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COURT OF APPEALS

STATE OF NEW YORK

SABINE,

Appellant,

-against-

NO. 118

STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
November 20, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Sabine v. State of New York.

3 (Pause)

4 MR. KENNY: Good afternoon. Michael Kenny, on
5 behalf of the appellant, Michael Sabine. And if I may,
6 Your Honor, I'd for two minutes in rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. KENNY: Thank you. At the outset, I'd like
9 to thank this distinguished court for its time in
10 addressing this issue as to when a claimant or plaintiff is
11 entitled to prejudgment interest under CPLR 5002 in a
12 bifurcated trial. The issues we're going to talk about
13 today center around three basic things: Section 5002 of
14 the CPLR, Section 5102(d) of the New York State Insurance
15 law, and Section 5104 of the Lnsurance law.

16 JUDGE GARCIA: Counsel, I think it's four things.
17 The first one is preservation. How is this issue before
18 the court?

19 MR. KENNY: Let me address that. As the record
20 reflects the - - - we - - - at the end of the trial when we
21 got the decision from Judge Fitzpatrick - - -

22 JUDGE CANNATARO: What decision are you talking
23 about?

24 MR. KENNY: The damages decision, okay?

25 JUDGE CANNATARO: Okay.



1 MR. KENNY: We reached out to the court as is our
2 process and practice. And we presented at a proposed
3 judgment. The clerk of the court said, no. We reached out
4 to Judge Fitzpatrick's court again, and they said to us - -
5 -

6 JUDGE GARCIA: They said - - - who actually said
7 to you?

8 MR. KENNY: Sean Gleason, which was Judge
9 Fitzpatrick's law clerk, reached back out to us. And it's,
10 I think, on page 466 of the record.

11 JUDGE HALLIGAN: This is the E-mail you're
12 referring to?

13 MR. KENNY: Yes.

14 JUDGE GARCIA: And has this court ever considered
15 - - - preserved an issue between an E-mail between a party
16 and a law clerk?

17 MR. KENNY: Well, I can take that a different way
18 too, Your Honor.

19 JUDGE GARCIA: Well, take it the way I'm asking
20 first. Have we ever done that?

21 MR. KENNY: I don't know that you have done that.
22 As a practical matter, Judge, we did present this to the
23 Court of Claims, maybe not in the form of a motion, but we
24 were given the option. The option of - - -

25 JUDGE SINGAS: Was the judge cc'd on that?

1 MR. KENNY: Excuse me?

2 JUDGE SINGAS: Was the judge cc'd?

3 MR. KENNY: Well, it came from the judge's
4 chambers.

5 JUDGE SINGAS: But was the judge cc'd?

6 MR. KENNY: Judge cc'd as - - -

7 JUDGE SINGAS: Judge Fitzpatrick. How do we know
8 that Judge Fitzpatrick actually weighed in on this?

9 MR. KENNY: Well, Sean Gleason was Judge
10 Fitzpatrick's law clerk, and he was part of her - - - his -
11 - - her staff.

12 JUDGE SINGAS: I believe he said in the end of
13 that email, you may make a formal motion on this, correct?

14 MR. KENNY: That's correct.

15 JUDGE SINGAS: So doesn't that indicate that this
16 discussion that you were having over E-mail was not a
17 formal motion and was just an informal discussion that the
18 law secretary was basically saying to you, if you want to
19 take this up, take it up in a formal motion like we
20 normally do?

21 MR. KENNY: I believe that that was qualified if
22 you have additional cases outside of Ruzycki. And in that
23 sense - - - right? So the issue was brought up. But to
24 move it beyond - - -

25 JUDGE CANNATARO: But is that a determination for

1 a law clerk to make? I mean, the invitation to make a
2 motion seems to be to raise these seemingly valid legal
3 arguments regarding the applicability of Ruzycki.

4 MR. KENNY: Well, is - - - is that reasonable?
5 It is reasonable in practice, right? On the flip side of
6 that, given that Judge Fitzpatrick was bound by Ruzycki,
7 clearly, in the Fourth Department. What we would have done
8 is we would have - - -

9 JUDGE CANNATARO: Well, Counsel, you're making
10 arguments here today that Ruzycki - - - are you just asking
11 the court to overrule Ruzycki? Because I saw you cite to
12 the law in other departments, changes to the law post-
13 Ruzycki. And I think, in this case, you even have an
14 argument that you have a liability judgment, not a
15 negligence judgment. These are all issues that could have
16 been raised in - - - directly to the court in the context
17 of a motion. And then they would have been - - - for - - -
18 you know, for lack of a better expression, you would have
19 put the court's feet to the fire to address all of those
20 issues. But none of that happened here.

21 MR. KENNY: Right. You're absolutely right. So
22 what we did is we brought it up to the Fourth Department -
23 - -

24 JUDGE GARCIA: But they have authority to
25 consider issues that aren't preserved. So when you got

1 that E-mail, it lays out two choices. You could go
2 preserve this issue and make a motion in front of the trial
3 court, which you chose not to do, or you could raise it in
4 the Fourth Department, where they can consider anything
5 they want. We can't. So when you didn't make a motion,
6 it's unpreserved for us.

7 MR. KENNY: Well, I believe that - - - that under
8 Telaro, that since it was a pure question of law, that we
9 have the ability - - -

10 JUDGE GARCIA: But even assuming Telaro, which
11 we've applied four times in fifty-five years, would apply
12 here, what about Judge Cannataro's point that - - -

13 JUDGE CANNATARO: You had legal arguments to
14 make.

15 JUDGE GARCIA: - - - legal arguments.

16 MR. KENNY: Yeah. And as a practical matter and
17 - - - and in reality, what the situation was is that it,
18 number one, adds additional burden on the court. It adds
19 an additional burden on the state because she was bound by
20 the ruling in Ruzycki, right? So we could have made that
21 argument. We absolutely could have in - - - in the form of
22 a motion, but we were given that option as - - - as the
23 chambers indicate to us, either make a - - - make the
24 motion and - - -

25 JUDGE TROUTMAN: So are you making - - -

1 MR. KENNY: - - - and show us some additional
2 law.

3 JUDGE TROUTMAN: Are you making a futility
4 argument because the court, you say, was bound by that
5 precedent?

6 MR. KENNY: Well, what I'm saying is that she was
7 bound by that precedent in Ruzycki that the Fourth
8 Department came down with. So - - -

9 JUDGE TROUTMAN: But if you made the motion and
10 the - - - there's a ruling - - -

11 MR. KENNY: Right.

12 JUDGE TROUTMAN: - - - arguably, there could have
13 been something offered to the court to make a determination
14 as to whether or not it was to be followed, if it was still
15 good law - - -

16 MR. KENNY: Well, she - - -

17 JUDGE TROUTMAN: - - - even in the very least.

18 MR. KENNY: She and her chambers indicated it was
19 still good law, and that was their position. And when we -
20 - -

21 JUDGE TROUTMAN: I think what the - - - my
22 colleagues raise a very valid point. You refer to the
23 chambers, to the law clerk - - -

24 MR. KENNY: Yes.

25 JUDGE TROUTMAN: - - - but not the judge - - -

1 MR. KENNY: That's right.

2 JUDGE TROUTMAN: - - - not the judge. So holding
3 or anything of the sort, these are inquiries. Inquiries
4 are made to chambers all the time. And you are not
5 suggesting that the clerk said that their opinion was that
6 of the court, or are you?

7 MR. KENNY: I'm saying that the law clerk, Mr.
8 Gleason, in this situation, indicated to us that, based on
9 Ruzycki, they would - - - the court was not going to change
10 - - -

11 JUDGE TROUTMAN: So the law clerk and the judge
12 are the same. Is that what you're saying?

13 MR. KENNY: I'm saying that the law clerk is
14 under the guise of the judge, yes. And - - - and this is -
15 - - and this is how this - - -

16 JUDGE CANNATARO: What does that mean, the guise
17 of the judge? The law clerk speaks for the judge?

18 MR. KENNY: Well - - -

19 JUDGE CANNATARO: The - - - the law clerk's
20 statement is the law of the judge?

21 MR. KENNY: Well, I don't want to be so
22 presumptuous as to say that, Judge, because that wouldn't
23 be fair. But what I am saying is that when Mr. Gleason
24 reached back out to us, relative to the fact that Ruzycki
25 was - - - that Judge Fitzpatrick was going to apply Ruzycki

1 and - - - and hence, there wasn't going to be any interest
2 flowing from September of 2018 until the date of the
3 damages decision, that that's, in essence, what they were
4 saying, yeah.

5 JUDGE RIVERA: Was this typical practice in this
6 litigation where the clerk would communicate the judge's
7 position - - -

8 MR. KENNY: Yeah. I mean, when - - - when - - -

9 JUDGE RIVERA: - - - outside of the judge's
10 presence?

11 MR. KENNY: Right. As a matter, of course, we
12 would reach out to the clerk to - - - for guidance in these
13 matters. And as a result, the clerk would respond with
14 that.

15 JUDGE HALLIGAN: What about a ruling on a - - -
16 on a question? In other words, guidance might take the
17 form of how many pages for this motion, when should it be
18 filed, all those sorts of procedural issues. But was it
19 practice to ask for a ruling on a contested question from
20 the law clerk via an E-mail and to receive one without any
21 direct engagement from the judge?

22 MR. KENNY: So - - - if were you using the
23 example, Your Honor, of the number of pages or something
24 along those lines? If - - - if that was the case,
25 absolutely.

1 JUDGE HALLIGAN: Yeah. But something - - - I'm
2 asking something that is not procedural - - -

3 MR. KENNY: Oh, I see.

4 JUDGE HALLIGAN: - - - or mechanical, something
5 that is a substantive question, was the practice to obtain
6 a ruling from the clerk as opposed to something from the
7 judge directly?

8 MR. KENNY: Yes. And this hasn't just happened
9 in - - - in this case. It happened in other cases as well.
10 When we would have rulings for depositions, for instance,
11 and there was a question that arose during a deposition, we
12 would reach out to the law clerk, and the law clerk would
13 respond to us. So - - -

14 JUDGE CANNATARO: And is it your position here
15 that we should encompass that practice within our
16 preservation requirement? In other words, equate a law
17 clerk ruling with the judge's ruling for purposes of
18 preservation?

19 MR. KENNY: In terms of preservation, I would say
20 that - - - I would ask this court to rely on Telaro, right?
21 And say that this is a pure question of law, and that at
22 any time, the Appellate Division could take that issue up,
23 could address that issue, which they did in this case.

24 JUDGE CANNATARO: Telaro requires more, you know
25 - - - with all - - - you know, notwithstanding what Judge

1 Garcia said about the paucity of instances where we've
2 applied Telaro, it involves more than just being a question
3 of law. It requires the existence of available legal
4 arguments and counter steps that could have been taken to
5 diminish the other side's position. And you seem to have
6 acknowledged that you had arguments to make. You just
7 chose to accept the invitation to go directly to the
8 Appellate Division without making a motion first.

9 MR. KENNY: As it relates to that, I - - - I'd
10 like to bring up to the court that - - - the - - - those
11 are not the - - - there were no factual issues as it
12 related - - -

13 JUDGE CANNATARO: I'm not talking about factual
14 issues.

15 MR. KENNY: Yes.

16 JUDGE CANNATARO: I'm talking about legal
17 arguments.

18 MR. KENNY: Right. I'm talking about legal
19 arguments too. There were no factual issues that the other
20 side had any - - -

21 JUDGE GARCIA: So any time there's no factual
22 issues, we can just hear new theories here as long as we
23 don't have to find new facts?

24 MR. KENNY: Your Honor, I believe that in this
25 situation, we did reach out to the court. We did make an

1 attempt to address this issue. We were given the option of
2 taking it up to the Appellate Division where - - -

3 JUDGE GARCIA: Where they can hear anything they
4 want. They have that authority that we do not.

5 JUDGE HALLIGAN: Can I ask: what would the
6 argument have been if you had made it in a formal motion?
7 Would it have been that Ruzycki was somehow
8 distinguishable, that it was wrongly decided and you would
9 be making a record for further review? What would you have
10 done if you'd filed a formal motion?

11 MR. KENNY: I would have said that Ruzycki was
12 wrongly decided.

13 JUDGE HALLIGAN: But not that it was
14 distinguishable?

15 MR. KENNY: Right. And would have said that it
16 was wrongly decided based on Van Nostrand in - - - in
17 Justice Dillon's decision therein, you know. And we can
18 talk about the other things, but - - - if you would like.
19 That's up to the court. I'd like to address it. You know,
20 if - - - you know, 5002 of the CPLR and the language
21 therein sets forth that interest shall be recovered upon
22 the total sum awarded including interest to verdict,
23 report, or decision in any action from the date the verdict
24 was rendered or the report or decision was made to the date
25 of final judgment.

1 JUDGE TROUTMAN: And how is that impacted when
2 you have a bifurcated situation?

3 MR. KENNY: Well, this court's already determined
4 that, right? Under Love v. the State of New York. Love v.
5 the State of New York was out of the very same Court of
6 Claims that this case is, right? And in Love v. the State
7 of New York, there was a bifurcated case. It was an
8 automobile crash case. And there was a determination by
9 Judge Margolis in that situation that liability attached.
10 That the state trooper violated the Vehicle and Traffic Law
11 and injured Mr. Love, okay? And as a result of that, there
12 was a subsequent damage determination. And that damage
13 determination resulted in a certain sum certain. So what
14 this court said is that the interest is to be determined
15 from the date of the liability - - - that the liability was
16 established. In that case, the liability was when the
17 driver - - - the state trooper violated the vehicle and
18 traffic law. And that was determined.

19 JUDGE HALLIGAN: I thought we said there that it
20 starts to run when the defendant's obligation to pay the
21 plaintiff is established. And I don't see how that is
22 established until serious injury is determined.

23 MR. KENNY: Serious injury is - - -

24 JUDGE HALLIGAN: Well, is there an obligation to
25 pay unless and until serious injury is established?

1 MR. KENNY: Yes, Your Honor, there is, because
2 serious injury is not an element of liability.

3 JUDGE HALLIGAN: But - - - I take your point.
4 But is there an obligation for a defendant to pay if a
5 plaintiff cannot and does not establish serious injury? I
6 thought under the statutory scheme, the answer is no.

7 MR. KENNY: Under 5104, that's clear, right? In
8 order to - - -

9 JUDGE HALLIGAN: Right.

10 MR. KENNY: - - - recover - - -

11 JUDGE HALLIGAN: So how is there an obligation to
12 pay until that is established?

13 MR. KENNY: Well - - -

14 JUDGE HALLIGAN: It seems to me that's why - - -
15 I'll just ask you to address one other case quickly because
16 I see your light is on. In Licari, I thought that we
17 determined that the case should be dismissed if there
18 wasn't a finding of serious injury. So I struggle to
19 understand how there is some obligation that could attach
20 before the finding.

21 MR. KENNY: So if you look at it in the sense of
22 - - - of what serious injury is, it's naturally a damage
23 question. It's related to the nine criteria under 590 - -
24 -

25 JUDGE HALLIGAN: Yeah.

1 MR. KENNY: - - - or 5102(d). And if you were to
2 look at a bifurcated trial, the first part of it, we're
3 going to try duty, right? Lack of duty, right?

4 JUDGE HALLIGAN: Yeah.

5 MR. KENNY: Breach of the duty. And then we're
6 going to, later on, try the damages. And that's part of
7 damages. And what Justice Dillon sets forth in Van
8 Nostrand is that - - - is that the fault issue, right, the
9 common law liability issue is separate and apart from the
10 damage issue, which the serious injury has done, right?
11 When we try a case in real life, we - - - in a bifurcated
12 sense, we are trying liability first. We are trying - - -

13 JUDGE SINGAS: Yeah. But that - - - what about
14 the effect of the no fault law? Doesn't that change that
15 paradigm?

16 MR. KENNY: No, it doesn't at all.

17 JUDGE SINGAS: Why not, though?

18 MR. KENNY: Because - - - and you - - -
19 certainly, I'm not going to be able to express it as
20 eloquently as Judge - - - Justice Dillon did. But in that
21 situation, right, all it is is an element. It's no
22 different than - - -

23 JUDGE SINGAS: Right. They're saying liability
24 won't attach until serious injury is proven.

25 MR. KENNY: No. No. That - - - that's not what

1 I'm saying at all. In fact - - -

2 JUDGE SINGAS: No. I know what you're saying.
3 I'm asking what the law says.

4 MR. KENNY: Right. Well, the law doesn't say
5 that either. Because 5104 doesn't say that, certainly
6 5102(d) doesn't say that. And on top of that, 5002 which
7 was interpreted by this court in Love and later in Daniel,
8 right? That doesn't say it either, right? So - - - so
9 what the situation is, is that serious injury and liability
10 are two separate things, right? And serious injury is
11 nothing but another aspect that we have to try when we try
12 a lawsuit.

13 JUDGE SINGAS: Well, if you don't prove serious
14 injury, could you - - - what's your damages award?

15 MR. KENNY: Zero.

16 JUDGE SINGAS: Okay. So why doesn't - - - how
17 does that support your position?

18 MR. KENNY: Okay. But if I I have summary
19 judgment on a slip and fall case, right, to use an analogy,
20 and I go in and I can't prove any damages, what are - - -
21 what ends up happening?

22 JUDGE SINGAS: That's different. That's damages.
23 Here we're talking about liability.

24 MR. KENNY: But you're conflating the two.
25 There's two different aspects here.

1 JUDGE HALLIGAN: In the example that you gave of
2 summary judgment where the damages number is zero, I don't
3 think that gets dismissed on appeal if that's the finding.
4 I think that the damages are zero. But it seems to me that
5 what we decided in Licari is that it should be dismissed.
6 And that's what indicates, perhaps, that there was no
7 liability that attached, absent a finding of serious
8 injury, because of the differences in the no fault scheme.

9 MR. KENNY: To use the language in Van Nostrand,
10 it's a distinction without a difference. It'd be - - - it
11 - - - the situation is if you don't meet that threshold,
12 right, under 5102(d), you can't recover noneconomic losses,
13 pain and suffering, right? If you you had a case of
14 property damage and a question of serious injury at the
15 damage trial, right? And you didn't match the - - - you
16 didn't meet the threshold under 5102(d), but the - - -

17 JUDGE HALLIGAN: It may not matter as to the
18 plaintiff if the plaintiff is getting \$0. I appreciate
19 that. But it does seem to me - - - and I won't continue,
20 but that there's a procedural distinction between a
21 dismissal and a decision that the damages are zero in terms
22 of the way we think about the disposition of a case.

23 MR. KENNY: I appreciate that. Anything else?
24 Thank you.

25 CHIEF JUDGE WILSON: Thank you.



1 JUDGE TROUTMAN: What is the effect of a finding
2 of liability in a bifurcated trial?

3 MR. BRODIE: Thank you, Judge Troutman. And may
4 it please the court. Frederick Brodie, for the State.
5 Answering your question, the effect of a finding of quote,
6 "liability" depends on what's been litigated. If only
7 negligence was litigated, it's not really a finding of
8 liability in a no-fault case because before you can hold
9 someone liable in a no-fault case, you need serious injury.

10 JUDGE TROUTMAN: So what does that separate
11 determination mean? That in this instance, there was a
12 liability finding, then damages was separated, and you have
13 to establish that there was something recoverable, correct?

14 MR. BRODIE: Correct.

15 JUDGE TROUTMAN: And in this instance, we're
16 talking about when prejudgment interest attaches.

17 MR. BRODIE: Right.

18 JUDGE TROUTMAN: So that liability finding means
19 nothing?

20 MR. BRODIE: No. The liability finding - - -
21 let's say it's a finding of just negligence. It's like
22 summary judgment on an element of your claim or a trial - -
23 - a separate trial under, I think, it's CPLR 612 or 512,
24 separate trial on one element of your claim which can be
25 done. That element is taken care of. It's adjudicated in

1 favor of the plaintiff.

2 JUDGE TROUTMAN: But it's not enough for the
3 clock to begin to run is what you're saying?

4 MR. BRODIE: Correct. And here's why. Under
5 insurance law 5104(a), unless the claimant proves serious
6 injury, quote, "There shall be no right to recovery," close
7 quote, for noneconomic loss.

8 JUDGE CANNATARO: Counsel, I've always understood
9 - - - I have done my fair share of motor vehicle cases with
10 threshold issues. I've always understood that to be
11 exactly what the statute says, a statutory bar to recovery,
12 a completely legislatively-created creature that, in my
13 view, was enacted to effectuate the purposes of the no-
14 fault law. The legislature, in order to have no-fault be
15 meaningful, decided to shunt a whole body of cases into the
16 no-fault system by barring a recovery in court. But it - -
17 - to me, it never spoke to a party's fault, and it doesn't
18 even speak to damages. Because you could have very
19 significant damages in a case. They just don't happen to
20 meet a very arbitrary list of damages that will qualify you
21 to get over the threshold. So I have a very hard time
22 understanding - - - you know, I get - - - let me just say
23 it. I have a hard time understanding how it's a bar or how
24 it affects liability when it - - - when the legislature
25 itself calls it a bar to recovery.

1 MR. BRODIE: Well, it doesn't say a quote, "bar
2 to recovery." It says you have no right of recovery. And
3 I think the - - -

4 JUDGE CANNATARO: What's the difference?

5 MR. BRODIE: Yeah. The term right is critical
6 because it goes to the existence - - -

7 JUDGE CANNATARO: Please tell me again.

8 MR. BRODIE: - - - it goes to the existence of a
9 cause of action. Rather than limiting damages, it
10 abolishes a claim. And it does that. And this will
11 address - - -

12 JUDGE CANNATARO: But it - - - I agree with you,
13 but it doesn't abolish the claim because the plaintiff
14 can't prove fault. And it doesn't even abolish the claim
15 because plaintiff can't prove some amount of damages. It
16 just abolishes the claim because it doesn't meet an
17 arbitrary standard for letting the case stay in court. If
18 there were no no-fault law, that case could definitely go
19 forward in court and plaintiff could recover damages. They
20 might be small, but they could recover damages. You agree
21 with that, don't you?

22 MR. BRODIE: Yes.

23 JUDGE CANNATARO: So if there were not a no-fault
24 law, then this would be like any other case in supreme
25 court or county court or whatever court you want, and a

1 ruling on summary judgment on liability would entitle you
2 to prejudgment interest, wouldn't it?

3 MR. BRODIE: Yes. You and I are agreed. Now,
4 what's the effect of the no-fault law? It adds by
5 modifying the common law. And remember, it's a statute - -
6 - statute modifying the common law to add an element. So
7 it's not enough to prove just negligence. It's not enough
8 to prove just some damage. You have to prove one of these
9 nine categories, or however many there are, categories of
10 damages as an element of your case before there can be
11 liability.

12 CHIEF JUDGE WILSON: So you have a departmental
13 split here. And you have the Appellate Division here
14 saying, this fits in the Telaro exception. What's your
15 position on whether it fits or doesn't fit?

16 MR. BRODIE: I think it fits within the Telaro
17 exception.

18 CHIEF JUDGE WILSON: Because?

19 MR. BRODIE: We didn't argue preservation below.
20 I think, you know, Telaro exception is - - - one moment,
21 Your Honor. I - - -

22 CHIEF JUDGE WILSON: And I assume just for - - -
23 you'd like to have the split resolved.

24 MR. BRODIE: I think the split's been hanging
25 there since 2007, so - - -

1 CHIEF JUDGE WILSON: Does it cause you any
2 problems?

3 MR. BRODIE: Does it - - - well, it's \$150,000 at
4 issue in this case.

5 CHIEF JUDGE WILSON: Well, I don't mean this
6 case. I mean, you litigate these, presumably, more - - -
7 not you personally, but the State does, and probably would
8 like to have a uniform rule on this?

9 MR. BRODIE: Certainly, a uniform rule would be a
10 good thing, and - - -

11 JUDGE CANNATARO: Well, there are no shortage of
12 motor vehicle cases with threshold issues out there, right?
13 If this case isn't preserved, the next one will come along
14 in short order, I'm sure.

15 MR. BRODIE: Well, I don't know about short order
16 because, again, the last one - - -

17 JUDGE GARCIA: You're winning that much.

18 MR. BRODIE: - - - that was up here was 2007.

19 CHIEF JUDGE WILSON: Yeah.

20 JUDGE GARCIA: Yeah. You're winning that much.
21 It's not going to likely to come along. So do you think,
22 as an institutional matter, appellate court should certify
23 a question of law to us that's unpreserved on the hope that
24 we're going to apply Telaro exception to it?

25 MR. BRODIE: I suppose that's what happened here.

1 If the court doesn't think that Telaro exception applies,
2 I'm perfectly happy, we win. Fourth Department gets
3 affirmed. That's why we didn't brief preservation. That's
4 all at play.

5 JUDGE RIVERA: Well, if he had filed - - - if he
6 had filed a formal motion pursuant to the clerk's - - - I
7 don't know what to call that thing - - - clerk statement in
8 the E-mail, what would you have said? Would you have said
9 anything different from what you would have said to the
10 Appellate Division?

11 MR. BRODIE: We would have said that Ruzycki is
12 the law of the department and - - -

13 JUDGE CANNATARO: Well, the clerk wasn't inviting
14 you to make a motion, were they? I thought they were
15 inviting the plaintiff.

16 JUDGE RIVERA: No. No. Right.

17 MR. BRODIE: I - - - I - - -

18 JUDGE RIVERA: That was not the question. The -
19 - -

20 MR. BRODIE: I think - - -

21 JUDGE RIVERA: Yeah. Go ahead.

22 MR. BRODIE: Yeah. I think Judge Rivera was
23 asking me, what would I say in response to - - -

24 JUDGE CANNATARO: What would you argue?

25 MR. BRODIE: - - - the motion.

1 JUDGE CANNATARO: Yeah.

2 MR. BRODIE: And my response would be that
3 Ruzycki was the law of the department, and it was also
4 correct.

5 JUDGE RIVERA: Right. Which is the same position
6 you'd take at the Appellate Division.

7 MR. BRODIE: The same position we - - -

8 JUDGE RIVERA: Right?

9 MR. BRODIE: - - - took in the Appellate Division
10 and out of this - - -

11 JUDGE RIVERA: Same position. There's not
12 anything different. And you agree that the trial judge is
13 bound by the Fourth Department?

14 MR. BRODIE: Yes.

15 JUDGE HALLIGAN: Counsel, I know your office
16 appears in a lot of cases across the state. So is your
17 decision not to press preservation here - - - picking up on
18 the Chief's question, do you have a broad view across cases
19 that Telaro is an available exception here? I mean, would
20 we expect to see the same position taken when preservation
21 might benefit you in a different case?

22 MR. BRODIE: I can't speak to the hypothetical of
23 a different case because I'm not in the knowledge of what -
24 - -

25 JUDGE HALLIGAN: Well, I think you understand



1 what I'm getting at.

2 MR. BRODIE: But you know - - -

3 JUDGE HALLIGAN: Is it a reading of Telaro or is
4 it more specifically the point that because you benefited
5 from the decision, it was not something that you invoked as
6 a way to keep us from the merits?

7 MR. BRODIE: You know, often arguments morph at
8 the appellate level. And - - -

9 JUDGE HALLIGAN: And is that true about the
10 Telaro point?

11 MR. BRODIE: That's the Telaro point. That's a -
12 - - you know, so Telaro is a useful procedural device to
13 reach arguments that may not have been - - -

14 JUDGE GARCIA: Do you know the last time we
15 applied it that way? Do you know what year it was?

16 MR. BRODIE: It was a while ago.

17 JUDGE GARCIA: 1986.

18 MR. BRODIE: I will - - - I - - - that sounds
19 about right.

20 JUDGE GARCIA: And this is the question that we
21 should apply it too in thirty-five years, or whatever that
22 is. This is the next one.

23 MR. BRODIE: I mean, again, Your Honor, if - - -
24 if the court does not think Telaro should be applied, and
25 the court certainly has discretion to apply it or not apply

1 it, then we win, and I can sit down. But I do want to say
2 a little more about serious injury before I sit down. What
3 I want to say is that the court has described serious
4 injury as a threshold question. And it's a threshold - - -
5 again, this is going to Judge Cannataro's inquiry. It's a
6 threshold for the right to recover and thus for liability.

7 JUDGE RIVERA: But under your analysis, it means
8 that even those claimants who succeed on liability on the
9 first part of bifurcation and then succeed on the damages
10 and show serious injury can't get the interest. And that
11 strikes me as wholly unfair. There's something wrong with
12 that.

13 MR. BRODIE: Well, I'm not grasping Your Honor's
14 hypothetical. You're saying they succeed on negligence - -
15 -

16 JUDGE RIVERA: Right. Look, it's dismissed when
17 it's zero. But if they actually establish serious injury,
18 why shouldn't they get the interest? You've been able to
19 profit off the money that would have been theirs otherwise.

20 MR. BRODIE: Well, they get interest from the
21 point when serious injury is established, yes. So I agree
22 they get interest. The question is: when does the
23 interest start from?

24 JUDGE RIVERA: I know that's the question, but
25 all I'm saying is, any other plaintiff would have been able

1 to get that interest.

2 JUDGE CANNATARO: If there was no no-fault law,
3 this plaintiff would almost positively have been able to
4 recover prejudgment interest from the date of the liability
5 verdict - - - judgment?

6 MR. BRODIE: Absolutely. But in the no-fault
7 law, the legislature specifically disfavored automobile
8 accident negligent cases - - - negligence cases.

9 JUDGE RIVERA: But not the ones that fit this
10 particular framework. And then they are being treated less
11 favorably even though they meet the higher standard that
12 the legislature has set out.

13 MR. BRODIE: Well, I think there are good policy
14 reasons for the structure - - -

15 JUDGE RIVERA: Well, a good - - - certainly, we
16 understand the policy behind the no-fault law. We've
17 talked about it in the past. This isn't about prejudgment
18 interest, which is sort of whether or not you're going to
19 treat plaintiffs the same.

20 MR. BRODIE: Well - - - if you commence interest
21 after - - -

22 JUDGE RIVERA: Yes.

23 MR. BRODIE: - - - serious injury is found - - -

24 JUDGE RIVERA: Yes.

25 MR. BRODIE: - - - it encourages early resolution



1 of that dispositive issue. And swift disposition of
2 nonserious cases - - -

3 JUDGE RIVERA: Well, I would think that the
4 reason they bifurcated on the damages and not on the
5 summary judgment beforehand is because they need the
6 testimony and that you can't do on the papers. So it's a
7 function of, in part, the bar that's been set by the
8 legislature.

9 MR. BRODIE: Well, when you say bifurcate
10 liability and damages, there's actually - - -

11 JUDGE RIVERA: Yes.

12 MR. BRODIE: - - - a lot more flexibility there.
13 I mean, a court could resolve serious injury on summary
14 judgment. And the court - - -

15 JUDGE RIVERA: Yes, they could. That - - - that
16 was my point. That there may be some of those cases, but
17 then there may be some where you can't do it on the papers.
18 You got to get live testimony.

19 MR. BRODIE: That's right. So you - - -

20 JUDGE RIVERA: And that's usually when you need
21 the plaintiff to describe the injuries.

22 MR. BRODIE: Right. So you could try serious
23 injury together with negligence. You could try serious
24 injury separately under CPLR 603, which is the cite for
25 which I was grasping when I was answering Judge Troutman.

1 You could try the case in the conventional way with all
2 issues heard together in a single trial. Ultimately, when
3 and how - - -

4 JUDGE RIVERA: And the State wouldn't object to
5 it. The State would be totally comfortable with that?

6 MR. BRODIE: I'm sorry?

7 JUDGE RIVERA: The State would be comfortable
8 with that?

9 MR. BRODIE: The - - - the - - -

10 JUDGE RIVERA: Injecting into the trial issues
11 that might be emotional and otherwise sway the trier of
12 fact.

13 MR. BRODIE: Well, you could always have a
14 limiting instruction - - -

15 JUDGE RIVERA: Okay.

16 MR. BRODIE: - - - that, you know, for instance -
17 - -

18 JUDGE CANNATARO: Counsel, can I ask you: is
19 there any practical reason why when a plaintiff in a motor
20 vehicle case makes a motion for summary judgment on
21 liability, as this plaintiff did, that you couldn't cross-
22 move for summary judgment on threshold?

23 MR. BRODIE: We could. In this case - - -

24 JUDGE CANNATARO: You didn't, but could you - - -

25 MR. BRODIE: We - - - no, we didn't, but - - -

1 but absolutely, you could.

2 JUDGE CANNATARO: You cross-moved for summary
3 judgment on threshold?

4 MR. BRODIE: We did not in this case.

5 JUDGE CANNATARO: Right.

6 MR. BRODIE: But one could do that. In fact, the
7 Licari case encourages courts to use summary judgment,
8 encourages defendants to go out and move for summary
9 judgment on the threshold issue. You know, ultimately,
10 when and how to present the issue of serious injury is a
11 matter of trial strategy. And judges have flexibility in
12 structuring trials, and parties have flexibility in
13 structuring how their case is going to be put on. And the
14 judicial process is - - - that's very familiar to the
15 judicial process. So once the parties know that, okay, I'm
16 going to get interest only on - - -

17 JUDGE RIVERA: Can the judge proceed in a
18 bifurcated path, right? Bifurcated on these issues even if
19 the parties object, or perhaps if the plaintiff objects?

20 MR. BRODIE: Yeah. The court has discretion to
21 do that.

22 JUDGE RIVERA: Yeah. So then the plaintiff would
23 pay the price even though they were willing to try and put
24 this evidence in?

25 MR. BRODIE: I - - - I - - -



1 JUDGE RIVERA: Or at least you wouldn't have to
2 pay the price. That's actually the way that works out.

3 MR. BRODIE: I suppose so. If they wind up
4 winning - - -

5 JUDGE RIVERA: Yes.

6 MR. BRODIE: - - - their - - - the - - -

7 JUDGE RIVERA: Well, yeah. Yeah.

8 MR. BRODIE: - - - the interest would start
9 running from a later point.

10 JUDGE RIVERA: Yes. Yes.

11 MR. BRODIE: That's assuming, you know, they have
12 the option of moving for summary judgment. They can ask
13 the judge for a separate trial. They can make that point.
14 If the court abuses its discretion in structuring the
15 trial, of course, that's an issue for the Appellate
16 Division.

17 JUDGE RIVERA: I see.

18 MR. BRODIE: And the Appellate Division can make
19 a corrective ruling on that. I'd also like to point out
20 that when one reads the - - - just to conclude, if I may.

21 CHIEF JUDGE WILSON: Uh-huh.

22 MR. BRODIE: When one reads the opinion that came
23 out after trial, it not only decided serious injury and
24 damages, but it also decided causation. We had an argument
25 that the claimant's shoulder condition was not caused by

1 the accident but pre-existed. Causation is an element of
2 common law liability. So even if you accept claimant's
3 argument about common law liability, causation was not
4 decided until the same time as serious injury. So that,
5 likewise, requires affirmance.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. BRODIE: Thank you.

8 MR. KENNY: I'll try to be brief as I can.

9 Judge, you - - - you mentioned something that is important
10 here. And that is that three of the departments find that
11 serious injury is a question of damages, namely the First,
12 Second, and Third, and the Fourth Department, the
13 department that this case was tried under, believe
14 something different. In this situation, there is basic
15 unfairness, okay? It - - - the Fourth Department has set
16 up a different standard as to how they treat motor vehicle
17 folks than the First, Second, and Third - - -

18 JUDGE GARCIA: Well, depending on what you say,
19 that may be unfairness to the State and the other three
20 departments. But I - - - I'm sorry.

21 MR. KENNY: Your Honor, I - - -

22 JUDGE GARCIA: I was going to ask you: how did
23 Rodriguez affect this issue in the trial court?

24 MR. KENNY: So as the record shows - - - and I
25 was involved in this, right? So as the record showed, we

1 made a motion beforehand, first, for summary judgment on
2 liability with Judge Fitzpatrick. And she said that there
3 - - - I won't get into the facts that we tried. But
4 basically this woman lost control - - -

5 JUDGE GARCIA: Yeah.

6 MR. KENNY: - - - parks, and rec person hit our
7 guy. But basically said, well, because there was hay
8 flying out from the back of his thing, maybe that was
9 comparative negligence.

10 JUDGE GARCIA: Right.

11 MR. KENNY: Then this court ruled in Rodriguez.
12 And Rodriguez, we brought a motion to renew the decision or
13 reargue the decision. And she said, you know what? Yeah,
14 you're right. Summary judgment should be granted, and I'm
15 going to toss the comparative because that didn't really
16 exist. So that was the situation.

17 JUDGE GARCIA: So did Rodriguez - - - the holding
18 affect that reargument motion substantively? I know it was
19 the vehicle you got in, but it was based on Rodriguez's
20 decision that now she could do what you had asked?

21 MR. KENNY: That's right. And she revisited the
22 facts that - - - so because the reason she said we couldn't
23 get summary judgment is she said, oh, maybe there's a
24 question of comparative.

25 JUDGE GARCIA: Right. So in light of Rodriguez,

1 which is a fairly recent decision and came down kind of in
2 the middle of your - - - we should expect to see more of
3 this issue arising, right?

4 MR. KENNY: Your Honor, I'm not so sure because
5 if you look at Ruzycki and cases that have determined that
6 afterwards, I mean, a lot of things have to be in play
7 here, right? And number one - - - and speaking from a
8 practical standpoint because I'm the - - - I'm a trial
9 lawyer and this is what I do, you have to have this exact
10 situation, meaning the bifurcated trial. You have to have
11 a situation where serious injury is determined afterwards.
12 And maybe more importantly, you have to have a client who's
13 willing to say, I think that this is patently unfair, so
14 I'm going to ask the court to determine it. Because, as it
15 sits right now, there's really an untenable dichotomy
16 between what Ruzycki says and how other personal injury
17 actions are dealt with. If we have a 240 or 241(6) case
18 and we get summary judgment on that case, we get interest
19 from the date of that determination up until the date that
20 that - - - the jury or the trier of fact comes back. If
21 there's a slip and fall or a medical malpractice in those
22 rare circumstances on medical malpractice, we get interest
23 from that. The statute never distinguished that it
24 shouldn't be allowable, right? So it's a really - - - it's
25 a problem. And the - - - and a bigger problem, I think,

1 and one that I'm asking this court to address is three
2 departments are out there, and there's - - -

3 JUDGE GARCIA: And I understand. It's just the
4 question I'm obviously having trouble with is we get splits
5 here. We try to resolve splits between the departments,
6 obviously, but it's not a split in the department that will
7 cause us to waive our preservation rules, right.

8 MR. KENNY: I understand that. But you have the
9 ability to do so. And the question is: should you do so
10 when you have this situation where people in different
11 parts of the state are being treated differently? If I'm
12 driving in Manlius, New York, and I drive over a hundred
13 feet into Cazenovia, New York, I am treated differently.
14 And that is patently unfair. And I - - -

15 JUDGE GARCIA: And even under Telaro, that's not
16 a fact, all right?

17 MR. KENNY: You have the ability to do so, Your
18 Honor. And for fairness, I believe - - - and it's just me,
19 right? I believe that this court should take that up.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. KENNY: Thank you very much.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Sabine v. State of New York, No. 118 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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