NEW YORK COURT OF APPEALS ROUNDUP

UNRESOLVED SPLIT—THE ACCRUAL OF PREJUDGMENT INTEREST IN NO-FAULT AUTOMOBILE ACTIONS

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In *Sabine v. State of New York*, the Court of Appeals recently addressed the issue of the point at which a personal injury action accrues under New York's no fault insurance regime for purposes of the imposition of prejudgment interest. The question of when prejudgment interest begins to accrue in bifurcated automobile accident actions has divided the Appellate Divisions for a long time. In a memorandum decision, a majority of the court found that the issue had not been preserved for appeal and did not discuss the underlying merits.

A three-judge dissent, however, did consider the substantive merits and found that prejudgment interest should be calculated from the date plaintiff obtained summary judgment on the issue of liability and not from the later date on which plaintiff obtained a verdict that he sustained a "serious injury" entitling him to recover non-economic damages under Article V of the Insurance Law.

Because the *Sabine* majority did not reach the underlying issue, there still is not a definitive resolution to the Appellate Division split, but given the fact that all three dissenting judges who did consider the merits found that prejudgment interest runs from the date liability is established rather than when the quantum of damages is determined, the decision still has predictive value as to how an eventual majority would rule if and when the issue comes back up to the Court of Appeals.

The plaintiff was injured in an automobile accident that occurred when the vehicle he was driving was struck by a truck owned by the State and driven by a State employee. The plaintiff brought suit in the Court of Claims and moved for partial summary judgment on the issue of liability. The court granted partial summary judgment on Sept. 26, 2018. Under New York's no fault insurance regime, the plaintiff would only be entitled to recover non-economic damages if he could establish that he suffered a "serious injury" as defined in Section 5102(d) of the Insurance Law.

After a bench trial, the Court of Claims determined that plaintiff had suffered serious injury and, in an Oct. 27, 2021 decision, awarded him $550,000 in damages. Judgment was entered awarding plaintiff damages along with prejudgment interest calculated from the date of the Oct. 27, 2021 decision rather than the Sept. 26, 2018 date of the partial summary judgment on liability.

The plaintiff appealed from that part of the judgment that calculated prejudgment interest as of the latter date and argued that the Court of Claims should have awarded interest as of the date the State was found liable instead. The Appellate Division, Fourth Department unanimously affirmed the judgment, but two of the five Fourth Department justices found that the issue had not been properly preserved for appeal. *Sabine v. State of New York*, 183 N.Y.S.3d 892 (4th Dep't 2023). The Fourth Department granted leave to appeal. *Sabine v. State of New York*, 189 N.Y.S.3d 378 (4th Dep't 2023).

Four judges of the Court of Appeals agreed with the two dissenting Fourth Department justices and, in a memorandum decision, affirmed the Fourth Department ruling on the grounds that the sole issue on appeal had not been preserved because plaintiff had not raised it before the Court of Claims. Even though

the State did not oppose the Court of Appeals' resolution of the issue, the majority noted that the court has an independent duty to determine whether an issue has been properly preserved.

The three dissenting judges, in an opinion written by Judge Jenny Rivera, joined by Chief Judge Wilson and joined in part by Judge Troutman, found that the issue had been preserved for appeal and would have overturned the Fourth Department decision and remanded the case back to the Court of Claims so that prejudgment interest could be determined as of the September 2018 date on which the State was initially found liable.

The dissent rejected the State's argument that "serious injury" is an element of liability under New York's No Fault Law and, accordingly, that prejudgment interest should not be calculated until the trier of fact finds that plaintiff suffered serious injury. The dissent noted that the Second and Third Departments have previously ruled that the issue of serious injury is an element of damages rather than liability for purposes of calculating prejudgment interest, while the Fourth Department has taken an opposite view.

The dissent discussed the purpose and legislative history of New York's no fault regime which limits individuals injured in an automobile accident to recovery through insurance coverage unless they can establish that they suffered serious injury, in which case they retain all otherwise available judicial remedies to recover for non-economic loss. The dissent noted that the purpose of prejudgment interest is to compensate a plaintiff for the time value of the money to which they are entitled from the moment that liability is determined.

This can be more complicated in bifurcated trials, like the one in *Sabine*, but the same principles apply and the dissent would rule that a finding of serious injury may be a necessary prerequisite to a determination of damages but it is not an essential element of liability. Accordingly, the dissent would find that the plaintiff is entitled to prejudgment interest as of the date the trial court granted partial summary judgment on the issue of liability.

As noted above, the four-judge majority did not address this issue because they found that, because the plaintiff had not raised this argument before the Court of Claims, the issue had not been preserved for appeal. The dissent disagreed with this finding and explained that the Court of Claims' ruling was in accordance with binding Fourth Department precedent, so the plaintiff's first opportunity to present his argument that the judgment should be modified to calculate prejudgment interest from the earlier summary judgment date was on appeal to the Fourth Department.

They disagreed with the majority's position that the plaintiff could have sought relief from the trial court pursuant to CPLR 5015 and 5019, and they would have applied an exception to the preservation rule that enables a party to raise claims for the first time on appeal that "could [not] have been obviated or cured by factual showings or legal countersteps" in the trial court. *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969). The majority had expressly rejected the application of this exception, noting that it not been applied in more than four decades and had never been applied in a situation like the present one in which the protesting party had been blocked by controlling precedent from seeking the relief at issue.

Although the majority did not reach the underlying issue, the fact that the three judges who did consider the issue–as well as the Second and Third Departments–would calculate prejudgment interest in a no-fault automobile action as of the date that liability is first determined still has predictive value as to how a majority of the Court of Appeals may rule if and when this issue comes before them again. In the meantime, practitioners are advised to be certain to raise this issue before the trial court even if they are trying the case in the Fourth Department.

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