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September 28, 2023

Hon. Lisa A. LeCours
Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Sabine v. State of New York*, APL 2023-00096

Dear Ms. LeCours:

Please accept this letter as the submission of respondent, the State of New York, under Rule 500.11.

In this automobile-accident case, 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); and (2) whether the automobile accident had caused that injury. 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 in Point I, 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 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 affirm for the reasons set forth in Point II. 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 and 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.

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, prejudgment 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. (ADD2.[1])

B. The Accident

Claimant was injured in an automobile accident while driving his pickup truck in Waterloo, New York. (R7, 330-331.[2]) 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

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[1] The memorandum and order of the Appellate Division entered March 17, 2023 is attached hereto as pages ADD1 through ADD3 of the Addendum.

[2] References to "R__" refer to pages in the Record on Appeal that claimant filed in the Appellate Division.

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 extensive 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 and had engaged in negligent or culpable conduct. (*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.)[3]

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

[3] Although the court ordered that an interlocutory judgment be entered in claimant's favor (R436), no separate interlocutory judgment was entered.

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). In *Van Nostrand,* 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 that commenced prejudgment interest 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 Memorandum and Order

The Appellate Division, Fourth Department, unanimously affirmed the judgment. (ADD1-2.) Although claimant had not moved 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. (ADD2.)

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. (ADD2.)

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. (ADD2.) 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." (ADD2 [internal quotation marks, brackets, ellipses, and citation omitted].) Consequently, the Court of Claims properly calculated the award of prejudgment interest from the date of the decision determining that claimant had sustained a serious injury. (ADD2.)

Two Justices concurred in the result, opining that claimant's sole contention on appeal was unpreserved. (ADD2-3.) The Appellate Division subsequently granted claimant's motion for leave to appeal. (6/9/23 Order, NYSCEF #27.)

ARGUMENT

POINT I

CLAIMANT'S ARGUMENTS FAIL AT THE THRESHOLD BECAUSE THE COURT OF CLAIMS DEFERRED RULING ON CAUSATION AS WELL AS SERIOUS INJURY

This Court should affirm the judgment. However, the Court need not reach claimant's argument that prejudgment interest began to run when defendant's negligence was determined even though the issue of serious injury had not yet been decided. 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 Claimant's asserted injuries were "causally related to the accident." (*See* R29.) The court 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 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 (Ltr. at 2), 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. (ADD2.) The Court of Claims therefore started prejudgment interest on the correct date.

POINT II

THE FOURTH DEPARTMENT CORRECTLY HELD THAT PREJUDGMENT INTEREST DID NOT COMMENCE RUNNING UNTIL SERIOUS INJURY WAS FOUND

To the extent this Court considers claimant's arguments on appeal, it should affirm the Fourth Department's holding that "liability" for non-economic losses cannot be assigned under the No-Fault Law unless and until "serious injury" has been found. (ADD2.)

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).

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 (ADD45).

Contrary to claimant's suggestion (Ltr. at 5, 8), 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* Ltr. at 8), *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* Ltr. at 8-9). 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.* 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.[4] 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* Ltr. at 9-10.) 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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[4] 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) (attached as ADD4 through ADD44). 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." (ADD5.)

B. The Departments Are Not in Conflict Over When Prejudgment Interest Begins Running in a Bifurcated No-Fault Case.

Upon analysis, the conflict that claimant and the amicus purport to find among the Appellate Division's departments (Ltr. at 5-8; Amicus Br. at 12) turns out to be illusory.

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) (cited in Ltr. at 6); *Shinn v. Catanzaro,* 1 A.D.3d 195, 199 (1st Dep't 2003). The Third Department's approach is similar. *See Altman v. Shaw,* 184 A.D.3d 995, 996 (3d Dep't 2020) (under No-Fault Law, "a person injured in a motor vehicle accident may only recover damages if he or she sustained a serious injury") (internal quotation marks and citation omitted).

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 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).

When the Second Department expressed disagreement with the Fourth Department on the commencement of prejudgment interest, it mistakenly focused on 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].) But the result 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 Advanced by Claimant and the Amicus Do Not Override the Legislature's Express Policy that Serious Injury is a Separate Element to be Satisfied in No-Fault Cases.

This Court should reject the four 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 express policy determination 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 (Ltr. at 10; *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 (Ltr. at 7-8). *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 deferral of the issue of serious injury to the damages phase of trial is not a requirement of the No-Fault Law. 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) (cited in Ltr. at 7); (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 that of damages or the defenses thereto (Amicus Br. at 16). But as the amicus acknowledges (Amicus Br. at 6), the No-Fault Law's definition of "serious injury" 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").

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" (Ltr. at 9). 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.

Respectfully submitted,

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cc: All counsel

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals, 22 N.Y.C.R.R. § 500.11(m), 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 letter-brief, the body of the letter-brief contains **4,859** words, which complies with the 7,000-word limit in § 500.11(m).

Frederick A. Brodie

FREDERICK A. BRODIE
Assistant Solicitor General

ADDENDUM

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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.)

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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

STATE OF NEW YORK COURT OF CLAIMS

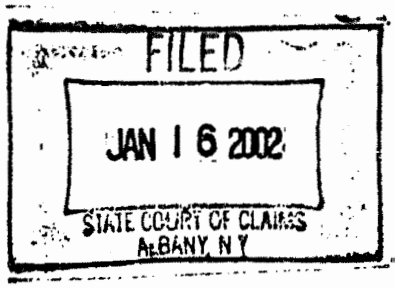
JAMES S. DENIO, as Adult Guardian of Person and Property of SARAH J. DENIO pursuant to Article 81 of the Mental Hygiene Law,

Claimant, DECISION

-v-

STATE OF NEW YORK, **Claim No. 83215**

Defendant.



BEFORE: **HON. EDGAR C. NEMOYER**
Judge of the Court of Claims

APPEARANCES: **For Claimant:**
HOGAN AND WILLIG, PLLC
By: Corey J. Hogan, Esq.
Jon Louis Wilson, Esq.

For Defendant:
HONORABLE ELIOT SPITZER
ATTORNEY GENERAL
By: Richard B. Friedfertig, Esq.
Assistant Attorney General, of counsel

The trial of this claim was bifurcated. In a decision dated February 22, 1999 and filed March 5, 1999 this court found the defendant 40% liable for injuries sustained by Sarah J. Denio. An interlocutory judgment was entered March 12, 1999. Therefore, this decision relates only to Ms. Denio's damages as a result of her injuries.

This claim arose in the mid-afternoon of October 11, 1992 on Route 31 near its intersection with Cottage Road in the Town of Royalton, Niagara County, New York. Sarah J.

Denio was proceeding west on Route 31 in her 1984 Ford Escort when a 1979 Pontiac Grand Prix, being driven east on Route 31 by Eric B. Poler, went out of control on a wet roadway and crossed into the west lane. Ms. Denio's and Mr. Poler's vehicles collided just west of Cottage Road, and as a result, Ms. Denio sustained very severe injuries. At the time of the accident Ms. Denio was 28 years old.

There was no dispute that Ms. Denio suffered extensive neurologic, orthopedic, and facial damage as a result of this accident. Although, all of Ms. Denio's injuries were serious, the most severe appears to be the traumatic brain injury sustained by her. In addition to this injury, Ms. Denio sustained numerous fractures throughout her body. Exhibits 215 and 216 graphically depict these fractures and their repairs. These fractures consist of the following:

1. Ten major fractures of the face accompanied by numerous other small facial fractures.
2. Two fractures of the jaw.
3. Three fractures of the pelvis on the right side.
4. Fracture of the right femur.
5. Right ankle fracture
6. Fracture of the first and tenth ribs.
7. Left humeral neck fracture.
8. Left elbow fracture involving the humerus and olecranon.
9. Fracture of left wrist.
10. Lump on left finger.
11. Fracture of transverse process of L5 on left side.

12. Two fractures of the pelvis on left side.

13. Left ankle fracture.

The repair of Ms. Denio's facial and jaw fractures required that nine fixation plates with numerous screws be attached to her face and jaw. The right femur required a lengthy fixation plate with approximately eight screws. Ms. Denio's left elbow area was repaired using two fixation plates with screws and a K-wire. Two screws were also inserted into Ms. Denio's left ankle to secure that fracture. All of these fixation plates, screws, and the K-wire remain in Ms. Denio's body, except for a screw and pin which had to be removed.

Because of the seriousness of Ms. Denio's injuries, both her inpatient and outpatient hospital stays were extensive and arduous. Ms. Denio was transported from the scene of the accident on October 11, 1992 by ambulance to Lockport Memorial Hospital. She was diagnosed at Lockport Memorial Hospital as having a closed head injury with numerous fractures (Exhibit 202). That same day she was transferred by Mercy Flight to the Trauma Unit of Erie County Medical Center (ECMC) due to the seriousness of her injuries. While at ECMC, Ms. Denio's intra-cranial pressures increased dramatically, to the point that on October 12, 1992 she underwent a craniotomy and evacuation of her intra-cerebral hematoma. On October 30, 1992 Ms. Denio underwent an open reduction and internal fixation of her right femur fractures, and left humerus fractures in her elbow area. She also underwent a tracheostomy. Subsequently, on November 2, 1992 Ms. Denio underwent open reduction and internal fixation of her facial and jaw fractures. While Ms. Denio was at ECMC, she was initially in a coma for two to three weeks. At the outset the coma was the natural consequence of her brain injuries, but then was drug induced to lower her intra-cranial pressure. Ms. Denio was discharged from ECMC on December 7, 1992. Upon her discharge, Ms. Denio's neurologic status

had somewhat improved, but she was only able, on occasion, to communicate with her family by blinking her eyes. Sometimes she smiled at the staff. There was only occasional spontaneous movement of her limbs, and she was unable to respond with her extremities upon commands. Ms. Denio was also dependant upon a ventilator to aid her breathing, when discharged from ECMC.

On December 7, 1992 Ms. Denio was transferred by ambulance to the Lake Erie Institute of Rehabilitation (LEIR) in Erie, Pennsylvania. Ms. Denio remained at LEIR for rehabilitation purposes from December 7, 1992 until February 1, 1994. On admission to LEIR, Ms. Denio had a tracheostomy tube in place, was ventilator dependent, and suffered from quadriplegia. The admission diagnosis from LEIR (Exhibit 208, volume 1) indicated Ms. Denio suffered from "[s]evere traumatic brain injury with resultant ventilator dependency, severe cognitive and physical deficits rendering patient totally dependent for all functions." The admission diagnosis also noted Ms. Denio suffered from multiple orthopaedic fractures, which were at various stages of healing after surgical reductions. While at LEIR, both the ventilator and tracheostomy tube were successfully discontinued. During her stay at LEIR, Ms. Denio underwent numerous therapeutic modalities, including neuropsychology treatment, occupational and physical therapy, respiratory therapy, therapeutic recreation, and speech therapy. Ms. Denio was discharged with a cognitive functioning status of 7 on a scale of 10. When she entered LEIR, her cognitive functioning status was 3.

Ms. Denio next became a patient at the Deaconess Center Skilled Nursing Facility in Buffalo, New York from February 1, 1994 to June 30, 1995. It should be noted that from Ms. Denio's initial hospitalization through her admission to Deaconess Center, she was being fed through a feed tube. The use of this was discontinued in January, 1995. The course of treatment at Deaconess Center for Ms. Denio involved multiple therapies, including physical and occupational

therapy, behavioral and nutritional counseling, psychological counseling, and family support counseling. During Ms. Denio's hospitalization at Deaconess Center for approximately 1½ years, she appears to have shown significant progress from the treatment she received. Throughout her stay at Deaconess, Ms. Denio underwent active physical therapy five times per week. She was also involved in a program for speech, swallowing, and cognitive therapy, which was discontinued in June, 1994, because Ms. Denio had reached a plateau. The Deaconess Center records stress Ms. Denio made excellent progress in all areas of care. Upon discharge, Ms. Denio was independent in mobility with the use of a wheelchair and rolling walker, and also in transfers and feeding. When she left Deaconess Center, it was recorded in the records that Ms. Denio was capable of doing her own laundry and budgeting her own checkbook. She was also able to grocery shop and remain within a set budget. She needed partial help with dressing and bathing. However, it was also noted Ms. Denio continued to have mood swings and verbal outbursts. Ms. Denio was discharged from Deaconess Center on June 30, 1995 to live at home with her parents. Upon discharge, it was recommended she provide her own care and dressing, and do her own laundry, checkbook, and bed making. It was further recommended she stay active and participate in local organizations.

Ms. Denio continued her occupational and physical therapy through several outpatient facilities. From August 1995 to October 1995 she attended the Weinberg Campus, which is an adult day-care center, twice a week. She was at Mount View Health Facility, Lockport, New York, twice a week from November 30, 1995 to June 5, 1996. She next was in the ECMC head trauma program, three times a week from June 10, 1996 to September 1996. She continued her physical and occupational therapy at Lockport Memorial Hospital three times a week between February 18, 1997 and January 9, 1998. Ms. Denio also attended a physical therapy and occupational therapy program

at Niagara Falls Memorial Medical Center between March 25, 1999 and May 10, 1999. During this outpatient treatment, Ms. Denio was an inpatient at the Our Lady of Victory Head Trauma Rehabilitation Unit, Lackawanna, New York between September 30, 1996 and November 27, 1996.

After Ms. Denio's discharge from the Deaconess Center, she resided at home with her parents. In January 1999 Ms. Denio obtained her own apartment, where she currently resides. She is attended there by aides on a daily basis, and is also aided by her parents.

Judith A. Denio is the mother of Sarah Denio. She testified that before the accident, Ms. Denio was very independent, and lived on her own. She was quite involved in photography and guitar playing. Mrs. Denio testified her daughter loved the family, and was devoted to animals, especially horses. She loved horseback riding. According to Mrs. Denio, Sarah had been interested in horses and horseback riding from a very early age, and took horseback riding lessons through her college courses. However, Mrs. Denio acknowledged Sarah suffered from episodes of depression prior to this accident. She stated there was a history of depression in the family. According to Mrs. Denio, her daughter's depression "became full blown"[1] in the spring of 1985, after the death of her grandfather in Connecticut in March 1985. Mrs. Denio explained Sarah had been very close to him. This incident involved Ms. Denio not returning home after work, and driving to Connecticut, where she parked in the driveway of a hospital. Ms. Denio then used a razor to injure her wrists. After Sarah had been missing for two days, Mr. And Mrs. Denio received a telephone call from the hospital, that Sarah had been treated and hospitalized. They flew to Connecticut, and drove Ms. Denio home. According to Mrs. Denio, there was also an incident in 1986 when Ms. Denio was

[1] Quotes are from trial notes unless otherwise indicated.

admitted to a psychiatric hospital in Buffalo, New York for short-term treatment.

The day of the accident, Sunday, October 11, 1992, was Mrs. Denio's birthday. It was customary for the family to gather together on Sundays, so a birthday celebration was planned. Mrs. Denio stated she received a telephone call about Ms. Denio's accident, and then went to the hospital with her husband and son. She saw Ms. Denio, and described her as appearing "very still."

In contrast to the personality of Ms. Denio prior to the accident, Mrs. Denio testified that after the accident, Sarah lost her independence and freedom. She stated her daughter cannot read more then ten minutes without being tired, and has difficulty writing. Mrs. Denio testified Sarah has no freedom of movement because of her physical disabilities, and needs daily assistance. Mrs. Denio stated that since January 1999, when Sarah began residing in an apartment alone, aides provide assistance for her Monday, Wednesday, Friday, and Saturday for a few hours a day. She stated she and her husband check on Sarah every other day, either in person or on the telephone.

Mrs. Denio testified her daughter is presently quite overweight, and weighs approximately 240 pounds. She stated that prior to the accident, Sarah weighed approximately 125 to 130 pounds. She noted Sarah has difficulty walking, and spends most of her time in her apartment in a wheelchair. According to Mrs. Denio, when Sarah was staying at home after the accident, she used a walker mostly, and very rarely a wheelchair. Mrs. Denio testified Sarah cannot cook, do laundry or even walk to the mailbox.

Mrs. Denio described Sarah's current attitude as happy and childlike. She stated Sarah talks "non-stop", and likes people very much. However, she noted Sarah now has trouble with language, and sometimes it takes a while for her to express herself.

Mrs. Denio described a typical day for Sarah when she visits her. According to Mrs.

Denio, she often finds unwashed dishes in the sink and on the table, and sometimes clothes strewn about the apartment. Mrs. Denio stated there are three bulletin boards in Sarah's apartment and notes all around to remind Sarah of her appointments and other tasks during the day. She stated Sarah watches quite a bit of television during the day. Sarah's reading ability is usually in short ten minute spans, when she reads children's books and magazines of a fourth to fifth grade level. Mrs. Denio testified, Sarah is usually snacking on something during the day. Mrs. Denio also stated Sarah currently uses a computer for some creative writing.

James S. Denio is Sarah Denio's father. He described Sarah prior to the accident as "independent, strong, loyal, quiet champion of the underdog." He stated Sarah also participated in sports. Mr. Denio acknowledged that after Sarah left high school, she had "free control over her life." According to Mr. Denio, prior to the accident, Sarah managed her own finances, but now he has found it necessary to take care of them. He also stated, before the accident, Sarah seldom displayed anger, but now there are quick and brief episodes of anger when issues are in dispute.

Mr. Denio testified he currently sees Sarah about three to four times a week, for maybe ½ hour to sometimes all day. He stated Sarah's mobility is extremely restricted , and she needs a wheelchair to go anywhere beyond her apartment. He noted she spends most of her waking hours in her apartment in the wheelchair, and only uses her walker when he and his wife insist. He believes Sarah has been increasingly dependent on her wheelchair, using it 95 to 100 % of the time. However, he estimated that in 1995, Sarah used her wheelchair only 65% of the time. He stated Sarah purchases food at the grocery store, but either goes there with an aide or with him or his wife. According to Mr. Denio, Sarah eats quite a bit of "prepared junk food." He described her as very overweight and weighing approximately 250 pounds, as opposed to 120 to 125 pounds just prior to

the accident. He has observed that Sarah watches television a great deal of the time, and sleeps quite a bit. Mr. Denio testified Sarah's personal hygiene is now quite poor, whereas before the accident she was "meticulous." However, he acknowledged that Sarah is able to shower by herself, and make her own bed. He stated she is also capable of loading and unloading her dishwasher. Even though Sarah spends substantial time in her apartment, Mr. Denio acknowledged she does visit a nearby mall, and socializes with people there.

Mr. Denio described Sarah's rehabilitation course while she was at LEIR. He stated the first goal at LEIR was to remove Sarah from the ventilator, which took approximately five months. Another goal was to obtain a purposeful response from her. In order to accomplish this, an alphabet board was used, so Sarah could paint letters on it. After this, she was encouraged to write out words. Musical therapy was also utilized to encourage responses from Sarah. Mr. Denio testified that while Sarah was at LEIR, she had to learn to speak, walk, and eat again. Initially all of Sarah's therapies at LEIR were done in bed, then progressed to a wheelchair, and finally to therapy sessions. Mr. Denio stated that during Sarah's early confinement at LEIR, her arms and legs would tense into a fetal position. Consequently, casts were used on her arms and legs to remove her from this fetal position. This continued for a couple of months. Mr. Denio testified Sarah made progress at LEIR, and was permitted to leave to return home for Christmas 1993. He and his wife brought her home for a couple of days in the handicap van, which they had purchased.

For the first 2½ months while Ms. Denio was at Deaconess Center, Mr. Denio visited her every day of the week. Subsequently, he stated he was with her at the Center two to three days a week. Mr. Denio testified his daughter continued to use a food tube when she entered Deaconess Center, but after approximately five weeks, was gradually able to eat on her own. He further stated

Sarah was incontinent when she arrived at Deaconess Center, and would have an accident nightly. While at Deaconess, Mr. Denio stated Sarah's verbalization was good, to the point she could carry on a conversation. During the last six months of her stay at Deaconess Center, Ms. Denio was able to go home every weekend from Friday night to Sunday. According to Mr. Denio, Sarah was resistant to daily physical and occupational therapy, and always complained of pain from her sessions. Mr. Denio testified that when Sarah left Deaconess Center on June 30, 1995, she was eating regular meals. He noted though, that after leaving, Sarah's weight gain has been constant and continuous.

Sarah Denio testified she had no recall of the accident. She stated the first thing she recalled was waking up at LEIR. Ms. Denio was asked to review several photographs she had taken and developed for her high school photography class (Exhibit 154-174). Ms. Denio reviewed each of these photographs in detail, and in most instances recalling when and where they were taken and even the names of some of the horses in the photographs. Many of the photographs were of horses and equestrian events. Ms. Denio expressed the love she had for horses prior to the accident, and stated she now "misses" them. She testified she no longer had confidence with the horses, as a result of the injuries she sustained in the accident. The court was impressed with Ms. Denio's long-term memory she displayed while reviewing these photographs. Ms. Denio testified she has not taken any photographs after her accident. She explained she used to move around quite a bit while taking photos, but now, since she is confined to a wheelchair, her mobility is quite restricted. She also stated she did not seem to think in a photographic sense, as she had previously. She expressed a fondness for the independence photography gave her, prior to the accident. Ms. Denio testified she valued her independence, but now she has no independence as a result of the injuries sustained in

this accident. She stated she seems to need help with everything in her daily life. This help comes from daily aides visiting her, and her parents.

Despite Ms. Denio's excellent long-term memory, her testimony revealed her short-term memory is quite deficient. She testified that if she does not write things down, she will not remember them. Therefore, she always has something with her on which to jot notes. According to Ms. Denio, she will be able to remember things if she writes them down and looks at them often. She also believes she needs help with motivation. Ms. Denio explained it is difficult to perform household chores and everyday tasks. She could not explain why she felt this way.

Ms. Denio was quite candid about her depression. She testified she was very young when she first had feelings of depression. She openly discussed the incident in Connecticut in 1985, and her hospitalization in 1986. During her depressive periods, Ms. Denio testified she "just wanted to be left alone by everybody." She stated she was "very sad" during these periods of time. After her accident, Ms. Denio stated she began taking medication for her depression, which has significantly helped her. Before the accident, she described herself as being so "incredibly sad and angry at times", but now she feels wonderful just to be alive. However, when asked on cross-examination if she was happier after the accident, her reply was an emphatic "hell no." She explained she only feels happier now, as regarding her depression, because of the medication. Ms. Denio appears fully aware of the injuries she sustained and the limitations caused by them. She stated "I was bashed in so badly - I would not wish that on my worst enemy."

Ms. Denio testified she resided with her parents for a couple of years after being discharged from Deaconess Center. In January 1999 she moved into her own apartment. She stated she was extremely excited about having her own apartment. In her words, "I was finally out on my

own." She testified her typical day usually begins at 7:30 a.m. when she gets up. She uses the bathroom. She is able to prepare breakfast for herself. According to Ms. Denio, she watches a television show from 10:00 a.m. to 11:00 a.m. On Monday, Tuesday, and Wednesday, Ms. Denio attends a computer class for a couple of hours at the United Cerebral Palsy Association. She is taken there by taxi. Ms. Denio testified she uses the Internet quite a bit and does creative writing with the computer. However, her short-term memory deficits are quite evident with regard to the stories produced by her creative writing. She stated she just keeps "going on and on with the stories, and doesn't seem to recall much at all." Ms. Denio stated some days she goes to a nearby mall, talks to people she knows, and has lunch there. Since she uses her wheelchair to get to the mall, she is unable to do this in the wintertime. Ms. Denio stated she sometimes reads children's books because it is easier for her, due to her inability to concentrate. According to Ms. Denio, two aides come to her apartment to help her, and they also take her shopping. She stated her parents also help her about 30 to 35 hours per week. She explained she wears keys on a chain around her neck so that she always knows their location. The only banking Ms. Denio does is to go to the bank or credit union, and get money out. She explained her father balances her checkbook and pays all her bills. She merely signs the checks.

Ms. Denio testified she has no sense of smell. As a consequence of this, she has a fear of being in her apartment alone, because she would be unable to smell smoke if a fire ever occurred. She stated she seldom uses the stove, partly because of her fear of fire.

Ms. Denio testified she visited the Cortland Facility in April 2000. It appeared to her to be a wonderful facility, which she stated she felt would be very beneficial to her. While she was there, she met some members of the staff and some patients. Ms. Denio believes she would benefit

from the physical therapy she would receive at Cortland.

While the court does not dispute the seriousness of Ms. Denio's injuries and the physical and mental limitations caused by them, it was observed during her testimony that she was quite articulate and rational. She appeared quite well kempt and pleasant, smiling much of the time. From her testimony, it was evident that she had a love for horses, photography, and also music. Unfortunately, this terrible accident has prevented her from engaging in horseback riding and photography. She testified she does have an electric guitar, but it appeared she does not play it. While reviewing her previous photographs, Ms. Denio seemed to be able to move her arms well and handle the photographs easily. The court found Ms. Denio very animated. The court also observed various scars on Ms. Denio's body as a result of this accident. She had a scar about 1 inch long and 1/8 inch wide in the front of her neck area from her tracheostomy. Her left elbow scar was approximately 9 inches long. She had a scar on her right leg which was approximately 12 inches long. Her left middle finger appeared to have a small hook in it. Also, she was unable to fully extend her left arm.

Dr. Andrew C. Matteliano, M.D. specializes in physical medicine and rehabilitative physiatry. He testified as an expert for the claimant. According to Dr. Matteliano, his practice centers around trauma patients. He has been licensed as a physician in New York State since 1984, and is board certified in rehabilitative medicine. He received a bachelor of science degree in biology and chemistry from State University College at Buffalo, and a master's degree in natural science from SUNY at Buffalo. Dr. Matteliano obtained his medical degree from Upstate Medical Center. Dr. Matteliano was not a treating physician of Ms. Denio, but was consulted by claimant to evaluate Ms. Denio's condition. Dr. Matteliano testified he reviewed all of Ms. Denio's medical records, and

spent approximately five hours with Ms. Denio and her parents.

Dr. Matteliano explained that the facial fractures suffered by Ms. Denio were caused by a massive frontal impact. This caused a severe injury to the inferior frontal lobe of the brain, where the cerebral peduncle is located. Dr. Matteliano described the cerebral peduncle as "grand central station", because all signals to the brain pass through this area. Dr. Matteliano stated Ms. Denio's injuries placed her in a deep coma, with a Glasgow Coma Scale score of 3. The Glasgow Coma Scale is a system of measuring the severity of a person's coma, on a scale of 3 to 15. According to Dr. Matteliano, a score of 3 constitutes the deepest coma, in which the upper sections of the brain shut down. When Ms. Denio was discharged from Erie County Medical Center to LEIR, her Glasgow Coma Scale was approximately 9.

Dr. Matteliano testified, the initial CT (computed tomography) scan of Ms. Denio's brain on October 11, 1992 showed two significant lesions with large areas of bleeding deep inside the left side of her brain. A CT scan of Ms. Denio's brain on October 13, 1992 showed this hemorrhage becoming larger. According to Dr. Matteliano, Ms. Denio had over a 400% increase in intra-cranial pressure. The CT scan on October 15, 1992 showed continued hemorrhaging in Ms. Denio's brain. Dr. Matteliano stated it was necessary to reduce this intra-cranial pressure by surgical intervention, when, on October 15, 1992, Ms. Denio underwent a craniotomy. Dr. Matteliano noted that even after this surgery her intra-cranial pressure continued to rise. As a result of this, he stated Ms. Denio was placed in a pentobarbital coma to essentially put the brain asleep, in order to lower its demand for nutrients and blood supply. Dr. Matteliano noted that during the craniotomy, a portion of Ms. Denio's brain tissue was removed, but the right side of her brain hemorrhage was unable to be addressed. Eventually, Ms. Denio's intra-cranial pressure was reduced. According to

Dr. Matteliano, the outcome for a patient with prolonged periods of intra-cranial pressure and coma is generally poor. He stated these conditions are likely to result in permanent residual, neurologic, physical, and behavioral deficits.

Dr. Matteliano testified Ms. Denio developed post traumatic seizures while she was a patient at LEIR. As a result of this, it was necessary to place her on seizure medication, which she continues to use. Dr. Matteliano believes the seizure disorder is directly related to Ms. Denio's brain injury. He explained Ms. Denio's seizure areas are in the location where her brain was damaged. However, Dr. Matteliano conceded that there was a family history of seizure disorder.

Dr. Matteliano's review of Ms. Denio's records also indicated she experienced muscle spasticity during her various hospitalizations and rehabilitation, which continues to this day. Dr. Matteliano stated the spasticity is the culmination of inappropriate signaling from the damaged brain, which causes muscles to tighten. He explained Ms. Denio's spasticity in her calf muscles is so severe that her ankles point downward. He explained her calf muscles are always "turned on." Because of this, Ms. Denio is unable to bring her feet together to stand appropriately. He explained her feet are at a "Y" position. He also stated her gate is unsteady, uncoordinated, and spastic. It was Dr. Matteliano's opinion all of these problems are permanent and related to the brain injury

Dr. Matteliano testified Ms. Denio suffered significant cognitive loss from her brain injury. He stated Ms. Denio's problem is new learning, because her brain injury has rendered her immediate and recent memory very poor. He opined these memory deficits are permanent. He believed that in order to somewhat overcome the memory deficits, Ms. Denio should be in a setting where there is constant reaffirmation.

When Dr. Matteliano interviewed Ms. Denio, he observed her mood and behavior.

He stated she was euphoric and continues to be so, acting childlike with inappropriate giggling. He stated Ms. Denio was disorganized, constantly talking and suffers from disinhibition, to the extent she has the habit of spontaneously blurting things out. Dr. Matteliano testified all of these conditions are consistent with Ms. Denio's frontal lobe brain injury, and are caused by it. He also stated Ms. Denio has suffered a permanent loss of smell as a result of her brain injury.

Dr. Matteliano testified Ms. Denio suffers from a compulsive eating disorder caused by her brain injury. He noted Ms. Denio has no feedback from her brain as to the content of her stomach, which deprives her of any concept of fullness. He explained her brain cannot process the signal coming back from the stomach, as to fullness or emptiness. As a result of this, she continually eats, and cannot control her caloric intake. Dr. Matteliano noted Ms. Denio has been gaining weight at the rate of approximately 25 pounds per year. It was his opinion that she will continue this 25 pound per year weight gain under her current conditions. However, it was noted during Dr. Matteliano's cross-examination that Ms. Denio weighed 192 pounds on November 6, 1995, and in May 2000 weighed 243 pounds, which did not equal a 25 pound per year weight gain. Dr. Matteliano opined the only way to control Ms. Denio's weight gain and promote weight loss would be to place her on a totally controlled caloric intake. He also stated upper body exercise would help to burn calories.

According to Dr. Matteliano, Ms. Denio's mobility is extremely impaired because of all of her injuries from this accident. He stated that other then a few steps, Ms. Denio is wheelchair bound. Dr. Matteliano noted Ms. Denio's injuries have reduced the range of motion of her right knee and her right hip. He stated the spasticity and lack of coordination brought about by her brain injury is directly related to her impaired mobility. Dr. Matteliano believed that even with

intensive mobility training, claimant would never progress to the point where she could ambulate on her own from room to room. Dr. Matteliano stated Ms. Denio also displays the early onset of post traumatic arthritis in her left elbow and right knee from her injuries. It was his opinion Ms. Denio also suffered from osteoporosis, brought about by her lack of mobility.

Dr. Matteliano believed Ms. Denio should be checked by an orthopedic surgeon once a year for the rest of her life. It was his opinion she would eventually need a knee replacement. Dr. Matteliano felt Ms. Denio would benefit from further occupational and physical therapy for weight loss and increased mobility. He stated this should occur once a day for at least two to three years and then "beyond." However, Dr. Matteliano did not give an outside time limit. Dr. Matteliano further stated Ms. Denio would need an MRI (magnetic resonance imaging) every three years and an EEG (electroencephalogram) every two years for the rest of her life. It was his opinion Ms. Denio should see a rehabilitation specialist three times a year for the rest of her life.

Finally, it was Dr. Matteliano's opinion Ms. Denio would benefit substantially by being in an assisted living facility, such as Cortland Community Reentry Program, Inc. This facility will be discussed later. Dr. Matteliano explained such a facility would provide Ms. Denio with appropriate occupational and physical therapy, along with a structured diet to control her weight gain.

Dr. Ralph H. B. Benedict testified as an expert neuropsychologist on behalf of claimant. Dr. Benedict obtained his bachelor of science degree from Ohio State University in 1983. He then attended Arizona State University where he received a masters and doctoral degree in clinical psychology. Thereafter, he had three postgraduate years of training in clinical neuropsychology. Dr. Benedict is board certified in neuropsychology.

Dr. Benedict saw Ms. Denio on two occasions, once in 1994 and another time in 1999. He was not Ms. Denio's treating neurologist. Dr. Benedict noted Ms. Denio suffered severe injuries to the prefrontal cortex and the frontal lobe of her brain as a result of this accident. He stated the length of her coma was quite severe, such that it rendered her long-term outcome for recovery very poor. He pointed out that Ms. Denio's medical records showed she suffered severe brain edema and hemorrhaging in the brain. When Dr. Benedict saw Ms. Denio in 1999, she was having problems with her gate, and suffered from a faulty memory. He observed she tended to speak too much.

Dr. Benedict administered several neuropsychological tests to Ms. Denio in 1999. He stated the test results showed three primary areas of severe deficiency for Ms. Denio. These areas were word retrieval, verbal learning, and attention. Dr. Benedict stated Ms. Denio scored less than 1% in these areas. He stated such scores were totally consistent with her brain injury. His examination and testing of Ms. Denio also demonstrated she had a very severe attention deficit brought about by her brain injury. He believed her brain injury has brought about personality changes, and is the cause of her compulsive overeating. Dr. Benedict testified the personality change is evident by excessive inappropriate speech patterns.

Dr. Benedict described Ms. Denio's current condition as that of a classic frontal orbital syndrome. He stated she is consistently euphoric, but, in reality, she has nothing to be happy about. He stated people in this condition display "great disparity between the mood and what their circumstances are." He testified there would be very little progress in Ms. Denio's life. Such a person may set goals, but will never accomplish those goals. According to Dr. Benedict, all of this has been brought about by the serious brain injury sustained by Ms. Denio. Dr. Benedict also stated

Ms. Denio suffers a moderate degree of impairment in her insight to problems. He noted Ms. Denio lacks a consistent motivational state to improve, which he attributed to the brain injury. Because of all these infirmities brought about by the brain injury, Dr. Benedict believed Ms. Denio's prognosis for future employment was quite poor. He stated she had a very severe attention deficit, and would have a great deal of difficulty with vocational training.

Dr. Benedict estimated Ms. Denio's pre-accident overall IQ was approximately 110. He conceded her post accident IQ is approximately 104, which is in the normal range. However, he stated a normal IQ is not inconsistent with this type of brain injury. Also, despite Ms. Denio's serious brain injury and related disabilities as a result of this accident, Dr. Benedict acknowledged that she scored normal in several categories of her intelligence test.

It was Dr. Benedict's opinion Ms. Denio currently requires, and would require in the future, supervision to meet daily activity needs, in both cognitive and physical rehabilitation. For her cognitive needs, Dr. Benedict stated Ms. Denio should have neuropsychological counseling weekly or every other week for a few years, and then every other month to the end of her life. However, his written report made no reference to these frequencies, nor did Dr. Benedict speak to any of Ms. Denio's treating physicians regarding the necessity for neuropsychological counseling. Dr. Benedict suggested there were two ways Ms. Denio's supervision, cognitive and physical requirements could be met. One of these would be as a full time resident at a facility such as the Cortland Community Reentry Program, Inc. Although Dr. Benedict recommended the Cortland Program as one alternative, he testified he was only "vaguely" familiar with this program. According to Dr. Benedict, the other alternative for Ms. Denio would be for her to remain in her apartment, and receive the necessary treatment there. It was Dr. Benedict's opinion that all of Ms. Denio's brain

injuries and related deficits from them are permanent.

Dr. William J. Belles, M.D. specializes in head and neck surgery. He was the facial surgeon for Ms. Denio at ECMC. Dr. Belles received a bachelor of science degree from the University of Scranton, Scranton, Pennsylvania in 1982, and his medical degree from Jefferson Medical College, Philadelphia, Pennsylvania in 1986. From 1986 to 1988 Dr. Belles practiced general surgery at Allentown Affiliated Hospital, Allentown, Pennsylvania. He then became resident and chief resident in the Department of Otolaryngology at SUNY at Buffalo Medical School from 1988 to 1991. In addition to his private practice, Dr. Belles is also a clinical assistant professor in the Department of Otolaryngology at SUNY at Buffalo. Dr. Belles is licensed in New York and Pennsylvania, and board certified in Otolaryngology.

Dr. Belles testified Ms. Denio had multiple comminuted fractures of her face. He referred to Exhibit 216, which is a diagram of Ms. Denio's facial fractures, and noted that Ms. Denio has 13 major facial fractures. However, he stated there were actually 30 to 40 total facial fractures. Dr. Belles testified Ms. Denio's entire face had been moved by the trauma to it. According to Dr. Belles, Ms. Denio's face was "free floating" when he saw her after the accident. Dr. Belles noted Ms. Denio sustained serious damage to her cribriform plate (roof of sinus cavity). He explained there are many nerve endings, including the olfactory nerves, passing through this area, and they were all disrupted and damaged. Consequently, these nerves degenerated, and have caused Ms. Denio to lose her sense of smell, which is permanent.

The surgery to repair Ms. Denio's face was extensive. Dr. Belles explained the surgical procedure as "putting together a jigsaw puzzle." Dr. Belles stated an incision was initially made on Ms. Denio from ear to ear at the top of her head, and down the side of her face. All of the

soft tissue was then removed from her face, i.e. it was peeled off, to prevent extensive scarring. Dr. Belles testified he began the surgical procedure by stabilizing a particular point, and then went from fracture point to fracture point, stabilizing as he proceeded. He stated fixation plates with screws were used to repair the fractures, and Ms. Denio's jaw was wired shut. After all of the fixation plates had been secured in place, the facial soft tissue was returned and the incisions closed. Dr. Belles stated all of the fixation devices are permanent, except for the devices used to wire Ms. Denio's jaw closed. According to Dr. Belles, the fixation plates in Ms. Denio's face get quite cold during the winter. Their composition is titanium, and are held in place with metal screws. Dr. Belles testified one of these fixation plates and its screws had to be removed two years after the surgery, because it was protruding through the skin and had caused an infection.

Dr. Belles noted Ms. Denio will have permanent and ongoing problems as a result of her facial fractures. He stated she will have complaints related to her temporomandibular joint, in the form of recurrent headaches, jaw and neck pain, and chewing problems. Dr. Belles testified Ms. Denio has a permanent nasal obstruction because of a deviated septum. He reiterated Ms. Denio has a permanent loss of smell. According to Dr. Belles, Ms. Denio will have sinus infections the rest of her life, because of the disruption of her mucosal lining.

Dr. Belles testified Ms. Denio's future medical needs would include ongoing treatment for her temporomandibular joint problems, in the form of anti-inflammatory medications. It was Dr. Belles' opinion, Ms. Denio would also need medication for her nasal obstruction and sinus infections monthly for the rest of her life. Because of Ms. Denio's ongoing medical problems with regard to her facial fractures, Dr. Belles stated she should be examined by an ear, nose and throat specialist two to three times a year for the rest of her life. He opined Ms. Denio should also have

a CT scan of her facial bones every ten years for the rest of her life.

Placing a value on pain and suffering is an elusive and difficult task. It asks the court to step into the shoes of the victim, and gage the value of the past and future pain and suffering the victim has endured and will endure in the future. Each award for pain and suffering is unique to the facts and circumstances of each case. The record is abundantly clear Ms. Denio has suffered substantial and severe pain and loss of enjoyment of life as a result of this accident. This severe and substantial pain will continue in the future for the remainder of Ms. Denio's projected life expectancy of 43.8 years. 1 NYPJI 3d 1417 (2001). Consequently, the court awards claimant, as adult guardian of the person and property of Sarah J. Denio, $1,300,000.00 for past pain and suffering and $2,200,000.00 for future pain and suffering. Since defendant's liability was only partial, claimant's recovery for this non-economic loss is limited to 40% of the amount awarded. Therefore, claimant's past and suffering award is $520,000.00, and the future pain and suffering award is $880,000.00, for a total pain and suffering award of $1,400,000.00.

The parties have stipulated that past medical expenses amount to $576,810.33, which constitutes the past medical expense award to claimant. These past medical expenses are liens upon the award from the Niagara County Department of Social Services for Medicaid payments (Exhibit 194), $361,039.67; Medicare (Exhibit 195), $15,770.66; and Allstate Insurance Company (Exhibit 196), $200,000.00.

Thomas P. Rick is self-employed as president of DRS & Associates, and has held this position since 1981. Mr. Rick and his company are engaged in a private rehabilitation counseling and evaluation practice, which provides disability management services to clients in the areas of rehabilitation, business, employment, and vocational training. Mr. Rick received a bachelor's degree

in industrial technology from State University College at Buffalo in 1968, and a master's degree in vocational rehabilitation from the University of Wisconsin at Stout in 1969. He is board certified as a rehabilitation counselor and disability management specialist.

In the summer of 1999 Mr. Rick evaluated Ms. Denio in order to develop a life care plan for her, and determine her employability in the future. In order to accomplish this, Mr. Rick reviewed numerous medical records, and met with Ms. Denio, her parents, and her aides. Mr. Rick testified he expended approximately 50 hours in developing Ms. Denio's life care plan. According to Mr. Rick, the focus of the plan was on vocational rehabilitation.

On September 7, 1999, Mr. Rick spent approximately five hours with Ms. Denio, administering various tests to her. These tests included, (1) independent problem solving, (2) computer aptitude and literacy, (3) clerical comprehension and aptitude, (4) tri-level measurement, (5) written opinion values, (6) business typing, (7) eye and foot coordination, and (8) grip strength. Based upon these various vocational rehabilitation tests, Mr. Rick determined that concentration for Ms. Denio was a significant problem. He believed she had some useful skills, which could be tapped momentarily, but over an extended period of time, she would be unable to sustain attention to a task at hand. Mr. Rick concluded there was no position which Ms. Denio could hold, either in a competitive or a non-competitive work environment. Mr. Rick opined Ms. Denio is not employable in the future because of her physical and mental disabilities caused by this accident. Mr. Rick stated all of Ms. Denio's limitations are permanent. Based upon the court's observations of Ms. Denio during the course of this trial and the injuries sustained by her, the court is in agreement with Mr. Rick that Ms. Denio is not employable in any capacity in the future.

Ronald R. Reiber, Ph.D testified as claimant's economic expert to provide guidance

in calculating Ms. Denio's past and future lost earnings. He also testified with regard to the total cost of Ms. Denio's life care plan without inflation and with inflation (Exhibit 276). Mr. Reiber received a bachelor's degree in business administration from the SUNY at Buffalo in 1965. He received his master's degree from SUNY at Buffalo in 1968, and a Ph.D in economics from the University of Arizona in 1974. Since 1978, Mr. Reiber has been an associate professor in economics at Canisius College, Buffalo, New York.

In making his projections, Mr. Reiber testified he used average female earnings from the United States Bureau of Census, instead of Ms. Denio's actual average earnings. He explained he did this because of the relatively young age of Ms. Denio. He also felt it was more advantageous to use average female earnings in making long term projections. Mr. Reiber utilized three categories of average female earnings. Those categories were, (1) some college no degree, (2) female two year college graduate, (3) female four year college graduate. His work-life expectancy for the first two categories commenced in January 1994, and for the third category in January 1996. Ms. Denio would have been 30 years old in 1994 and 32 years old in 1996. He projected her lost earnings using two work-life expectancies for each of the three categories. The first projection was based upon a work-life expectancy of 22.3 years for the first two categories and 23.8 years for the last category. He also projected lost earnings using a work-life expectancy for males to age 60 and 62 respectively. Mr. Reiber testified he obtained the work-life expectancy from the table in the Pattern Jury Instructions. According to Mr. Reiber, he used an average annual inflation rate of 3%, and assumed a fringe benefit package averaging 25% of annual earnings. Based upon these assumptions, Mr. Reiber testified that Ms. Denio's total lost earnings, using a work-life expectancy of 22.3 years and 23.8 years would have been $1,077,562.00 for category one, $1,196,544.00 for category two, and

$1,651,914.00 for category three. If the expected work-life expectancy for Ms. Denio would have extended to age 60 and 62, her total projected lost earnings for each of the three categories would have been respectively $1,678,815.00, $1,837,977.00, and $2,348,628.00. These lost earnings figures included the cost of projected lost benefits. Mr. Reiber acknowledged that his figures were not reduced to present value.

The defendant produced Michael J. Vernarelli, Ph.D as its expert economist. Mr. Vernarelli received his bachelor's degree in economics from the University of Michigan in 1970. He acquired his master's and doctorate in economics from SUNY at Binghamton in 1974 and 1978. Mr. Vernarelli is currently the chairman of the economics department in the College of Liberal Arts at Rochester Institute of Technology, and has held that position since 1987. Since 1983, he has also been president of Rochester Economic Consultants, a firm engaging in numerous aspects of forensic economics. In preparing his analysis and testimony, Mr. Vernarelli reviewed various records pertaining to Ms. Denio, including her prior work and educational history, and Mr. Reiber's economic analysis.

Mr. Vernarelli explained that he and Mr. Reiber used basically the same methodology in preparing their analyses. However, his lost earnings projections are different, because he used different assumptions than Mr. Reiber. Mr. Vernarelli stated he utilized the Bureau of Census table analyzing all females with some college and no degree, whereas Mr. Reiber used the Bureau of Census table analyzing females working full-time. Mr. Vernarelli explained he did this because, after reviewing Ms. Denio's work history from 1986 through 1991, he concluded she was never a year round full-time worker, and did not fit a full-time female employee category. Also, Mr. Vernarelli did not make any earning calculations for two and four year female college graduates. Mr.

Vernarelli utilized Ms. Denio's actual earning history to project her past and future lost earnings, as opposed to Mr. Reiber's projections based upon Bureau of Census figures. Mr. Vernarelli testified he used a female, no degree expected work-life, and not a male expected work life, as did Mr. Reiber. Finally, Mr. Vernarelli did not interject into his analysis any fringe benefit loss, because he could find no evidence of them in Ms. Denio's prior work history.

Mr. Vernarelli stated he obtained Ms. Denio's prior earnings from her Social Security records (Exhibit 151). From this, he calculated her average earnings from 1986 through 1991. Mr. Vernarelli stated Ms. Denio would not have worked full-time, year round for any of these years. Ms. Denio's average earnings for the period 1986 through 1991 were $4, 454.00 per year. Mr. Vernarelli stated the average earnings per year for all females with some college and no degree for those same years was $9,628.00. According to Mr. Vernarelli, Ms. Denio's actual average earnings totaled 46.3% of the $9,628.00.

Despite the foregoing, Mr. Vernarelli, for purposes of his analysis, started with an average yearly wage for Ms. Denio of $11,671.00. This amount represented her combined income for 1990 and 1991, neither of which years Ms. Denio worked for the full year. Mr. Vernarelli calculated Ms. Denio's total past lost earnings from 1992 to May 14, 2000, or 7.6 years. This amounted to total past lost earnings of $115,210.00. Mr. Vernarelli explained that if he had utilized the 46.3% reduction, the total past lost earnings would have amounted to $65,210.00.

Mr. Vernarelli used a future work- life expectancy for Ms. Denio of 15.8 years, which he obtained from the tables in the Pattern Jury Instructions. He also used a 3.5% wage inflation rate for future lost earnings. Mr. Vernarelli stated he started with $19,175.00 as the first year of future lost earnings, and the last year of the these futures totaled $37,421.00. According to Mr. Vernarelli's

analysis, Ms. Denio's total future lost earnings were $439,449.00. Once again, if the 46.3% reduction was used, Mr. Vernarelli stated Ms. Denio's future lost earnings would have been $248,735.00. Looking at the average female cohort group with some college and no degree, Mr. Vernarelli stated total past lost earnings would be $140,844.00 and total future lost earnings would be $537,223.00.

In determining Ms. Denio's recovery for past and future lost earnings, the court has given substantial weight to her employment and educational history prior to the date of the accident, October 11, 1992. Ms. Denio graduated from Kenmore West Senior High School, Kenmore, New York in June 1982 with a cumulative average for the four years attendance of 85.45%. Based upon her academic performance, Ms. Denio received a regents college scholarship, awarded to her by the University of the State of New York Education Department. Ms. Denio entered Centenary College in September 1982 to study equestrian science. She stayed at Centenary College for only one semester, at the end of which she was placed on academic probation because of her poor performance. Her average when she left was 1.925 on a four point system. Ms. Denio's father, James Denio, acknowledged in his testimony that his daughter left Centenary College partially because of academic problems. According to Ms. Denio, she only stayed a semester at Centenary College because she "started getting itchy." She also expressed concern for the tuition cost of $4,000.00 per semester expended by her parents. Ms. Denio next attended Daemon College in Amherst, New York for two semesters, between September 1983 and June 1984. She withdrew from Daemon College after these two semesters with a cumulative average of 1.77 on a four point system. Ms. Denio did not attempt to enter college again until January 1985, when she went to Villa Maria College of Buffalo. She took a full course load in her first semester, which emphasized art and

photography courses. She withdrew from one course and received B's in all her other courses. She did not attend Villa Maria College of Buffalo for the fall semester of 1985, but attended again in the 1986 spring semester. She took two courses, which she failed. Ms. Denio next attended Niagara County Community College for the spring 1990 semester. She enrolled in a liberal arts curriculum, and was academically dismissed at the end of the semester.

Ms. Denio's work history for the ten year period following her graduation from high school to the date of the accident displays an inconsistent pattern. During the summers of 1983, 1984, 1985 and 1986 Ms. Denio worked as a counselor at a Girl Scout camp. In 1984, Ms. Denio also worked as a clerk in a Wendy's restaurant. Ms. Denio was employed as a clerk in a record store during parts of 1986 and 1987. In 1987 she was also employed in the Sears photography department. That position continued into 1988. Thereafter, in 1988 and 1989 Ms. Denio worked at three different establishments. Two of those jobs were at restaurant/bar premises, Niagara Falls Summit Inn and Scooters Place. Her other position in 1989 was with the Salvation Army. During portions of 1990 and 1991 Ms. Denio worked for FSI Computer Marketing Services, which was a telemarketing company. In September 1991, Ms. Denio began working at the Heartland Motel, and worked there until the date of the accident. She received a salary there, which her father testified was probably cash and "under the table", since there are no Social Security records for this job. At the Heartland Motel, Ms. Denio cleaned rooms, was a clerk at the desk, and a part-time babysitter for the owners.

In the court's view, the foregoing employment and educational history of Ms. Denio shows a person, who for ten years, lacked direction in life. Ms. Denio somewhat conceded this when she testified, that, up to the date of the accident, she was unsure of what she wanted to accomplish from school and work. She stated she would just get "sick of her jobs." Perhaps this lack of

motivation could be attributed to the fact that Ms. Denio suffered from clinical depression at an early age, which has previously been discussed.

Based upon this prior employment and educational history and Ms. Denio's episodes of depression prior to the accident, the court believes Mr. Vernarelli's past and future lost earnings projections are more reliable than those of Mr. Reiber. Consequently, the court will adopt and accept those projections. In determining lost wages, the court is mindful they must be established with reasonable certainty, focusing on Ms. Denio's earning capacity both before and after the accident. *Walsh v State of New York*, 232 AD2d 939.

Mr. Reiber used Bureau of Census tables for females working full-time, yet Ms. Denio's previous employment history did not support such a position. Instead, Mr. Vernarelli's use of the table setting forth at the average income of all females was more accurate and reliable under these circumstances. Furthermore, the court believes Mr. Reiber's projections for a female two-year college graduate, and a female four-year college graduate were speculative, considering Ms. Denio's educational history. Also, the court believes Mr. Reiber's use of an expected work life expectancy of a male is unrealistic. In calculating Ms. Denio's past and future lost earnings, Mr. Vernarelli started with an average income figure of $11,671.00, which the court believes gave Ms. Denio every benefit of the doubt. There was never a year prior to the date of the accident in which Ms. Denio earned over $6,635.00, which was her highest income year in 1991. Previous years show earnings of $5,036.00 in 1990, $1,968.00 in 1989, $5,489.00 in 1988, $5,683.00 in 1987, and $1,915.00 in 1986. Furthermore, because Ms. Denio had never previously received any benefits from her employment, Mr. Vernarelli was justified in not including any fringe benefit loss in his calculations.

Based upon the foregoing, the court accepts Mr. Vernarelli's projections, and finds

that as of May 14, 2000, Ms. Denio sustained past lost earnings of $115,210.00 and future lost earnings of $439,449.00. Since past and future lost earnings must be calculated as of the date of this decision, these numbers will have to be recalculated using Mr. Vernarelli's methodology. In recalculating the past and future lost earnings, the court finds Ms. Denio will have a future work life expectancy of 14.3 years [1 NYPJI 3d 1417 (2001)], as opposed to a 15.8 year future work life expectancy used by Mr. Vernarelli. Furthermore, Ms. Denio's lost earnings will be subject to all appropriate collateral source reductions, including Social Security benefits, which have been paid, and will be received in the future. Of concern to the court, is the fact that Mr. Vernarelli did not include as part of Ms. Denio's past and future lost earnings the employer contribution for Social Security. Although the court has found it was proper not to include a full benefit package in Ms. Denio's past and future lost earnings, this Social Security benefit would have been mandatory for any employer. Furthermore, all of Ms. Denio's past lost earnings, upon which Mr. Vernarelli relied, were subject to the employer Social Security contribution. It seems logical to the court that if Social Security benefits are being utilized as a collateral source to reduce Ms. Denio's past and future lost earnings, then the employer contribution for Social Security benefits should be included in her past and future lost earnings. All of the recalculations for past and future lost earnings previously referred to will be addressed at the 50-B proceeding.

Joseph Abdulla is the executive directive of the Cortland Community Reentry Program, Inc. (Cortland). This entity is an accredited rehabilitation facility devoted to providing for the needs of individuals suffering from traumatic brain injuries, and other injuries associated with the brain, such as strokes, brain tumors, and drug/alcohol abuse. Patients at Cortland are provided numerous services in support of their disabilities. Among those services are physical therapy,

occupational therapy, behavioral rehabilitation, neuropsychology, cognitive therapy, speech therapy, and nursing and medical support. Mr. Abdulla testified this is the only program of its kind in New York State. He stated Cortland currently has 40 clients in the program, ranging in age from 25 years to 60 years, with an average age of 35 years. Mr. Abdulla testified the Cortland program offers three living options for a patient, (1) group home living, (2) support apartment living, and (3) independent apartment living. In order for a patient to be admitted to Cortland, he/she must have a documented brain injury and be medically stable.

According to the Cortland brochure, Exhibit 181, a patient first undergoes a field evaluation, which includes meeting with the patient, their family, and previous service providers. A series of screenings and evaluations by an inter-disciplinary team next takes place to determine the patient's strengths and weaknesses. After the initial assessment is completed, a meeting takes place with the client and family to outline the necessary services needed at Cortland for that patient.

Mr. Abdulla was contacted by Ms. Denio's attorneys in March, 2000, which was approximately two months prior to the commencement of this damage trial. About one month later, Mr. Abdulla spent a couple of hours with Ms. Denio in her apartment. According to Mr. Abdulla, they spoke about Ms. Denio's daily routine and quality of life. Mr. Abdulla testified Ms. Denio and her parents later visited Cortland, and " she appeared to do very well." Mr. Abdulla observed Ms. Denio to be personable, and interact easily with the other patients. This was the total contact Mr. Abdulla had with Ms. Denio and her parents. Mr. Abdulla believed there were numerous services available at Cortland which would have direct application to Ms. Denio. These included dietary, physical therapy, and occupational therapy programs. Mr. Abdulla testified the cost for Ms. Denio at Cortland would be $400.00 per day for the first 90 days, and thereafter $300.00 per day for long-

term support and care. Mr. Abdulla believed Sarah "would do well with the Cortland program", and would need long-term support. If Ms. Denio was admitted to Cortland, Mr. Abdulla stated she would most likely be housed in an apartment setting.

Patricia Macy is a registered nurse, having received a bachelor's degree with honors in 1983 from SUNY at Buffalo School of Nursing. Thereafter, in 1992 Ms. Macy received a Juris Doctor degree with honors from SUNY at Buffalo School of Law. She is admitted to practice law in New York State. Ms. Macy testified she was contacted by DRS and Associates to prepare a life care plan for Ms. Denio to project her future needs. In order to prepare this plan, Ms. Macy met with Ms. Denio and her family, inspected Ms. Denio's apartment, and reviewed Ms. Denio's numerous medical records including the reports of Drs. Matteliano and Benedict. Ms. Macy explained the life care plan projects forward the cost to take care of Ms. Denio's future needs in present day dollars. In preparing her life care plan, Ms. Macy assumed Ms. Denio would have a normal life expectancy of 45 years. For purposes of the life care plan, the court has used a life expectancy for Ms. Denio of 43.8 years. Exhibit 254 is the life care plan prepared for DRS and Associates by Ms. Macy, and is dated January 5, 2000. Exhibit 256 is an addendum to that plan by Ms. Macy, dated May 19, 2000. Both of these exhibits contain cost projections for medicines, therapeutic modalities, medical care, medical equipment, living assistance, and housing, based upon Ms. Macy's contact with various vendors, organizations, and service providers.

The court has thoroughly reviewed the life care plan and addendum, which are brought together in outline form in Exhibit 273, and does not find them entirely reliable and accurate. Ms. Macy divided the life care plan into eleven categories, with each one containing various subcategories. The first of these is projected evaluations. The court has not considered the cost of

these because they appear to be duplications of similar projected services for Ms. Denio in the life care plan.

Ms. Macy next projects the cost of therapeutic modalities for Ms. Denio. This category consists of occupational therapy, maintenance, physical therapy, optical examinations, community integration, independent living counseling, and dietician consultations. The cost of all of these items are projected to Ms. Denio's life expectancy, except the occupational therapy which is projected at three times per week for 18 months. Ms. Macy testified her projections for community integration and independent living counseling were based upon the New York State Department of Health approval (Exhibit 256) of the program developed for Ms. Denio by Venture Forthe, Inc. This is the organization providing these aide services to Ms. Denio. According to Ms. Macy, she based her cost projections for occupational therapy and maintenance physical therapy upon Dr. Matteliano's testimony. Unfortunately, the record before the court does not support these projections, except for occupational therapy, optical, and dietician. Dr. Matteliano's testimony was that Ms. Denio would benefit from occupational therapy and physical therapy once a day for at least two to three years and beyond. He stated this was for weight loss and increased mobility. However, Dr. Matteliano never testified how much beyond the two to three year period the maintenance physical therapy should continue. It seems unlikely to the court Ms. Denio would be actively engaged in physical therapy five times a week in her sixties and seventies. Consequently, the court has recomputed the maintenance physical therapy to provide Ms. Denio with such therapy five times a week for three years, and thereafter twice a week for 40.8 years. The total cost of this would be $226,044.00. Although Ms. Macy testified she obtained the community integration and independent living counseling from the Venture Forthe plan approved by the New York State Department of

Health, there is nothing in the plan indicating it should continue for Ms. Denio's projected life expectancy. Furthermore, even though the Venture Forthe plan called for community integration, the daily records from Venture Forthe (Exhibit 258) demonstrate that, between January 1999 through March 2000, Ms. Denio never received community integration counseling. Therefore, the court rejects the projected cost for this service. As far as independent living counseling is concerned, the court believes a ten year span of such counseling should be sufficient to serve Ms. Denio's needs. The total projected cost for independent living would therefore be $171,600.00. Based upon all of these adjustments, including a life expectancy adjustment of 43.8 years, the total projected costs for therapeutic modalities are $422,459.00.

Ms. Macy's next life care plan category is routine future medical care. This category consists of rehab medicine, neurophychologists, neurologists, orthopedists, otolaryngologist, blood levels, MRI of brain, CT scan of face, and EEG. Once again, the court does not find all of Ms. Macy's projections in this category to be reliable. Ms. Macy's projections for rehab medicine and the neuropsychologists are supported by the testimony of Dr. Matteliano and Dr. Benedict. However, the record is devoid of any support for the projected cost of a neurologist twice a year for Ms. Denio's life expectancy. Consequently, the court has rejected this cost. Ms. Macy projected that Ms. Denio should see an orthopedist once a year for her life expectancy. She based this projection on Dr. Matteliano's testimony. His testimony was that Ms. Denio would have to be followed by an orthopedic surgeon once a year, but he gave no testimony as to the length of time this should continue. Furthermore, Dr. Matteliano conceded he was not an orthopedist, nor was there any testimony from an orthopedic surgeon as to the necessity and duration of such a consultation. Because of this uncertainty, the court believes an orthopedic consultation once every two years

would be adequate for Ms. Denio. Therefore, the total projected cost for this service would be $3,263.00. The projected cost for the otolaryngologist was supported by the testimony of Dr. Belles, as was the CT scan of Ms. Denio's face. Ms. Macy projected the cost of blood level monitoring on a twice a year basis for Ms. Denio's future life expectancy. The court did not find support in the record for this frequency, and believes blood level monitoring once a year for Ms. Denio's future life expectancy would be sufficient. This cost would be $5,475.00. Ms. Macy projected the frequency and duration of the MRI of Ms. Denio's brain and the EEG based upon the testimony of Dr. Matteliano. He testified Ms. Denio should have the MRI of the brain once every three years, and the EEG once every two years, for her future life expectancy. It should be noted no treating physician for Ms. Denio has recommenced these frequencies. Dr. Matteliano had ordered an MRI for his examination of Ms. Denio in 2000. Ms. Denio's previous MRI was in 1996. There was no significant change noted from the MRI of 1996 to the one of 2000. It would seem to the court these procedures would only be necessary if there was a change in Ms. Denio's condition for the worse. Taking these factors into consideration, the court believes that five MRI's of the brain and five EEG's would be adequate to monitor Ms. Denio's condition. A projected cost of the MRI of the brain would be $5,750.00, and the EEG $1,000.00. Based upon the foregoing, the total projected cost for Ms. Denio's routine future medical care is $74,027.00.

The next category in Ms. Macy's life care plan is future hospital medical care. This consists of a total knee replacement and gastro bypass for Ms. Denio in the future. The court has not considered the projected costs for these items because the proof does not support their inclusion in the life care plan. Dr. Matteliano testified Ms. Denio would need a knee replacement in the future. However, he did not elaborate the medical reasons for this. Furthermore, as previously stated, Dr.

Matteliano is not an orthopedist, and there was no testimony from any orthopedist regarding a knee replacement. The only testimony regarding the gastric bypass to curb Ms. Denio's weight gain was from Dr. Matteliano. He merely stated Ms. D) may need a gastric bypass. The court considers such a medical procedure in the future to be merely speculative, and unsupported by medical proof.

Ms. Macy projected that various items of medical equipment needed by Ms. Denio currently and in the future would have to be replaced every five years. Her total cost for these items was $17,998.00. The court did not find Ms. Macy's life care plan or her testimony supported the expected life of these items and their replacement frequency. Consequently, the court has assigned $15,000.00 for the projected cost of medical equipment.

The court has accepted Ms. Macy's projected future cost of $4,500.00 for equipment maintenance and repair.

The supplies and medications section of the life care plan entails future projected costs for medications, bed liners, orthotics, and consumable supplies. Ms. Macy's future cost projections for medications in her life care plan dated January 5, 2000 (Exhibit 254) was $91,455.00, using a life expectancy of 43.8 years. Her addendum to the life care plan dated May 19, 2000 (Exhibit 256) projected the future cost of Ms. Denio's medications to be $152,512.00. Once again, this projection is based upon a life expectancy of 43.8 years. The only explanation given by Ms. Macy for this drastic increase was that the information came from Dr. Belles. However, Ms. Macy was unable to designate any report from Dr. Belles calling for increased medications, nor was there any testimony from Dr. Belles to support the medication increase. Consequently, the court will rely upon the initial cost projection for medication in the life care plan dated January 5, 2000 of $91,455.00. The court accepts Ms. Macy's projected cost for bed liners and orthotics. However,

there was no explanation given by Ms. Macy in her testimony, nor in her life care plan of what constitutes consumable supplies. In the court's view, these supplies could be items which Ms. Denio would consume in her daily life, whether or not she had been injured. Without an explanation of consumable supplies, the court cannot accept this category as a future anticipated cost. Accordingly, the court finds the future projected cost for Ms. Denio's supplies and medications is $96,150.00.

In the life care plan category of home furnishings and recreation, the court has reservations with respect to two categories, the replacement frequency of Ms. Denio's computer, and the projected cost for home exercise equipment. Ms. Macy anticipated Ms. Denio's computer should be replaced nine times throughout her life expectancy, or every five years. The court considers this projection excessive, considering the fact the projections extend to Ms. Denio's life expectancy of approximately 80 years old. The court believes a replacement frequency of six times over Ms. Denio's life expectancy for her computer would be adequate. The cost of this at $1,500.00 for the computer would be $9,000.00. The projected cost of home exercise equipment did not appear in the life care plan of January 5, 2000, but was included in the life care plan addendum dated May 19, 2000. However, Ms. Macy never described the home exercise equipment or the necessity for it. The court can understand the necessity for some home exercise equipment in order for Ms. Denio to keep her limbs and joints as limber as possible, considering her extensive medical problems. Nevertheless, such body toning should also be accomplished through the physical therapy, which has been provided. Furthermore, the court believes that, as Ms. Denio ages into her sixties and seventies, the necessity for home exercise equipment should probably decrease. Therefore, the court assigns a value of $5,000.00 for the future cost of home exercise equipment. After the foregoing adjustments, the total recovery for future home furnishings and recreation is $19,680.00.

Ms. Macy has assigned $35,594.00 for architectural renovations for Ms. Denio's apartment, needed to accommodate her disabilities. The court accepts this figure.

Ms. Macy has projected future transportation costs for Ms. Denio at $171,376.00. These costs were figured at $.31 per mile. Program mileage was projected at 8,640 miles per year through Ms. Denio's life expectancy. The mileage attributed to Ms. Denio's parents for their transportation of her was 3,000 per year for life expectancy. There is also additional mileage projected of 645 miles once a year for life expectancy. Ms. Macy's projections are based upon approximately 12,000 miles per year being driven to transport Ms. Denio over a 43.8 year life expectancy. The court believes this figure is somewhat exaggerated and optimistic. The most obvious would be the parental mileage, which assumes Ms. Denio's parents will live another 43.8 years. This would appear to the court to put them over 100 years of age. Furthermore, the court feels that, as Ms. Denio ages into her late fifties, sixties and seventies, she probably will not be as active a participant in her programs as she was at a younger age, thereby decreasing the mileage necessary to transport her. Furthermore, the court has made several reductions in Ms. Denio's programs and necessary medical care, which would also reduce the mileage projections. In light of this, the court finds that $50,000.00 would be adequate to cover transportation costs.

In summary, the court finds the total cost of Ms. Denio's future needs to be $717,410.00. This amount is based upon the court's calculations as follows:

Therapeutic modalities	$422,459.00
Routine future medical care	74,027.00
Medical Equipment	15,000.00
Equipment maintenance and repair	4,500.00

Supplies and medications	96,150.00
Home Furnishings and recreation	19,680.00
Architectural renovations	35,594.00
Transportation	50,000.00
Total	$717,410.00

Ms. Macy developed three options for future home care, which anticipated Ms. Denio would not be able to care for herself. According to Ms. Macy, Ms. Denio "requires aide supervision and assistance to maintain a safe and habitable environment, maintain her current medical condition through the timely and consistent administration of her medications and attendance at medical appointments, and to maintain a kempt and presentable person", (Exhibit 254, p18, subdivision J). Ms. Macy developed three options, and projected their costs to the end of Ms. Denio's life expectancy. Under option 1, Ms. Denio would continue to live in her apartment with continued parental assistance and aide services. Option 2 assumed Ms. Denio's parents were no longer able to assist her, and their absence would be replaced by additional aide services. Option 3 assumed Ms. Denio would spend the rest of her projected life expectancy of 43.8 years residing in an assisted living facility, the Cortland Community Reentry Program, Inc. The only option the court has considered is the situation wherein Ms. Denio's parents are no longer able to assist her. Although the court has no doubt that Ms. Denio's parents would continue to assist her as long as they were capable, the court does not believe that they should be burdened with such a responsibility.

The court has not considered the Cortland facility option. Although Ms. Denio was

interviewed by Mr. Abdulla and visited the Cortland facility, the staff never met with Ms. Denio to assess her needs and develop a long term care plan for her. This would appear to be essential to determining whether Cortland would be appropriate for a person, since such an assessment and evaluation is called for in the Cortland brochure (Exhibit 181). Although Dr. Benedict and Dr. Matteliano testified the Cortland facility would be appropriate for Ms. Denio, it was conceded by them that no physician involved in her care had recommended that Ms. Denio be admitted to a facility such as Cortland. Moreover, none of Ms. Denio's treating physicians have expressed any reservations about Ms. Denio living independently in her own apartment. However, that does not mean Ms. Denio can reside in her own apartment without some personal assistance.

Ms. Macy's home care needs for Ms. Denio under option 2, living independently without parents assistance, were initially projected at 35 hours per week at $12.00 per hour. Using a life expectancy of 43.8 years this would be a total cost of $956,592.00 for aide service. Under the addendum to the life care plan, Ms. Macy increased the weekly aide service to 49 hours per week at $12.00 per hour. The total projected cost for the home care needs under the May 19, 2000 life care plan addendum would be $1,339,228.00. Ms. Macy explained the increase in aide service was brought about because she underestimated the time Ms. Denio's parents aided her. It should be noted, these calculations do not take into consideration that Ms. Denio will be receiving independent living counseling from Venture Forthe for ten years in the future, according to the court's calculations. The independent living figure was based upon the Venture Forthe aide being present with Ms. Denio in her apartment 11 hours per week. Ms. Macy also included in both her calculations for home care needs $144,180.00 for case management. However, neither the life care plan nor the addendum to it explained the need for case management, nor did Ms. Macy's testimony.

After thoroughly considering both home care needs scenarios under option 2, the court believes Ms. Denio can be adequately provided for by aides serving her 35 hours per week or five hours per day. Therefore, the court finds Ms. Denio is entitled to $1,000,000.00 for future home care needs, which amount includes additional sums for any necessary case management.

To summarize, claimant, James S. Denio, as adult guardian of the person and property of Sarah J. Denio, is awarded the following amounts: $520,000.00 for past pain and suffering; $880,000.00 for future pain and suffering; $576,810.33 for past medical expenses; $115,210.00 for past lost earnings; $439,449.00 for future lost earnings; $717,410.00 for future needs as set forth herein; $1,000,000.00 for future home care needs; for a total of $4,248,879.00.

Entry of judgment will be held in abeyance pending completion of proceedings under CPLR Article 50-B. The 50-B proceeding will also address any recalculations necessary for past and future lost earnings, along with collateral source applications, and all other necessary adjustments, including those for inflation, which have not been taken into consideration in this decision. The parties are directed to contact the court when they are in a position to proceed.

Buffalo, New York
December 15, 2001

Edgar C. Nemoyer

EDGAR C. NEMOYER
Judge of the Court of Claims

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

February 13, 1973

MEMORANDUM filed with Senate Bill Number 2000-B, entitled:

"AN ACT to amend the insurance law, the workmen's compensation law and the vehicle and traffic law, in relation to establishing a comprehensive automobile insurance reparations system"

#1

CHAPTER 41

A P P R O V E D

With the enactment of this measure, the present automobile insurance system -- a system which costs too much, takes too long to pay off and delivers too little protection -- will be cast aside. In its stead will be a new insurance reparations system which

-- assures that every auto accident victim will be compensated for substantially all of his economic loss, promptly and without regard to fault;

-- will eliminate the vast majority of auto accident negligence suits, thereby freeing our courts for more important tasks; and

-- provides substantial premium savings to all New York motorists.

The passage of no-fault auto insurance is a triumph of good sense and a victory for the people. On the solid foundation of this bill, I hope that we can continue to achieve further premium savings and get even more negligence cases out of the courts in the future.

I am, therefore, pleased to give my approval of this long overdue measure.

The bill is approved.

(signed) NELSON A. ROCKEFELLER

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

William Sportman, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent(s) herein.

On the 28th day of September, 2023, I served a copy of the annexed **Letter Brief and Addendum** upon the party named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a letter box of the Capitol Station Post Office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to the said party at the address within the State and respectively designated by said party for that purpose as follows:

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Sworn to before me this
28th day of September, 2023.

Cristal R. Gazelone
NOTARY PUBLIC

CRISTAL R. GAZELONE
Notary Public, State of New York
Reg. No. 01GA6285501
Qualified in Rensselaer County
Commission Expires April 2, 2024