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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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CASE LAW DEVELOPMENTS

Pesky Preservation Prerequisite Results in Important Issue Being Out of Play

Court of Appeals Unable to Resolve Conflict as to Accrual of Prejudgment Interest in Personal Injury Action Arising From Motor Vehicle Accident

In *Love v. State*, 78 N.Y.2d 540 (1991), the Court of Appeals ruled that, in a bifurcated personal injury action, prejudgment interest is to be calculated from the date of the liability determination. What the Court has not resolved, and which is subject of a conflict among the Departments of the Appellate Division, is the accrual date for prejudgment interest in a personal injury case arising from a motor vehicle accident (under the No Fault regime). In that setting, there is a three-part process: first determine whether there is a basis for liability; then whether the plaintiff has sustained a "serious injury," as defined in Insurance Law § 5102(d), a requirement before a plaintiff can recover in a third-party tort action; and finally, the amount of damages to be awarded. Thus, the more specific question here is whether prejudgment interest should accrue from the date of the liability determination or from a later finding of serious injury.

The Second and Third Departments have concluded that the serious injury issue is a damages question, not liability, when calculating prejudgment interest. *See Van Nostrand v. Froelich*, 44 A.D.3d 54 (2d Dep't 2007); *Kelley v. Balasco*, 226 A.D.2d 880 (3d Dep't 1996). However, the Fourth Department has held to the contrary. *Ruzycki v. Baker*, 301 A.D.2d 48, 51 (4th Dep't 2002) (holding that the term "liability" encompasses both the negligence and serious injury determinations).

Sabine v. State of New York, 2024 N.Y. Slip Op. 06288 (Dec. 17, 2024), was teed up for the Court of Appeals to resolve the conflict. But that pesky preservation rule got in the way, resulting in the issue being out of play. Simply stated, four judges on the Court found that the issue was not preserved at the trial court level and thus unreviewable.

The majority noted that the Court of Appeals "with rare exception does not review questions raised for the first time on appeal"; in order to preserve a question of law for the Court's review, a party must demonstrate that it raised the specific argument in the trial court so that the Court has the benefit of a full record and a reasoned trial court opinion; and even if the parties do not raise preservation arguments—the State did not oppose the Court deciding the issue here—the Court is required to assess whether an issue has been properly preserved.

The underlying action was one for personal injuries brought by the claimant against the State in the Court of Claims under New York's No Fault regime arising from a car accident caused by a State employee. The Court of Claims granted the claimant's partial summary judgment motion on liability in September 2018, but only determined in a bench trial some *three years* later (in October 2021) that claimant established a "serious injury" and awarded $550,000 in damages. The claimant argued here that the Court of Claims miscalculated the prejudgment interest by measuring it from the date of the decision finding serious injury and awarding damages, rather than from the earlier liability determination.

A majority of the Court of Appeals ruled that the claimant did not preserve his argument as he never raised the question in the trial court. Moreover, the majority asserted that, since the claimant was objecting to a provision in the judgment, he should have sought relief under CPLR 5015 and 5019, as the trial court had apparently invited the claimant to do. In this way, there would have been a fully developed record on appeal, which would have made the issue reviewable by the Court.

The Court rejected the Appellate Division's resort to

> a rarely used exception to the preservation rule . . . which applies only where the unpreserved argument could not

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> have been avoided through "factual showings or legal countersteps" in the trial court. That exception, which this Court has rarely applied in this manner (and not once in the past four decades), does not apply here. Nor has it ever been applied in the manner that our dissenting colleagues would like to use it—"when controlling precedent blocks the protesting party from obtaining relief" (citations omitted).

Id. at *3–4.

The dissent believed there to be no preservation bar "to resolving this issue of statewide importance." The claimant timely appealed the Court of Claims final judgment awarding defendant damages and prejudgment interest. His only challenge related to the miscalculation of the prejudgment interest by the Court of Claims, which was based on binding Fourth Department precedent (see above). The claimant's "first opportunity to present his argument for modification of the judgment was on appeal to the Appellate Division, the court that established the binding precedent. Thus, the question is properly before us on appeal from the Appellate Division's decision to adhere to its long-standing precedent." *Id.* at *15.

The dissent rejected the majority's argument that the Court could not consider the issue here because the claimant failed to raise it before the Court of Claims. The dissent deemed such an exercise "futile" and a "hollow formality" based on prevailing Fourth Department precedent. It dispensed with the assertion that the appellate record was inadequate to assess the merits, since "the dates and numbers are set."

Moreover, the dissent maintained that the majority incorrectly cited to CPLR 5015 and 5019 as bases for the claimant to challenge the judgment. CPLR 5015 relates to the vacating of a judgment on certain grounds inapplicable here. Similarly, CPLR 5019 involves the correction of a judgment, in circumstances not present here.

Finally, the dissent believed that the exception to the preservation rules, rejected by the majority, applied:

> Parties may raise claims for the first time on appeal that "could not have been obviated or cured by factual showings or legal countersteps" in the court of original jurisdiction. . . . Here, because binding Fourth Department precedent required the Court of Claims to award prejudgment interest from the date of its serious injury determination all that remained was the ministerial act of a mathematical calculation. No argument by claimant could forestall that outcome and the State would have no reason to proffer "factual showings or legal countersteps" to overcome a patently unavailing claim (citations omitted).

Id. at *19–20.

On the merits of the appeal, the dissent would hold that prejudgment interest accrues from the date that liability is established and not from a subsequent serious injury determination:

> [L]iability is 'fixed' once a claimant establishes a defendant's culpability for the injury as a matter of fact and law. Indeed, a finding of serious injury is not an essential element of liability, but a finding of liability is a necessary prerequisite to a determination of damages. A finding of serious injury establishes what damages, if any, are due the claimant (citation omitted).

Id. at *12.

Reports Submitted to City Through Online Reporting System Constituted "Written Notice" Under Statute

And Were "Actually Given" to the Official Designated to Receive Such Notice

A condition precedent to the commencement of an action against a municipality is that it received notice of an alleged defective or unsafe condition of a road or sidewalk. Where a municipality establishes that it did *not* receive notice under a prior notification law, the burden then shifts to the plaintiff to prove the applicability of one of the two recognized exceptions to the rule (that is, that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality).

In *Calabrese v. City of Albany*, 2024 N.Y. Slip Op. 06289 (Dec. 17, 2024), the plaintiff was injured while he was operating his motorcycle and lost control after striking a depression in the road and fell. He commenced this negligence action seeking damages alleging that the accident was caused by a road defect that the City knew about but had not repaired. Both parties moved for summary judgment primarily focusing on whether the defendant City had received prior written notice. The trial court denied both motions, and the Appellate Division affirmed.

A unanimous Court of Appeals affirmed, finding that the plaintiff had raised triable issues of fact as to prior written notice to the appropriate City official and the affirmative negligence exception and ruling that the City lacked governmental immunity from suit.

The relevant prior written notice statute enacted in 1983 reads, in part:

> No civil action shall be maintained against the City for damages or injuries to person or property sustained in consequence of any street . . . being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in such damages or injury, written notice of the defective, unsafe, dangerous or obstructed condition of said street . . . was actually given to the Commissioner of Public Works and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.

Id. at *2–3.

Approximately 15 years later, the Department of Public Works was abolished, and its functions were transferred to the Department of General Services (DGS). However, the statute was not amended to reflect that change until after the plaintiff was injured.

The primary issue was "whether certain reports submitted to the City through an online reporting system called 'SeeClickFix'

(SCF) served as 'written notice' of that defect and, if so, whether those reports were 'actually given' to the official designated by statute to receive such notice." *Id.* at *1. The Court noted that when the applicable statute was enacted, the concept of such online communications could not have been contemplated. Thus, the Court was required to "confront the issue of whether such a relatively recent advance in technology can provide an avenue for written notice to be actually given to the statutory designee pursuant to the City's notice statute." *Id.* at *3–4.

The Court described the SCF system as

> an online reporting system maintained by the City that allows users to report, through a software application or website, "anything that they see that should be addressed by any city department." When a member of the public reports an issue in SCF, the system routes it automatically to the appropriate government office. Reports of road defects go to DGS, the agency responsible for road maintenance. Users may provide a description of the defect, its location, and photographs of the condition. Various City officials, including the DGS Commissioner, have encouraged the public to report road defects through SCF. At the same time, presumably anticipating potential liability for unaddressed road defects, the City requires SCF users to accept as a term of use the disclaimer that "use of this system . . . does not constitute a valid notice of claim nor valid prior written notice as established under . . . state and local law."

Id. at *4.

Initially, the Court rejected the plaintiff's argument that the notice statute was unenforceable because it required notice to an office no longer in existence (Commissioner of Public Works). In fact, the statutes that abolished the Department of Public Works made clear "that all functions, power, and personnel belonging to that department were transferred to DGS." More significantly, the Court held that the notices submitted electronically through SCF may qualify as "written" under the notice statute that were "actually given" to the Commissioner of General Services.

With respect to the former, the Court stressed that the word "written" in the statute includes electronic communications; "the SCF system was the City's sole process for recording road defect reports, including each defect's reported location and the date and time each report was received by DGS, and the system did not route such reports through any third party, consistent with the policy underlying the prior written notice requirement (citations omitted)" (*Id.* at *9); and any ambiguity as to what constitutes a "writing" is to be construed against the City. Thus, the Court concluded "that a report typed into SCF by a user and then transmitted to DGS is a 'written' communication (citations omitted)."

In addition, the Court held that "based on DGS's specific process for routing and maintaining the road defect reports received through SCF," those notices were "actually given" to the statutory designee. In doing so, the Court referred to its precedent "that notice to a subordinate could provide prior notice to the statutory designee." It concluded that the notice did not need to be "personally received" by the Commissioner:

> Here, DGS created a system for processing complaints that bypassed the need for the Commissioner's personal review. SCF was promoted by the Commissioner as a tool for reporting road defects within the City and was the only internal system for tracking those complaints and any remedial work done in response. Any written complaints addressed to the Commissioner and actually mailed to DGS would be subject to the same process—that is, they would be routed to the DGS front desk and entered into SCF.

Id. at *12–13.

Regarding the affirmative negligence exception, the Court found there was conflicting evidence "about the adequacy of the City's repair, and whether its consequences were immediately apparent after the repair's completion." *Id.* at *14.

Finally, the Court distinguished between governmental functions for which the City is immune from liability and proprietary functions, where it is not. In the former situation, the City is immune for "discretionary actions taken during the performance of governmental functions" defined as those "'undertaken for the protection and safety of the public pursuant to the general police powers' (citations omitted)." *Id.* at *15. On the other hand, proprietary functions are where the work performed is essentially "a substitute for or supplement traditionally private enterprises." In those circumstances, the City is subject to suit under the ordinary rules of negligence. Here, "while the City's response to the water main break may have been a governmental function, the City's repair of the excavation on Lark Street was a proprietary function. As a result, the City is not entitled to governmental immunity from suit." *Id.*

Precipitating Event That Could or Should Have Reasonably Been Anticipated Is Not an "Accident" for Purposes of ADR Benefits

Thus, Substantial Evidence Supported Comptroller's Determination

In prior editions of the *Law Digest,* we have dealt with circumstances where first responders were seeking accidental disability retirement (ADR) benefits that are generally more generous than performance of duty disability retirement benefits. In *Matter of Bodenmiller v. DiNapoli,* 2024 N.Y. Slip Op. 06234 (Dec. 12, 2024), the petitioner was a former police officer, who was injured when on desk duty at work. While sitting on his rolling desk chair, one of the chair wheels got caught in one of two ruts in the floor, causing the chair to tip backwards. The petitioner grabbed the desk to prevent a fall, resulting in injuries to his shoulder and neck. He then applied for ADR benefits, which were denied by the Comptroller.

The petitioner testified at a hearing as to his prior work desk duty for months leading up to the incident and his awareness of the ruts. The Comptroller concluded that the incident was not accidental because the petitioner could have reasonably anticipated the hazard of the chair catching in the floor. In this Article 78 proceeding seeking to annul the Comptroller's determination, the question was whether this conclusion was supported by substantial evidence.

The applicable statute, Retirement and Social Security Law § 363(a)(1), provides that members of the police and firefighters' retirement system are entitled to ADR benefits if they become "[p]hysically or mentally incapacitated for performance of duty as the natural and proximate result of an accident not caused by [the member's] own willful negligence sustained in such service. . . ." The issue here was whether the precipitating event that caused petitioner's injury was an "accident." A majority of the Appellate Division confirmed the Comptroller's determination, finding that an incident is not an accident if one "could or should have reasonably anticipated the precipitating event." The Court of Appeals affirmed.

The Court noted that in applying the substantial evidence standard, it is to assess whether the determination "is rationally supported by the record viewed as a whole"; the issue was whether the precipitating event here was an "accident"; and that "term is not defined by statute or regulation, but more than four decades ago this Court 'adopt[ed] the commonsense definition of a "sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact"' (citations omitted)." *Id*. at *4.

The Court of Appeals has previously ruled "that a known danger cannot be the cause of a compensable accident." However, left undecided was whether an event that the claimant could or should have reasonably anticipated can result in an "accident" under the statute.

Here, in *Matter of Bodenmiller*, the Court held that such an event is *not* an "accident":

> It is well established that "an injury which occurs without an unexpected event . . . is not an accidental injury" for purposes of section 363. The unexpected nature of the precipitating event is key to this definition. Because an occurrence is not "unexpected" if a person should "reasonably anticipate" that it will happen, an injury that results from a "reasonably anticipated event" is not an "accident." This objective standard is consistent with the precedent that . . . define[s] an accident as an "unforeseen, unexpected" event, that occurs "without one's foresight or expectation" (citations omitted).

Id. at *4–5.

Thus, the Court concluded that substantial evidence supported the Comptroller's determination that

> petitioner could or should have reasonably anticipated the near-fall from his desk chair. The Comptroller noted the photos documenting the condition of the precinct floor, as well as petitioner's hearing testimony about how long he had worked desk duty, how many times he had gotten into and out of the chair that day, and his familiarity with the ruts in the floor and their location underneath his chair.

Id. at *6.

Incident Was Not "Accident" Because It Resulted From a Risk Inherent in Petitioner's Job

Risk of Being Injured by Unseen Hazard While Investigating Potential Crime in the Dark Was Inherent in Patrol Officer's Ordinary Job Duties

Decided the same day as *Matter of Bodenmiller*, the Court of Appeals, in *Matter of Compagnone v. DiNapoli*, 2024 N.Y. Slip Op. 06235 (Dec. 12, 2024), dealt with another instance where a former police officer was seeking ADR benefits. Here, the petitioner sustained injuries while on a routine patrol, when he "fell into a hole in the ground in an unlit area at night while investigating a suspicious light from within a vacant house that was under construction." At a hearing, an "exhibit described the duties of the patrol division of petitioner's department as including '[p]rotection of persons and property,' '[g]eneral crime prevention,' and '[p]reliminary investigations of crime.'" Moreover, the petitioner testified that his assignment at the time of the incident was to patrol the midnight shift and to look for any suspicious people; while walking alongside the house, he fell into the hole; and "the hole had been dug for a sewer line, and that he knew at the time that the house was under construction." The respondent denied the petitioner's application, finding that the incident was not an "accident" because it was the result of a "risk inherent in petitioner's job."

The Court again found that substantial evidence supported the determination. It reiterated its precedent that where the incident is caused by a risk inherent in the petitioner's regular job duties, it is not an "accident" entitling him to ADR benefits. Here, the respondent properly considered whether the petitioner was acting within the scope of his ordinary employment duties and "'reasonabl[y] and plausibl[y]' determined that petitioner's risk of being injured by an unseen hazard while investigating a potential crime in the dark was inherent in his ordinary job duties as a patrol officer (citations omitted)." *Id*. at *2.

When Serving a Corporation Via a Designated Person Under CPLR 311(a), Personal *Delivery* to *That* Person is Required

CPLR 308(2) Service is Not Permitted

CPLR 311 provides for service on a corporation or governmental subdivision. Applicable here, CPLR 311(a)(1) requires that service on a domestic or foreign corporation be made by "delivering" the summons to "an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."

As the Second Department pointed out recently in *Flatow v. Goddess Sanctuary & Spa Corp.,* 2024 N.Y. Slip Op. 06029, at *4 (2d Dep't Dec. 4, 2024), "[p]ersonal service on a corporation must be made to one of the persons authorized by the statute to accept service, and an attempt to serve such person by substitute service pursuant to CPLR 308(2) or (4) will be insufficient to acquire jurisdiction over the corporation (citations omitted)." Thus, service must be made directly on the designated person; CPLR 308(2) service, applicable to personal service on a natural person, does not cut it.

Wishing each of you a happy, healthy, meaningful and peaceful 2025.

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