted]), related to the law in this Department with respect to the calculation of prejudgment interest in automobile accident cases.

Nevertheless, we reject claimant's contention. Under CPLR 5002, prejudgment interest begins to run from the date on which a "defendant's obligation to pay [a] plaintiff is established, and the only remaining question is the precise amount that is due" (*Love v State of New York*, 78 NY2d 540, 544 [1991]; *see Manzano v O'Neil*, 298 AD2d 829, 830 [4th Dept 2002]). "By enacting the No-Fault Law, the Legislature modified the common-law rights of persons injured in automobile accidents . . . to the extent that plaintiffs in automobile accident cases no longer have an unfettered right to sue for injuries sustained" (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *see* Insurance Law article 51). As a result, "[a] defendant is not liable for noneconomic loss under Insurance Law § 5104 (a) unless the plaintiff proves that he or she sustained a serious injury" (*Ruzycki v Baker*, 301 AD2d 48, 51 [4th Dept 2002]; *see* Insurance Law § 5102 [d]). Thus, "the issue of serious injury must be decided either by the court as a matter of law or by the trier of fact before a defendant will be held liable for damages for a plaintiff's noneconomic loss" (*Ruzycki*, 301 AD2d at 51). Here, claimant's pretrial motions sought summary judgment on the issue of "liability" without raising the issue of serious injury, and the court properly concluded that the relief sought was on the issue of negligence and granted summary judgment on that issue alone (*see id.*). Defendant'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] prove[d] at trial that [claimant] sustained a serious injury' " (*Manzano*, 298 AD2d at 830; *see DePetres v Kaiser*, 244 AD2d 851, 852 [4th Dept 1997]). The court was bound to apply the law as promulgated by this Court (*see Phelps v Phelps*, 128 AD3d 1545, 1547 [4th Dept 2015]). The court therefore properly calculated the award of prejudgment interest from the date of the decision determining, inter alia, that claimant sustained a serious injury.

All concur except CURRAN, and OGDEN, JJ., who concur in the result in the following memorandum: We concur in the result inasmuch as we conclude that claimant's sole contention on appeal—concerning the accrual date for the calculation of prejudgment interest—is

unpreserved for our review, requiring that we affirm the judgment (*see Panaro v Athenex, Inc.*, 207 AD3d 1069, 1070 [4th Dept 2022]; *Jones v Brilar Enters.*, 184 AD2d 1077, 1078 [4th Dept 1992]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). The majority assumes that the issue is unpreserved but reaches the merits of claimant's contention through application of an exception to the preservation rule (*see Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). In other words, on this appeal as of right from a final judgment (*see* CPLR 5701 [a] [1]), the majority is not limiting this Court's scope of review to those matters brought up for review pursuant to CPLR 5501 (a). We respectfully disagree with the majority to the extent that it elects to address an unpreserved issue of statewide interest inasmuch as it does nothing more than adhere to this Court's well-settled and decades-long precedent on that particular issue (*see generally Ruzycki v Baker*, 301 AD2d 48, 51 [4th Dept 2002]). In short, under the circumstances of this case, we disagree with the majority's decision to invoke what should be a very rare exception to rules of preservation only just to double down on our long-standing precedent. Indeed, by reaching claimant's contention challenging that precedent, the majority fails to fully recognize that the policy reasons underlying the preservation rule, and the rarity of times when we except from it, are "especially acute when the new issue seeks change in a long-established common-law rule," as is the case here (*Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359 [2003]).

Even though it appears that this Court's precedent governing claimant's contention directly conflicts with precedent in other departments (*compare Ruzycki*, 301 AD2d at 51, *with Van Nostrand v Froehlich*, 44 AD3d 54, 55, 59 [2d Dept 2007], *appeal dismissed* 10 NY3d 837 [2008]), we note that, under the circumstances of this case, the Court of Appeals likely will not review the issue because it was not raised before the Court of Claims (*see Telaro v Telaro*, 25 NY2d 433, 438-439 [1969]; *see generally* Arthur Karger, Powers of the New York Court of Appeals § 14:1 [3d ed rev, Aug. 2022 update]), and would decline to resolve the conflict based on this appeal. Consequently, we see no reason to reach claimant's unpreserved contention merely to reiterate our settled precedent. We accordingly concur in the result only.

Entered: March 17, 2023

Ann Dillon Flynn
Clerk of the Court