DISTRICT OF COLUMBIA
COURT OF APPEALS

ROGER TOVAR,

Appellant/Cross-Appellee,

v. **APPEAL NO. 23-CV-165**

REGAN ZAMBRI LONG, PLLC, *et al.,*

Appellee/Cross-Appellant.

ON APPEAL FROM NO. 2022-CA-002053-M IN THE DISTRICT OF COLUMBIA SUPERIOR COURT, CIVIL DIVISION
THE HONORABLE EBONY M. SCOTT

BRIEF OF APPELLANT ROGER TOVAR

Benjamin R. Ogletree*
Faith Kalman Reyes
VERDI & OGLETREE, PLLC
1325 G Street, NW, Suite 500
Washington, D.C. 20005
Ph: (202) 449-7703
Bogletree@ verdiogletree.com
Freyes@verdiogletree.com

Counsel for Appellant Roger Tovar

LIST OF PARTIES

Party	**Counsel**	**Status**
Roger Tovar	Verdi & Ogletree, PLLC	Plaintiff/Appellant/Cross-Appellee
Paul J. Cornoni	Carr Maloney P.C.	Defendant/Appellee/Cross-Appellant
Patrick M. Regan	Carr Maloney P.C.	Defendant/Appellee/Cross-Appellant
Regan Zambri Long PLLC	Carr Maloney P.C.	Defendant/Appellee/Cross-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

(Chief authorities are designated by an *)

Cases

Rules

I. STATEMENT OF APPELLATE JURISDICTION (RULE 28(A)(5))

This appeal is from a final order that disposes of all of the parties' claims.

II. STATEMENT OF ISSUES FOR REVIEW

1. The trial court erred in granting Defendants' D.C. Super. Ct. Civ. R. 12(b)(6) motion to dismiss because the Complaint properly pled a cause of action for legal malpractice that was sufficient to pass muster under D.C. Super. Ct. Civ. R. 8 and, even if the Complaint had been insufficient, the trial court should have given Plaintiff the opportunity to amend his pleading instead of dismissing the matter with prejudice;

2. The trial court erred when, in the alternative, it held that it would have granted summary judgment for Defendants because any summary judgment motion was premature and disputed issues of material fact and other grounds precluded summary judgment in any event; and

3. The trial court abused its discretion in not granting Plaintiff's request to take discovery before making a summary judgment ruling, where discovery had barely begun, none of the deadlines in the scheduling order were close, and the expert disclosure deadline had not passed.

III. STATEMENT OF THE CASE

A. Nature of the Case

This is a classic case of a trial court's improvident rush to judgment in granting a motion to dismiss that necessitates summary reversal. In April 2012, Plaintiff/Appellant/Cross-Appellee Roger Tovar ("Tovar" or "Plaintiff") was injured in an automobile accident when a fast-moving vehicle driven by an employee of McKesson Corporation negligently rear-ended Tovar's vehicle in the District of Columbia. (Appx. 13.) Tovar's injuries were devastating and permanent, including but not limited to a traumatic brain injury ("TBI") which will continue to worsen

over time. Because of his TBI-related ailments, Tovar never will be able to work again and will require a lifetime of future medical care. (Appx. 13-14.)

In 2014, Tovar hired Defendants/Appellees/Cross-Appellants Regan Zambri Long, PLLC and two of its attorneys, Patrick M. Regan and Paul J. Cornoni (collectively, the "Lawyers" or "Defendants"), to bring a lawsuit against McKesson and its driver based on the auto accident, which was tried in June 2018 ("Underlying Matter"). (Appx. 15.) The jury awarded Tovar damages consisting of $500,000 for bodily harm and $3,297,573 in lost future earnings. (Appx. 130.) The McKesson defendants filed an appeal. In the interim, Tovar and the McKesson defendants settled the Underlying Matter for the full amount of the jury's award of $3,797,573 (Appx. 131), and the appeal was dismissed on May 28, 2019. (Appx. 16.)

Afterwards, Tovar learned for the first time that the Lawyers could have sought additional damages for him at trial in the form of future medical expenses to cover the essential costs of his future medical care. The Lawyers, however, never informed or advised Tovar that he could seek future medical damages. (Appx. 1088, ¶¶ 6-7.) As a result, on May 9, 2022, Tovar filed this action against Defendants for professional negligence/legal malpractice. (Appx. 11-18.)

Defendants immediately filed a Motion to Dismiss for failure to state a claim and/or for Summary Judgment. (Appx. 27-64.) In their Motion, the Lawyers did not argue that Tovar failed to plead the elements of his malpractice claim, nor could

they do so. Instead, Defendants argued that the complaint failed to state a cause of action for malpractice based on Defendants' *unpled affirmative defenses* that Tovar's claim was (1) barred by the statute of limitations and (2) extinguished by a release provision in his settlement agreement with the McKesson defendants. (Appx. 40-46.) Defendants also sought summary judgment based on the *unpled affirmative defense* of judgmental immunity. (Appx. 46-51.) Although the trial court properly rejected Defendants' statute of limitations defense, it erroneously granted Defendants' Rule 12(b)(6) motion by relying on Defendants' proffered facts and evidence outside Tovar's complaint in concluding that he failed to state a claim for malpractice based on the release and judgmental immunity doctrine. (Appx. 1176-89.) Although the court did not reach Defendants' alternative request for summary judgment, it noted in *dictum* that it would have granted that motion, too, ignoring that disputed issues of material fact and Tovar's timely and alternative request for further discovery (*e.g.,* Appx. 915-20) would have precluded summary judgment. The trial court then dismissed Tovar's complaint with prejudice. (Appx. 1189.)

The issue in this appeal is not whether Tovar ultimately will prevail on his legal malpractice claim (although he should). The question is simply whether Tovar is entitled to proceed beyond the pleading stage to fully develop his claim and present his case for decision by a jury. The trial court's palpably flawed ruling in granting Defendants' Rule 12(b)(6) motion improvidently denied him that right.

Accordingly, this Court promptly should reverse the decision below and remand this case for further proceedings.

B. Course of Proceedings and Disposition Below

On May 9, 2022, Tovar filed his single-count complaint ("Complaint") for legal malpractice against Defendants. (Appx. 11-18.) On July 7, 2022, the Lawyers sought and received additional time to respond to the Complaint. (Appx. 5, docket entries dated 7/21/22.) In lieu of answering the Complaint, on July 29, 2022, the Lawyers filed a Rule 12(b)(6) "Motion to Dismiss and/or for Summary Judgment" ("Motion to Dismiss"). (Appx. 27-64.) Thereafter, on August 1, 2022, Defendants filed exhibits in support of their Motion to Dismiss. (Appx. 65-887.)

On August 12, 2022, the trial court held its initial scheduling conference and set certain deadlines, including proponent's expert report deadline (November 25, 2022), opponent's expert report deadline (December 30, 2022), close of discovery (February 8, 2023), and dispositive motions (April 10, 2023). (Appx. 888.)

On August 26, 2022, Tovar filed his opposition to the Lawyers' Motion to Dismiss. (Appx. 890-921, 1155-59.) Exhibit F to Tovar's response was his affidavit seeking, in part, additional discovery to allow him to fully respond to the summary judgment portion of the Lawyers' Motion to Dismiss. (Appx. 1087-92.) On September 12, 2022, Defendants filed their reply brief. (Appx. 1160-71.) On October 21, 2022, the trial court held a hearing on the Motion. (Appx. 1225-81.)

On February 2, 2023, the trial court entered an Order granting Tovar's consent motion to extend the deadlines in the scheduling order, under which the expert deadlines were reset to February 23, 2023 (for the proponent) and March 30, 2023 (for the opponent), discovery closed on May 9, 2023, and the dispositive motions deadline was reset for June 8, 2023. (Appx. 1174-75.) The next day, on February 3, 2023, the trial court entered an order granting the Motion to Dismiss and dismissed Tovar's Complaint with prejudice ("Order"). (Appx. 1176-89.) Although the trial court did not reach the Lawyers' alternative request for summary judgment, the court noted in its Order that if it had done so, it would have granted summary judgment for Defendants. (Appx. 1188.) On March 1, 2023, Tovar timely filed this appeal from the Order. (Appx. 1190-1207.) On March 14, 2023, Defendants filed a cross appeal. (Appx. 1208-24.)

IV. STATEMENT OF FACTS

A. The Underlying Matter

In 2014, Tovar retained Defendants to represent him in the Underlying Matter. (Appx. 15, ¶ 21.) The Underlying Matter was tried before a jury over six days in 2018. (Appx. 268, ¶ 22.) Tovar was not present in the courtroom other than during opening statements, to present his own testimony, and for closing arguments. (Appx. 268, ¶ 23.) Prior to trial, Defendants explicitly asked Tovar to approve their trial strategy of seeking damages for future earnings, but not his *past* medical bills.

(Appx. 293-95.) By contrast, Defendants never advised Tovar regarding his ability to seek *future* medical costs or sought his approval to forgo pursuing such damages at trial. (Appx. 1088.) Even so, the complaint that the Lawyers filed for Tovar in the Underlying Matter "claimed future medical care" (Appx. 915 n.10) and, during pretrial proceedings, the Lawyers repeatedly referenced Tovar's future medical costs as an element of his damages. (Appx. 119, 942-43, 1066-67.)

The jury awarded Tovar damages consisting of $500,000 for bodily harm and $3,297,573 in lost future *earnings*. (Appx. 16, ¶ 28; Appx. 130.) But nothing was awarded for Tovar's future medical expenses because his Lawyers never submitted that issue to the jury. While the matter was pending on appeal, the parties settled for the amount awarded by the jury and the McKesson defendants dismissed their appeal. (Appx. 16, ¶ 28; Appx. 130-31.) In the release settling the Underlying Matter ("Release"), Tovar expressly released *only* "McKesson Corporation and all of its affiliates, predecessors, successors, parents, subsidiaries, officers, directors, employees, agents, contractors, and insurers (collectively …'Releasees')" from any and all claims "which Tovar ever had, now has, or may ever have *against the Releasees*" related to the underlying vehicular accident. The Release, however, did not extinguish any potential claims by Tovar for legal malpractice or other causes of action against the Lawyers. (Appx. 131-33 (emphasis added).)

After he executed the Release, Plaintiff learned that Defendants could have sought damages in the trial court for his future medical expenses. (Appx. 1088, ¶ 7 (Tovar did not learn of the ability to claim future medical care as damages while still represented by the Lawyers).) This lawsuit followed.

B. The Allegations in Tovar's Complaint

Tovar filed his Complaint on May 9, 2022. (Appx. 11-18.) The Complaint's allegations—which are presumed to be true for purposes of a Rule 12(b)(6) motion—pleaded all of the elements of Tovar's legal malpractice claim:

- *Attorney-Client Relationship*: An attorney-client relationship existed between Tovar and the Lawyers. (Appx. 17, ¶ 32);
- *Standard of Care*: Defendants owed Tovar "a duty to exercise that degree of care and skill which a reasonably competent attorney, engaged in a similar practice and acting in similar circumstances, would exercise. This reasonable duty included but was not limited to asserting a claim for future medical care associated with Plaintiff's TBI and presenting evidence in support thereof at trial . . ." (Appx. 17, ¶ 32);
- *Breach of Standard of Care*: "Defendants breached the applicable standard of care owed to Plaintiff under the same or similar circumstances when they failed to present a claim for future medical care associated with Plaintiff's permanent TBI and present evidence in support thereof at trial in the Underlying Matter." (Appx. 17, ¶ 33); and
- *Causation/Damages*: "Defendants' breach of the standard of care was the proximate cause of Plaintiff's injuries and damages. But for Defendants' breaches of the standard of care, as aforesaid, Plaintiff would have, more likely than not, presented evidence of his need for extensive future medical treatment and care at trial, would have been successful, received a multi-million-dollar award to compensate Plaintiff for the lifetime of future care, and would have collected said award from the defendants in the Underlying Matter." (Appx. 17-18, ¶ 34; *see also* Appx. 16, ¶ 29.)

Notably, Tovar's Complaint did not reference the Release that Tovar signed with the McKesson defendants in the Underlying Matter or plead any facts that could have supported an affirmative defense of judgmental immunity for the Lawyers. (Appx. 11-18.) In his Complaint, Tovar demanded a jury trial. (Appx. 18.)

C. The Lawyers' Motion to Dismiss

Because Defendants chose not to answer the Complaint, *all of the Complaint's allegations were uncontested.* Defendants moved to dismiss the Complaint pursuant to Super. Ct. Civ. Rule 12(b)(6). (Appx. 40-46.) In addition—even though discovery barely had begun, no depositions had been scheduled, and expert disclosures were many months away—the Lawyers alternatively asked the trial court to award them summary judgment. (Appx. 46-53.)

In their Motion to Dismiss, the Lawyers applauded themselves for obtaining a verdict of $3.7 million in the Underlying Matter (despite having failed to advise Tovar that he could have sought significantly more recovery that he would need for his lifelong future medical care) (Appx. 30) and argued that dismissal under Rule 12(b)(6) was proper because: "(i) Mr. Tovar's claim is barred by the statute of limitations; (ii) Mr. Tovar's knowing and voluntary settlement of his case while on appeal precludes this legal malpractice claim; and (iii) Mr. Tovar's claim that if a lifecare planner had been called at trial [to support a claim for recovery of Tovar's future medical damages] it would have resulted in a higher verdict is entirely

speculative."[1] (Appx. 31.) Alternatively, the Lawyers asserted that "there is no genuine issue of material fact" and thus they were entitled to summary judgment as a matter of law on their defense of "judgmental immunity"—an affirmative defense they had not raised in a pleading. (Appx. 31; *e.g.,* Appx. 1124, ¶ 8.)

D. Tovar's Opposition to the Lawyers' Motion to Dismiss

In his opposition brief, Tovar *first* correctly recited that the trial court was required to accept as true all of his Complaint's allegations and construe *all* facts and interferences in his favor in ruling on Defendants' Rule 12(b)(6) motion. (Appx. 899.) Tovar also correctly noted that if a party appends materials outside of the pleadings to a Rule 12(b)(6) motion, such that the motion is converted to one for summary judgment under Rule 56, and "all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." (Appx. 899, quoting Super. Ct. Civ. R. 12(d).) In response to Defendants' statute of limitations argument, Tovar also showed that his Complaint was timely filed. (Appx. 900-04.)

[1] Ironically, despite arguing that Tovar's well-pleaded allegation that he would have received future medical damages at trial was "speculative," Defendants themselves speculated that *if* future medicals had been presented to the jury, the verdict "*would likely*" have been much lower. (Appx. 31.) In short, the Lawyers' argument that the Complaint's allegations were speculative necessarily asked the trial court to accept the Lawyers' own speculation. Under any scenario, this was an issue for the jury.

Second, Tovar demonstrated that his Release of the McKesson defendants in the Underlying Matter did not release his malpractice claim against the Lawyers in this action. (Appx. 904-08; Appx. 1155-56, ¶ 3.)

Third, Tovar demonstrated that—at the early pleading stage—he met his minimal burden which required only that he *allege* the elements of his malpractice claim. (Appx. 910, 912.) Tovar also correctly noted that merely because the jury returned a sizable verdict in the Underlying Matter did not mean that Defendants did not commit malpractice or foreclose the possibility that the jury's award would have been higher if the Lawyers had presented a claim for Tovar's future medical care at trial. (Appx. 909.) Tovar rightly noted that whether the jury would have awarded more, or how much more the jury would have awarded if such future care had been tendered for their consideration, were matters of proximate causation and damages that must be resolved by a jury applying the "case within a case" methodology under which legal malpractice claims are tried. (Appx. 909-12.)

Fourth, Tovar cited *numerous* disputed issues of material fact that precluded summary judgment regarding the Lawyers' judgmental immunity defense. (*E.g.,* Appx. 915-20.) For example, Tovar controverted Defendants' claim that they made a deliberate strategic decision not to seek future medical damages by pointing out at least *four* different documents in the record in the Underlying Matter in which Defendants took a completely contradictory position, asserting that Tovar's future

medical damages were significant issues for trial. (Appx. 915 n.10, 917-18, 893-95.) Tovar also reminded the trial court that given Defendants' choice to argue in their Motion to Dismiss vague facts that were unknowable to him (such as, for example, the names of D.C. Bar members with whom the Lawyers claimed to have consulted in deciding not to seek future medical damages, and the names of medical providers whom the Lawyers asserted would not support a claim for future medical costs, among others), discovery was needed. (Appx. 891-92, 912-18.)

This was particularly true since Tovar noted that he previously had propounded interrogatories asking Defendants to identify persons with information supporting their defenses. (Appx. 915-16; 1127, interrogatory 15; 1137 (same); 1149 (same); 1158, ¶ 13.) Even though Defendants answered Tovar's interrogatories on August 24, 2022 (Appx. 1130, 1142, 1154), *after* they filed their Motion to Dismiss on July 29, 2022 (Appx. 27-28), they failed to identify the D.C. Bar members with whom the Lawyers purportedly consulted in deciding not to seek future medical damages and otherwise played a game of "hide the ball" to avoid divulging information that would have helped Tovar refute Defendants' judgmental immunity defense in the pending Motion. (*E.g.,* Appx. 915-18; 1089-90; 1134, ¶ 6; 1138-39, ¶¶ 23-28; 1146, ¶¶ 4,6,8; 1150-51, ¶¶ 23-28; 1157-58.) Given the plethora of disputed material facts, the Lawyers simply did not and could not sustain their

burdens of pleading and proof to secure summary judgment on their unpled affirmative defense of judgmental immunity.

Finally, Tovar highlighted the absence of any record evidence that Defendants *ever* told him (1) that future medical damages were available to him *and* (2) that they had strategically decided against seeking such damages. (Appx. 915.) The trial court was required to accept as true all of Tovar's affidavit averments establishing that the Lawyers never advised him of the availability of seeking future medical damages, or the Lawyers' decision to abandon a claim for such damages in the Underlying Matter. (Appx. 1087-88, ¶¶ 4-9.) In short, given the requirements that the trial court must accept as true all of the Complaint's allegations and construe all facts and inferences in Tovar's favor, and that it could not grant summary judgment in the face of disputed issues of material fact, Tovar argued that the Lawyers' Motion to Dismiss must be denied. (*E.g.*, Appx. 920.)

E. The Lawyers' Reply

Defendants confirmed the lack of any basis for their Motion to Dismiss by inappropriately attaching additional exhibits to their Reply brief, including two e-mails, and by raising issues in Reply that they failed to raise in their initial briefing. (Appx. 1160-71.) Importantly, the two e-mail exhibits attached to the Reply—which Defendants claimed purportedly showed that Tovar knew before trial that a claim for future medical costs would not be asserted (Appx. 1163)—demonstrated no such

thing and, on top of that, were unauthenticated and contained inadmissible hearsay. (Appx. 1168-69.) In addition, the Lawyers misstated the contents of Tovar's response brief, incorrectly summarized Tovar's request for additional discovery, and (without record support) asserted that Tovar was aware that Defendants decided not to claim future medicals at trial. (Appx. 1162-64.) Defendants also touted their claim that Tovar originally was "ecstatic" with the jury's verdict—an irrelevant point since Tovar did not know that the Lawyers had failed to present to the jury a huge category of significant future medical damages until after the Underlying Matter was settled. (Appx. 918-19, 1163-64.)

For the first time in their Reply brief, Defendants argued that because Tovar did not produce expert testimony (even though no expert deadline had passed), he could not sustain his claim. (Appx. 1165-67.) The Lawyers' primary support for this argument was an inapposite, unpublished 1990 decision on a Rule 11 motion in a *medical* (not legal) malpractice case in which a trial court noted that the plaintiff should have consulted an expert before filing suit. (Appx. 1167, 1170-71.) Defendants failed to cite any rule, statute, regulation, or other binding precedent that required Tovar to proffer an expert's opinion *prior to* either the expert deadline or before Defendants responded to discovery in a meaningful way.

F. The Trial Court's Order

After a hearing in which it was evident that the trial court believed there were contested issues of fact (*see, e.g.,* Appx. 1228:3-6, 1234:4-8, 1241:6-21, 1256:21-1257:18, 1257:3-6, 1269:5-13), the trial court entered its Order granting the Motion to Dismiss. (Appx. 1176-89.) *First*, the Order rightly rejected Defendants' argument that Tovar's Complaint was time barred. The court conducted a detailed analysis of the applicable statute of limitations and rightly determined that under any mathematical calculus advanced by the parties, Tovar's legal malpractice claim was timely. (Appx. 1180-83.) That ruling is the subject of Defendants' cross appeal.

Second, the trial court erred in dismissing Tovar's Complaint under Rule 12(b)(6) by failing to address the only issue that mattered: whether the Complaint properly pleaded the elements of Tovar's legal malpractice cause of action. In fact, it did. (*E.g.,* Appx. 17-18, ¶¶ 32-34.)

Third, the trial court incorrectly found that Tovar failed to state claim for legal malpractice because the Release with the McKesson defendants in the Underlying Matter "unambiguously stated that Plaintiff agreed to release *Defendants [i.e., the Lawyers]* 'from any and all past, present or future actions, …'" (Appx. 1184-85, emphasis and brackets added.) This conclusion was clearly erroneous because Tovar's attorneys in the Underlying Matter (Defendants here) were not parties to the

Tovar-McKesson settlement; the Release provision therein therefore did not apply to, or release Tovar's malpractice claim against, the Lawyers. (Appx. 131-32.)

Fourth, the trial court erred in finding that Tovar failed to state a claim because "Plaintiff's claim for legal malpractice arises from the strategy employed by the Defendants in the [U]nderlying [M]atter, which Plaintiff was aware of prior to knowingly and voluntarily signing the settlement agreement." (Appx. 1185.) Nothing in the Complaint so much as hinted that Defendants' failure to pursue future medical damages was a "strategy." (Appx. 11-18.) The court also misapplied the Rule 12(b)(6) standard by failing to accept as true Tovar's factual averment in his Complaint that "Defendants never advised [him] that they would not present his need for future care at trial, nor did they inform him that omitting such a claim was prudent."[2] (Appx. 15-16, ¶ 26.)

Fifth, the trial court overlooked the Rule 12(b)(6) standards by ignoring the well-pled complaint rule in favor of the Lawyers' argument that given the size of the jury's future *earnings* award in the Underlying Matter, the Lawyers could not possibly have committed malpractice. (Appx. 1188.) However, the trial court again failed to accept as true the Complaint's allegations that Defendants had a duty to

[2] Even if this determination was instead a basis for the trial court's decision on summary judgment, it still was erroneous because Tovar submitted an affidavit in opposition to the Lawyers' summary judgment motion that directly contradicted their assertions on this point, and thus presented contested issues of material fact that precluded summary judgment. (Appx. 1087-88, ¶¶ 4-9.)

assert a claim for future *medical* care (Appx. 17, ¶ 32) and that but for Defendants' breach of the standard of care, "Plaintiff would have, more likely than not, presented evidence of his need for extensive future medical treatment and care at trial, would have been successful, received a multi-million-dollar award to compensate Plaintiff for the lifetime of future care, and would have collected said award from the defendants in the Underlying Matter." (Appx. 17-18, ¶ 34.) Indeed, given the sizable award for *future earnings*, it is evident that the jury found the harm to Tovar stemming from the accident to be on-going and therefore, it is just as likely (if not more so) that the jury would have awarded Tovar future medical expenses in addition to his lost future earnings.

Sixth, the trial court erred in conclusively determining for purposes of the Rule 12(b)(6) motion that the Lawyers' failure to present to the jury a claim for future medical care was a matter of trial strategy that could not form the basis of a malpractice claim under the judgmental immunity doctrine. (Appx. 1186-88.) Indeed, Defendants *did not assert* judgmental immunity as a basis for their Motion to Dismiss under Rule 12(b)(6).[3] (Appx. 40-46.) Nor could they; again, the Complaint was devoid of any allegations to support a *motion to dismiss* based upon the unpled affirmative defense that the Lawyers exercised their discretion in deciding

[3] Although the Order includes this holding in a section of the trial court's decision entitled "Speculation," the text addresses Defendants' judgmental immunity argument. (Appx. 1185-88.)

not to present this issue to the jury. (Appx. 11-18.) In any event, at the pleading stage, the trial court was required to accept as true Tovar's factual allegations that if the matter had been presented to the jury, it would have awarded him future medical damages. (Appx. 17-18.) The court implicitly acknowledged that its opinion in this regard was improper by relying upon case law in the context of a motion for summary judgment rather than applying the required Rule 12(b)(6) standard. (Appx. 1186-88.)

Seventh, after granting the Lawyers' Rule 12(b)(6) motion, the trial court noted in conclusory fashion that "*even if*" it "were to address the merits of Defendants' arguments in favor of Summary Judgment," it would have granted that motion as well. (Appx. 1188 (emphasis in original).) However, the court did not address the merits of Defendants' arguments for summary judgment (or Plaintiff's opposition thereto) and improperly decided disputed issues of material fact that permeated the record. (Appx. 1188.) The court also erroneously concluded that summary judgment would have been warranted because Tovar "failed to produce an expert to bolster his claim" (Appx. 1188), even though Tovar's deadline to name his experts had not expired—and, in fact, only the day before the trial court had extended that deadline. (Appx. 1174.)

Finally, even if the trial court could have considered the Lawyers' request for summary judgment (and it could not), the trial court erred by ignoring Tovar's Rule

56(d) affidavit (Appx. 1086-92), his request for further discovery (*e.g.,* Appx. 1089, ¶ 13), the fact that the trial court only one day earlier had just extended the relevant deadlines (including the expert disclosure deadline (Appx. 1174)), and incorrectly considered the summary judgment motion without allowing additional discovery.

V. SUMMARY OF ARGUMENT

The Order was wrongly decided and must be reversed. In granting the Lawyers' Motion to Dismiss, the trial court improperly considered evidence not before it, failed to adhere to the standards applicable to a Rule 12(b)(6) motion and ignored the Complaint's allegations in which Tovar irrefutably pleaded the elements of his legal malpractice claim—which is all that Tovar was required to do to prevail on Defendants' Rule 12(b)(6) motion.

In its *dictum* regarding Defendants' alternative request for summary judgment, the trial court improperly invaded the province of the jury by making and applying its own determinations about credibility, resolving contested issues of material fact, and declining to allow discovery (or to even acknowledge Tovar's request to take discovery before deciding the Motion) even though the close of discovery was still months away. The trial court also was wrong in suggesting that summary judgment was appropriate because Tovar had not provided expert testimony in response to the Motion to Dismiss—although the expert designation deadline had not passed (and,

indeed, had just been extended). The trial court's numerous errors require reversal of its Order dismissing the Complaint.

VI. ARGUMENT

A. Standard of Review

This Court's standard of review of the trial court's Order regarding Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is *de novo*. *See In re Estate of Curseen*, 890 A.2d 191, 193 (D.C. 2006) ("Because a motion to dismiss a complaint under Rule 12(b)(6) 'presents questions of law, our standard of review … is *de novo*.'"). With regard to the trial court's *dictum* regarding summary judgment, the standard of review is also *de novo*. *See Crawford v. Katz*, 32 A.3d 418, 327 (D.C. 2011). Finally, the standard of review from the trial court's denial of Plaintiff's request for discovery "premised on a Rule 56[(d)[4]] affidavit [is] abuse of discretion." *Flax v. Schertler*, 935 A.2d 1091, 1102 (D.C. 2007).

B. The Court Erred in Granting Defendants' Rule 12(b)(6) Motion

1. Governing Legal Principles

As this Court repeatedly has instructed, when considering a motion to dismiss under Rule 12(b)(6), a trial court must accept as true all of the complaint's allegations and "construe all facts and inferences in favor of the plaintiff." *Curseen*, 890 A.2d at 193, *quoting Atkins v. Industrial Telecommunications Ass'n*, *Inc.,* 660 A.2d 885,

[4] The former Super. Ct. Civ. Rule 56(f) is currently codified as Rule 56(d).

887 (D.C. 1995). *Curseen* applied this standard in the context of a motion to dismiss a complaint for legal malpractice, noting that to prove legal malpractice, a plaintiff "must show an applicable standard of care, prove a breach of that standard, and demonstrate a causal relationship between the violations and the harms enumerated in the complaint." *Id*. at 193, *citing O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982). That a plaintiff cannot yet *prove* his claim is irrelevant to the court's analysis of the complaint's averments: "The filing of a motion pursuant to Rule 12(b)(6) does not call upon the plaintiff to offer his proof. All that is required when we consider the sufficiency of the complaint is a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Super. Ct. Civ. R. 8(a)(2). Such a statement must 'simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' … 'Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely *but that is not the test*.'" *Curseen*, 890 A.2d at 193 (citations omitted, emphasis added).

Particularly relevant to the trial court's ruling here, this Court has made plain that a "Complaint [should not] be dismissed under Rule 12(b)(6) on the ground that no evidence has been offered by Plaintiffs as we take the facts alleged in the complaint as true, and *the presentation of evidence to counter a Rule 12(b)(6) motion is not required." Curseen*, 890 A.2d at 193, *quoting Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 497 (D.C. 2005) (emphasis added). On appeal, "[w]hen

reviewing the trial court's ruling on a [m]otion to [d]ismiss pursuant to Super. Ct. Civ. R. 12(b)(6), we consider only the legal sufficiency of the complaint, not whether the plaintiff would have ultimately prevailed." *Caglioti v. Dist. Hosp. Partners, LP*, 933 A.2d 800, 807 (D.C. 2007) (citation omitted). In short, the question applicable to a motion to dismiss merely is whether the pleading is sufficient, not whether the plaintiff will win in the end. *See Curseen*, 890 A.2d at 193.

Finally, a party moving to dismiss under Rule 12(b)(6) cannot present materials outside of the pleadings *unless* (1) the materials are public records; or (2) the defendant has "present[ed] an authentic copy" of a document "referred to in the complaint." *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010). In this case, the Lawyers presented 40 exhibits consisting of more than 820 pages, including two copies of the court docket and seven days of trial transcripts in the Underlying Matter. (Appx. 75-81, 106-116, 356-858.) Of the remainder, only six are in the public record from the Underlying Matter (Appx. 67-74, 82-105, 117-130, 323-40, 353-54). The other 25 documents (Appx. 131-322, 341-352, 355, 859-887), were not referenced in Tovar's Complaint nor were they matters of public record and therefore could not be considered by the trial court.

Although the trial court recited the legal standard for motions to dismiss, it failed to apply that standard in reviewing Tovar's Complaint. Instead, the trial court

engaged in fact-finding and considered extra-record exhibits, which are impermissible in the context of a Rule 12(b)(6) motion.

2. The Complaint Pleaded a Valid Claim for Legal Malpractice

Curseen and its progeny dictate the outcome here and required that the Lawyers' Motion to Dismiss be denied. As *Curseen* acknowledged, in responding to a Rule 12(b)(6) motion, a plaintiff need only show that the complaint *alleges* the elements of the plaintiff's legal malpractice claim. The plaintiff *need not* offer even a modicum of actual proof; instead, the motion must be decided by presuming that all of the complaint's allegations are true. 890 A.2d at 194 ("overcoming a Rule 12(b)(6) motion simply requires a sufficient pleading, not actual proof"). As set forth *supra* at section IV(B), Tovar's Complaint satisfied the requirements set forth in *Curseen*. Indeed, Defendants never even argued below that Tovar's Complaint failed to properly allege all of the elements required to state a *prima facie* claim of legal malpractice.

Having pled that an attorney/client relationship existed between Tovar and the Lawyers, Defendants breached the standard of care, and their negligence was the proximate cause of harm to (and damaged) Tovar, nothing more was required. On that basis, Defendants' Rule 12(b)(6) motion should have been denied then and there. (Appx. 15-18.) Notably, however, the trial court never discussed these pertinent allegations of Tovar's Complaint, much less applied the pleading standard to those

allegations. This defect, alone, requires reversal. Further, had the trial court found any legitimate defect in Tovar's pleading, it should have provided Tovar with an opportunity to amend rather dismiss his Complaint with prejudice. *See O'Donnell v. Barry*, 148 F.3d 1126, 1137 n.3 (D.C. Cir. 1998) ("dismissal under Rule 12(b)(6) generally is not final or on the merits and the court normally will give plaintiff leave to file an amended complaint" (citation omitted)).

Notably, the grounds on which the trial court granted the Lawyers' Rule 12(b)(6) motion (release of claims and judgmental immunity) are *affirmative defenses* that were not properly before the court. *See, e.g.,* Super. Ct. Civ. R. 8(b)(c)(1) ("In response to a pleading, a party must affirmatively state any avoidance or affirmative defense, including … release"); *Al Jazeera Int'l v. Dow Lohnes PLLC*, No. CIV.A. DKC 13-2769, 2014 WL 4373464, at *7 (D. Md. Sept. 2, 2014) ("Judgmental immunity is an affirmative defense," citing *Jones v. Lattimer*, 29 F. Supp. 3d 5, 8 n.2 (D.D.C. 2014)). Because Defendants had not raised these affirmative defenses in a pleading, and because the defenses were predicated on purported facts and evidence beyond the Complaint's allegations, the trial court should not have considered these arguments in the context of Defendants' Rule 12(b)(6) motion. These obvious errors mandate that the trial court's Order be reversed.

3. The Trial Court Improperly Considered and Applied the Release in the Underlying Matter

The trial court erred in dismissing Tovar's Complaint based on the Release in the Underlying Matter. *First*, the trial court wrongly considered the Release in connection with Defendants' Rule 12(b)(6) motion. (Appx. 1218-20.) The Complaint did not mention the Release and noted only that "Plaintiff and the underlying defendants reached a settlement" in the Underlying Matter. (Appx. 16, ¶ 28.) Because the Release neither was referenced in the Complaint nor central to Tovar's legal malpractice claim, it is not one of the limited types of documents that the trial court could consider in ruling on a Rule 12(b)(6) motion. *See Caglioti,* 933 A.2d at 807 ("Where '*the documents* involved *were referenced in the complaint and are central to appellant's claim* ... the trial court could consider them in connection with the motion to dismiss without converting the motion to one for summary judgment," citation omitted, emphasis added); *Johnson-Richardson v. Univ. of Phoenix*, 334 F.R.D. 349, 358 (D.D.C. 2020) (where a complaint merely references an extrinsic document, the document cannot be attached to a motion to dismiss; quoting with approval cases stating that "[l]imited … reference to documents ... is not enough to incorporate those documents, wholesale, into the complaint," citations omitted).

Second, the trial court compounded its initial error—*i.e.,* considering the Release at all—by erroneously finding:

> In settling the [Underlying Matter], Plaintiff signed a release which unambiguously stated that Plaintiff agreed to release ***Defendants*** "from any and all past, present or future actions, causes of action, claims, demand, liabilities, suits, damages, costs expenses or obligations of whatsoever kind which Mr. Tovar had or ever may have arising out of the motor vehicle accident which occurred on April 15, 2012." *See* Defs.' Statement of Material Facts not in Dispute in Support of Defs.' Mot. to Dismiss 2. This language makes clear that the instant claim for legal malpractice arises out of the [U]nderlying [M]atter.

(Appx. 1184-85, emphasis added.)[5] However, the Release provision *did not* release ***Defendants*** in this case, but by its express terms, released only the "Defendants" in the Underlying Matter, namely, "McKesson Corporation and all of its affiliates, predecessors, successors, parents, subsidiaries, officers, directors, employees, agents, contractors, and insurers (collectively referred to as 'Releasees')" from any claims "which Tovar ever had, now has, or may ever have *against the Releasees*" related to the underlying vehicular accident. (Appx. 131.) The trial court further erred by referencing the Lawyers' "Statement of Material Facts not in Dispute" (Appx. 1185) because a statement of material facts is relevant only to motions for summary judgment—there is no place for extra-record evidence in considering a Rule 12(b)(6) motion (absent one of the limited exceptions, not applicable to the

[5] The Order's reliance on *Dyer v. Bilaal*, 983 A.2d 349, 361-62 (D.C. 2009) (Appx. 1185), reinforces the trial court's mistaken belief that the Lawyers were parties to, and released by, the Release. In *Dyer*, this Court enforced settlement agreements against *the signatories* to the documents, which precluded future claims by or against *the parties to the agreements*. Unlike *Dyer*, the Lawyers were not parties to or beneficiaries of the Release in the Underlying Matter. (Appx. 131-32.)

Release in this case). *See* Super. Ct. Civ. R. 56(b), (c) (a *summary judgment* "movant must file a statement of the material facts that the movant contends are not genuinely disputed," by reference to "materials in the record").

Third, the Order confusingly conflated the Release issue with the trial court's later discussion of judgmental immunity, incorrectly stating that Tovar was aware of and approved the Lawyers' decision not to pursue future medical damages in the Underlying Matter. (Appx. 1185.)[6] This is not a fact that was before the trial court on Defendants' Rule 12(b)(6) motion, nor is it true. (Appx. 1087-88, ¶¶ 4-9.)

Finally, the cases cited by the trial court to support its dismissal of Tovar's Complaint based on the Release are inapposite. (Appx. 1185-86.) For example, the facts in *Venable LLP v. Overseas Lease Grp., Inc.*, 2015 U.S. Dist. LEXIS 98650, 2015 WL 4555372 (D.D.C. July 28, 2015), which the trial court cited, differed significantly from those alleged in Tovar's Complaint. (Appx. 1185.) The *Venable* court noted that the client in that case had "accepted the settlement offer that it now claims was the product of inadequate representation *after* it had already fired Venable and initiated a suit in New York against Venable pressing the same claims as the counterclaims here." *Id.,* 2015 WL 4555372, at *3 (emphasis in original). By

[6] Specifically, the Order reads: "Plaintiff's claim for legal malpractice arises from the strategy employed by the Defendants in the underlying matter, which Plaintiff was aware of prior to knowingly and voluntarily signing the settlement agreement." (Appx. 1185.)

contrast, Tovar never fired the Lawyers much less did so prior to settling the Underlying Matter. Instead, Tovar continued to use and rely on the Lawyers' legal services to negotiate the settlement with the McKesson defendants (from which Tovar paid Defendants $1,265,857). (Appx. 1100; *see also supra* n.5 discussing the trial court's erroneous reliance on *Dyer* in this section of its Order.)

In sum, the trial court erred in dismissing Tovar's Complaint under Rule 12(b)(6) based on the Release, thus requiring reversal of the court's Order.

4. The Trial Court Improperly Considered and Applied the Judgmental Immunity Doctrine

The trial court also erred in dismissing Tovar's Complaint under Rule 12(b)(6) based on the judgmental immunity doctrine. Judgmental immunity was explained in *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662 (D.C. 2009), upon which the trial court extensively relied in its Order (Appx. 1186-88):

> Essentially, the judgmental immunity doctrine provides that an informed professional judgment made with reasonable care and skill cannot be the basis of a legal malpractice claim. Central to the doctrine is the understanding that an attorney's judgmental immunity and an attorney's obligation to exercise reasonable care coexist such that an attorney's non-liability for strategic decisions "is conditioned upon the attorney acting in good faith and upon an informed judgment after undertaking reasonable research of the relevant legal principals and facts of the given case." ... ("[M]erely characterizing an act or omission as a matter of judgment does not end the inquiry."). "To hold that an attorney may not be held liable for the choice of trial tactics and the conduct of a case based on professional judgment is not to say, that an attorney may not be held liable for any of his actions in relation to a trial. He is still bound to exercise a reasonable degree of skill and care in all of his professional undertakings." ... As a result, the judgmental

> immunity doctrine has been described "as nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability."

Id. at 666 (citations omitted). Notably, *Biomet* applied judgmental immunity in the context of summary judgment—not a motion to dismiss. *See id.* at 664. The *Biomet* Court explained that "[i]n order to find that the trial court properly granted summary judgment for [the defendant] based on judgmental immunity, [the appellate court] must be satisfied that (1) the alleged error is one of professional judgment, and (2) the attorney exercised reasonable care in making his or her judgment." *Id*. at 666.

Here, the trial court's Rule 12(b)(6) ruling based on judgmental immunity was wrong in several respects. *First*, *the Lawyers did not move to dismiss Tovar's Complaint under Rule 12(b)(6) based on judgmental immunity* (Appx. 40-46), and for good reason: judgmental immunity is an inherently fact-specific affirmative defense which is rarely amenable to disposition on a motion to dismiss. *See Colella v. Androus*, No. CV 20-813 (RC), 2022 WL 888182, at *5 (D.D.C. Mar. 25, 2022) ("The question of whether an attorney breached the professional standard of care is not easily answered at the Rule 12(b)(6) stage. … The application of the judgmental immunity rule likewise does not easily submit to pleading-stage resolution;" denying motion to dismiss a legal malpractice claim).

Here, the Lawyers' judgmental immunity defense rested largely on the affidavit of *Defendant Cornoni* (Appx. 262-72), which by itself showed that the trial

court could not grant a Rule 12(b)(6) dismissal on that ground. The Cornoni affidavit was replete with newly-presented self-serving statements that the Order, by dismissing the Complaint, deprived Tovar of an opportunity to challenge and explore at depositions and via other modes of discovery. For example, in his affidavit, Defendant Cornoni claimed that he made all of the "trial decisions" in the Underlying Matter, including "but not limited to the decision not to pursue a life care plan" to support a claim for Tovar's future medical damages. (Appx. 264.) Cornoni also claimed to have spoken to various unnamed members of the D.C. Bar in making this decision. (Appx. 264-65.) However, neither the Cornoni affidavit nor Defendants' discovery responses (Appx. 1115-54) identified the alleged D.C. Bar members with whom Defendant Cornoni supposedly consulted, much less divulged the contents of their communications or when they occurred (thus necessitating further discovery). (Appx. 915-16.) For these reasons alone, the trial court erred in considering Defendants' judgmental immunity defense in the context of a Rule 12(b)(6) motion.

Second, the trial court's Rule 12(b)(6) ruling on judgmental immunity was tacitly premised on the false notion that Tovar failed to negate Defendants' unpled affirmative defense of judgmental immunity in his Complaint. As explained above, under *Curseen*, 890 A.2d at 194, there is no such requirement. Here, Tovar was obliged merely to *allege* the elements of his legal malpractice claim, which he did.

A plaintiff has no duty to anticipate a defendant's affirmative defenses and plead facts to negate a judgmental immunity defense as part of his own *prima facie* allegations of legal malpractice. *See Cabrera v. B&H Ntl'l Place, Inc.,* Civil No. 14-cv-01885 (APM), 2015 WL 9269335, *3 (D.D.C. Sept. 28, 2015) (plaintiff "is not required, as Defendants seem to suggest, to plead facts that anticipate and negate a good faith defense to defeat a motion to dismiss," *citing Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("We see no basis for imposing on the plaintiff an obligation to anticipate [an affirmative] defense by stating in his complaint [its negative]"); *Bausch v. Stryker Corp.,* 630 F.3d 546, 561 (7th Cir. 2010) ("pleadings need not anticipate or attempt to circumvent affirmative defenses" (citations omitted)); *Braden v. WalMart Stores*, 588 F.3d 585, 601, n.10 (8th Cir. 2009) (plaintiffs "need not plead facts responsive to an affirmative defense before it is raised").

Third, in dismissing the Complaint based on judgmental immunity arguments that Defendants did not even make in support of their Rule 12(b)(6) motion, the trial court misapplied this Court's *Biomet* holding.[7] If anything, *Biomet,* 967 A.2d at 663-65, shows why the Lawyers did not, and could not, seek dismissal of Tovar's

[7] The trial court also cited *Mills v. Cooter*, 647 A.2d 1118 (D.C. 1994), and *National Sav. Bank v. Ward*, 100 U.S. 195, 198 (1879), but neither case supports the court's Rule 12(b)(6) ruling. (Appx. 1187-88.) *Mills* addressed the judgmental immunity doctrine in the context of a motion for judgment notwithstanding the verdict *after trial*. And *Ward* is inapposite because it did not involve either an action for legal malpractice or the judgmental immunity doctrine. Instead, *Ward* ruled that a third party, not in privity, could not sue another individual's attorney. 100 U.S. at 200.

malpractice claim based upon the affirmative defense of judgmental immunity at the pleading stage. *Biomet*'s application of the judgmental immunity doctrine in the context of summary judgment was not—nor could it have been—made in the context of a motion to dismiss given the requirement that, in deciding a Rule 12(b)(6) motion, the court must treat all of the plaintiff's allegations as true. Here, the Complaint's allegations included that the Lawyers breached their legal duty to Tovar by failing to present a claim for future medical care (Appx. 17, ¶ 33), Tovar had a viable claim for future medical damages based upon the opinions of his health care providers (Appx. 16, ¶ 27), it is more likely than not that the jury in the Underlying Matter would have awarded Tovar damages for his future medical care at trial if the Lawyers had presented that issue (Appx. 16-18, ¶¶ 29, 34), and the Lawyers' failure to present such a claim is the proximate cause of Tovar's harm (*id.*). (*See also* Appx. 17-18, ¶¶ 31-35.)

Because Defendants had to accept these allegations as true, the additional "facts" that they presented on the issue of judgmental immunity were relevant, if at all, only to their request for *summary judgment*. (Appx. 46-53.) Indeed, only in the summary judgment context could the Lawyers have asked the trial court to consider the Cornoni affidavit and its conclusory assertions that Defendants' failure to seek future medical damages at trial was a reasonable exercise of their professional judgment (Appx. 48-50), and that Tovar purportedly knew of and consented to this

trial strategy (Appx. 50-51) (which was a disputed fact in any event given Tovar's affidavit to the contrary (Appx. 1087-88, ¶¶ 4-9)). Because Defendants relied on purported facts outside of the Complaint, *Curseen* barred the Lawyers from asserting—and the trial court from crediting—Defendants' judgmental immunity defense on a Rule 12(b)(6) motion. Nothing in *Biomet* remotely supports a different conclusion.[8] In sum, the trial court's failure to follow and apply the governing standards applicable to Rule 12(b)(6) motions requires that its Order be reversed.

[8] The trial court's reliance on *Biomet* was misplaced for other reasons. *First*, the *Biomet* holding was expressly limited: "This case presents us with the opportunity to make clear that no claim of legal malpractice will be actionable for an attorney's reasoned exercise of informed judgment *on an unsettled proposition of law*." 967 A.2d at 668 (emphasis added). *Biomet* is inapposite because there is no "unsettled" question of law in this case. *Second*, *Biomet* supports Tovar's position because it recognized that courts normally should not grant summary judgment—much less a motion to dismiss—based on judgmental immunity. *See id*. at 665. *Third*, *Biomet* stressed that the particular facts before the Court fell into the rare category of cases amenable to summary judgment on judgmental immunity, in part, because "*[n]either party dispute[d] the fact that [the defendant]'s decision about how to structure the initial appeal was an exercise of professional judgment*." *Id.* at 666 (emphasis added). Here, however, Tovar vehemently contested the Lawyers' assertion that their failure to present future medical damages to the jury was a matter of professional judgment as opposed to malpractice. (Appx. 915 n.10, 1157 ¶ 10.) *Lastly*, unlike *Biomet*, it is undisputed that the Lawyers *could* have sought future medical damages. Whether their failure to do so was malpractice or a matter of professional judgment thus is a matter to be resolved a trial—not on a Rule 12(b)(6) motion to dismiss.

C. The Trial Court's *Dictum*[9] Regarding Defendants' Alternative Request for Summary Judgment Was Wrong

1. Governing Legal Principles

Even if the trial court had reached Defendants' alternative request for summary judgment, the record was replete with contested issues of material fact that would have precluded summary judgment. On appeal, this Court substitutes its judgment for that of the trial court:

> The standard[] of review for a summary judgment motion … [is] familiar. "'Summary judgment is appropriate only when the record, viewed in the light most favorable to the non-moving party, establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" …. "Issues of negligence frequently 'are not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner.'". …. In reviewing the trial court's grant of a motion for summary judgment, we resolve all inferences in favor of the non-moving party. … We apply "the same substantive standard as the trial court" and "conduct[ ] an independent review of the record."

Crawford, 33 A.3d at 427 (citations omitted). Importantly, where (as here),

> the party moving for summary judgment bears the ultimate burden of proof, such as when the movant (here, [Defendants]) [are] asserting an affirmative defense, the movant bears the initial burden at summary

[9] As to summary judgment, the trial court's Order began by stating: "[T]he Court need not reach Defendants' alternative request for Summary Judgment." (Appx. 1418.) The trial court's summary judgment discussion that followed thus was *dictum*, as the court did not apply the Rule 56 standard to the underlying facts, nor could it have done so because Defendants' affidavit testimony was contradictory and contained inadmissible hearsay. *See generally Constantine Cannon LLP v. Mullen Mgt. Co., Inc.*, 123 A.3d 968, 971 (D.C. 2015) (where the court "itself noted the statement was unnecessary to its holding," the assertion is *dictum* and is without effect) (citation omitted).

> judgment of providing competent evidence that demonstrates the absence of a genuine dispute of material fact with respect to the elements of the claims. ... *Chaplin v. NationsCredit Corp.,* 307 F.3d 368, 372 (5th Cir.2002) ("To obtain summary judgment, if the movant bears the burden of proof on an issue because as a defendant he is asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the defense to warrant judgment in his favor.") … Thus, the general procedure at summary judgment may be summarized as follows:
>
> The standard for a motion for summary judgment differs depending on whether the party moving for summary judgment also bears the burden of proof on the relevant issue.... [*W]here the moving party has the burden—[such as] the defendant on an affirmative defense—his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party*.

Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. De C.V., 79 F. Supp. 3d 60, 73-74 (D.D.C. 2015) (citations and punctuation omitted; emphasis added); *see also Oparaugo v. Watts*, 884 A.2d 63, 75 (D.C. 2005) ("A party asserting an affirmative defense has the burden of proving it."); *Barth v. Gelb*, 2 F.3d 1180, 1182 (D.C. Cir. 1993) (same); *Nat'l Rifle Ass'n v. Ailes*, 428 A.2d 816, 821 (D.C. 1981) (a claim that "is in the nature of an affirmative defense [] must be pleaded and proved by the defendant[].").

Here, the trial court erred in remarking in *dictum* that it would have granted Defendants' alternative request for summary judgment (even though it did not reach that issue) because a plethora of disputed material facts, and Defendants' failure to carry their burden of proof, would have precluded summary judgment.

2. Disputed Issues of Material Fact Would Have Precluded Summary Judgment

At the hearing on Defendants' Motion, the trial court affirmatively stated that there were "material facts in dispute, mainly the fact that Mr. Tovar was seemingly pleased with the results of the verdict, and, subsequently, the settlement." (Appx. 1228:3-6). Also, during oral argument, the trial court acknowledged that the record *was not clear* as to whether the Lawyers had ever informed Tovar about the availability of future medicals or that Defendants intended to waive this right on his behalf. (*E.g.,* Appx. 1234:1-8 ([Defendants' Counsel:] "So Your Honor, very clearly, the issue was raised about future medicals …. THE COURT: Well, that's not so clear from the emails. It's clear that a question regarding this particular doctor was raised, but it was not so clear to the Court that this very specific issue or question was asked, which is why I'm asking you now.").) Given the trial court's recognition that there were indeed contested fact issues, its Order wrongly concluded that "there is no genuine issue of material fact," without discussing any of the many disputed facts *or* Tovar's Rule 56(d) affidavit requesting discovery. (Appx. 1188.)

Instead of denying summary judgment based upon its acknowledgment that disputed material facts existed, the trial court summarily stated in its Order:

> [T]he Court need not reach Defendants' alternative request for Summary Judgment. However, *even if* the Court were to address the merits of Defendants' argument in favor of Summary Judgment, based upon the record, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law, given the Court's findings that: (1) Defendants

> cannot be held liable for legal malpractice because the decision not to present a lifecare planner [to support a claim for future medical damages] was reasonable, and a protected exercise of legal judgment and not a basis for legal malpractice; (2) Plaintiff's knowledgeable and voluntary settlement of the [U]nderlying [M]atter precludes his claim for legal malpractice; (3) Plaintiff consented to, and participated in, the trial strategy at issue; and (4) The record does not support a finding that Defendants breached a duty owed to Plaintiff, and Plaintiff failed to produce an expert to bolster this claim.

(Appx. 1188, emphasis in original.)

As explained below, the trial court's "findings" relative to summary judgment were totally improper because they either were legally erroneous, premature, and/or resolved disputed issues of material fact that should have gone to the jury.

a. ***Erroneous Finding #1: "Defendants cannot be held liable for legal malpractice because the decision not to present a lifecare planner was reasonable, and a protected exercise of legal judgment and not a basis for legal malpractice."***

The trial court's first finding was wrong because, in opposing Defendants' Motion to Dismiss, Tovar disputed—with specific references to the record—the Lawyers' assertion that their alleged decision not to pursue future medical damages was a strategic choice rather than egregious malpractice. (Appx. 915 n.10 ("Plaintiff disputes that the omission of a claim for future care was a conscious decision given the inconsistent positions [taken by Defendants on this issue] throughout the Underlying Matter," listing documents); 1157, ¶ 10 (same).)

For example, Tovar noted that Defendants had designated numerous physicians as experts in the Underlying Matter, all of whom were "expected to testify

that the Plaintiff … will continue to incur substantial medical expenses." (Appx. 119.) Defendants also had identified an expert economist, Dr. Richard Lurito, who was "expected to testify regarding the economic losses suffered by Mr. Tovar, including . . . *future medical care costs*." (Appx. 127 (emphasis added) (Plaintiff's Preliminary Designation of Expert Witnesses in the Underlying Matter).)

Further, Tovar noted that the Lawyers had answered a damages interrogatory on his behalf in the Underlying Matter by stating: "Plaintiff has permanent injuries and is seeking *further medical treatment*," noting that he would "periodically update[]" his itemization of damages. (Appx. 942-48.)

Tovar also noted that even on the eve of trial in the Joint Pretrial Statement in the Underlying Matter, the Lawyers indicated their intent to seek future medical damages, asserting as one of their claims on Tovar's behalf: "Plaintiff incurred substantial medical expenses … and is likely … to expend future medical expenses in an effort to treat the injuries he suffered. …" (Appx. 1065.) In that same document, under the section entitled "RELIEF SOUGHT," the Lawyers represented that they were "seeking compensation for Mr. Tovar's past and *future medical expenses*." (Appx. 1066-67, emphasis added.) Given Lawyers' retention of multiple experts, including an economist, to address Tovar's future medical damages and their pretrial representations regarding that issue, Tovar adduced more than enough evidence to demonstrate the existence of a disputed issue of material fact as to

whether Defendants' failure to seek future medical damages at trial was a strategic decision based on their professional judgment, or instead, legal malpractice.

Finally, as set forth in more detail *infra*, Tovar, at the very least, demonstrated that discovery was required to test and explore the representations contained in Defendant Cornoni's affidavit about why Defendants failed to seek future medical damages at trial and the "reasonableness" of those purported justifications. The trial court's first "finding" therefore could not support the grant of summary judgment.

b. ***Erroneous Finding #2: "Plaintiff's knowledgeable and voluntary settlement of the [U]nderlying [M]atter precludes his claim for legal malpractice."***

The trial court's misreading of the Release—concluding that it applied to the Lawyers when it actually released only the McKesson defendants—rendered the court's second factual finding palpably erroneous. (*Supra* at Sections IV(A) and VI(B)(3); Appx. 131-32.) The trial court's second "finding" thus could not support the grant of summary judgment for Defendants.

c. ***Erroneous Finding #3: "Plaintiff consented to, and participated in, the trial strategy at issue."***

As the trial court recognized during the hearing on Defendants' Motion to Dismiss, this third "fact" was clearly in dispute. (*E.g.,* Appx. 1269:5-13.) In his affidavit in opposition to Defendants' Motion, Tovar averred:

> 4. During the Defendants' representation, they never informed me that they had made a decision not to present my need for future care for my permanent traumatic brain injury ('TBI').

> 5. Defendants never communicated the pros and cons of seeking compensation for my necessary future TBI-related care.
>
> 6. Defendants never informed me that claiming my future TBI-related care was an option available to me in the Underlying Matter.
>
> 7. During the Defendants' representation, I did not know that I could claim future medical care that I had not yet incurred as damages in the Underlying Matter. I did not object to the Defendants' failure to assert a claim for my future TBI care and did not recognize the Defendants' omission of the claim, whether at mediation or trial, as problematic.
>
> 8. If Defendants informed me of the pros and cons of claiming my necessary future care in the Underlying Matter and had they expressed the same cons outlined in Defendant Cornoni's Affidavit, I would have insisted that Defendants pursue a claim for my future care. If despite my insistence that the Defendants pursue a claim for my future care, the Defendants refused to do so, I would have retained new counsel.
>
> 9. Defendants explained the pros and cons of not seeking compensation for my *past* medical care at trial. If they had reached a similar conclusion with respect to my claim for lifelong medical care, I expected that the Defendants would have informed me of such.

Appx. 1087-88 (emphasis in original).

Despite the clarity of Tovar's affidavit, the trial court improperly acted as fact-finder by concluding that "Plaintiff's claim for legal malpractice arises from the strategy employed by the Defendants in the [U]nderlying [M]atter, *which Plaintiff was aware of* prior to knowingly and voluntarily signing the settlement agreement." (Appx. 1185, emphasis added.) In so holding, the trial court wrongly ignored Tovar's affidavit statements, the record evidence establishing that the Lawyers did not make other trial strategy decisions without Tovar's knowledge or approval, and the total absence of any evidence that Defendants ever discussed with Tovar the issue of future medical damages. (Appx. 1087-88, ¶¶ 4-9; 293-95 (Lawyers' emails with

Tovar discussing "our analysis regarding the *past medical bills*" and asking for his approval of *that* "trial strategy" (emphasis added)), 264-66 (Defendant Cornoni Affidavit indicating that Lawyers purportedly discussed whether to pursue a life care plan only with other attorneys but failing to assert that they ever discussed the issue with Tovar); 1157 ¶¶ 10-11 (nothing this was a disputed fact).)[10]

It is black-letter law that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted); *see also Anderson v. Ford Motor Co.*, 682 A.2d 651, 653–54 (D.C. 1996) (neither the court of appeals nor the trial court may "resolve issues of fact or weigh evidence at the summary judgment stage," "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of [the] judge.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor," citations omitted); *Barrett v. Covington & Burling LLP*,

[10] The unauthenticated hearsay e-mails improperly attached to Defendants' Reply brief (Appx. 1168-69) were inadmissible under Rule 56. In addition, on their face, the e-mails do not demonstrate that Defendants made Tovar aware that they could have, but decided not to, seek future medical damages at trial.

979 A.2d 1239, 1244-45 (D.C. 2009) (same). The trial court plainly violated these fundamental principles in making its third factual finding, which thus could not support a summary judgment ruling for the Lawyers.

d. ***Erroneous Finding #4: "The record does not support a finding that Defendants breached a duty owed to Plaintiff, and Plaintiff failed to produce an expert to bolster this [legal malpractice] claim."***

Whether the Lawyers breached their duty to Tovar to pursue future medical damages at trial was a hotly contested issue and certainly one as to which there were material facts in dispute. As set forth *supra*, Tovar demonstrated that the Lawyers claimed in the Underlying Matter that damages in the form of all medical expenses—including future medical expenses—would be presented to the jury. (*See supra* Section VI(C)(2).) Therefore, whether the Lawyers made a strategic decision at the eleventh hour not to seek recovery of Tovar's future medical costs—or simply dropped the ball in failing to raise that issue at trial, and now invoke judgmental immunity as a *post-hoc* excuse to evade liability—is an issue of credibility for the jury to decide (after Tovar has an opportunity, at the very least, to depose Defendant Cornoni and other witnesses whom Cornoni referenced in his affidavit, as Tovar requested in his Rule 56(d) affidavit). (Appx. 1089-90, ¶¶ 13-19; 1157-58, ¶¶ 10-13.)

Further, the trial court determined that it would have granted summary judgment for Defendants based on Tovar's purported "fail[ure] to produce an expert

to bolster [his malpractice] claim." (Appx. 1188.) This determination was obviously premature. The trial court wholly ignored that at the time the Lawyers filed their Motion to Dismiss, Tovar's expert designation deadline still was months away and, the day before it issued its Order dismissing the Complaint, the court extended the expert disclosure deadlines. (Appx. 1174-75.) Neither the trial court nor Defendants cited any case (and we found none) holding that dismissal of a malpractice action on summary judgment under these circumstances is permissible.[11] Moreover, the trial court never should have considered this issue in any event because Defendants improperly raised it for the first time in their Reply brief.[12] (Appx. 1165-67.) *See Benton v. Laborers' Joint Training Fund*, 121 F. Supp. 3d 41, 51–52 (D.D.C. 2015) ("it is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief"); *Nat'l Parks Conservation Ass'n v. United States Forest Serv.*, No. CV 15-01582(APM), 2015 WL 9269401, at *2–3 (D.D.C. Dec. 8, 2015) ("Litigation is a not a shell game, in which a movant is permitted to

[11] None of Defendants' cited cases on this issue is to the contrary. (Appx. 1165-67.)

[12] In their Reply, Defendants argued that "(1) Plaintiff has not produced a standard of care expert to say that [Defendants] breached the applicable standard of care at trial where they obtained a verdict for Mr. Tovar in the amount of $3,797,573; and (2) Plaintiff has provided no expert testimony on what his future medicals have been since his trial ended on June 26, 2018 or what they will be in the future." (Appx. 1166 (footnote omitted).) In their opening brief, however, Defendants did not argue for summary judgment based on Tovar's purported inability to adduce expert testimony on these—or any other—issues. (Appx. 46-53.)

make general assertions in a motion, leaving its opponent to guess at its grounds, only then to supply content in a reply brief.").

Moreover, that the trial court's ruling on this point was premature is evident from case law recognizing that *even where an expert deadline has passed* (and here, the expert deadline had not yet expired), summary judgment should *not* be granted where there is a pending request to identify an expert beyond the deadline. *Compare Abell v. Wang*, 697 A.2d 796, 800-01 (D.C. 1997) (reversing summary judgment order based on failure of plaintiff to identify an expert by the court's deadline, stating "we must balance th[e] concern for judicial economy against the strong judicial and societal preference for determining cases on the merits," and noting the trial court's denial of discovery that would allow the plaintiff to prepare an expert report was in error), *with Forti v. Ashcraft & Gerel*, 864 A.2d 133, 134 (D.C. 2004) (affirming summary judgment in a legal malpractice lawsuit only "after the plaintiff-appellant, herself an attorney, failed to meet repeated deadlines within which to name an expert witness."). As the expert deadline had not passed—and instead, had been extended to a future date—the trial court should have denied the motion for summary judgment because it was filed prematurely.

Additionally, the trial court simply assumed without analysis that expert testimony was necessary. This was a misstep because, depending on how the underlying factual record eventually is developed in discovery, expert testimony

may not be required (or at least may be significantly limited) for Tovar to prevail on his claim. In *O'Neil*, 452 A.2d at 341, this Court "adopt[ed] the widely followed rule that, in a legal malpractice action, the plaintiff must present expert testimony establishing the standard of care *unless the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge*." *Id.* (emphasis added). Here, for example, the issues to be presented to the jury include a factual dispute as to whether the Lawyers ever told Tovar that he could seek millions of dollars in damages for his future medical care. (Appx. 1088, ¶¶ 6-7.) Where this type of factual issue underlies a legal malpractice claim, an expert is unnecessary. *See, e.g., Greenberg v. Sher*, 567 A.2d 882, 884 (D.C. 1989) (finding expert testimony would be unnecessary in attorney fee litigation that "was bound up in essentially factual disputes—involving issues of credibility—such as how sensitive [the attorney] had been to [the client's] stated need for a prompt settlement and how low a figure [the client] had been willing to settle for. [The expert's] testimony would have shed no light on these issues.").

The question of whether an attorney should inform a client regarding the types of damages—let alone potentially millions of dollars in damages—available to him does not necessarily require expert testimony.[13] It is akin to "failure to follow

[13] At the Motion hearing, Defendants blithely asserted in response to the trial court's questioning that they were not required to seek their client's permission—or even to

client's explicit instructions" that *O'Neil* identified as a species of obvious, "common knowledge" malpractice for which expert testimony is not required. 453 A.2d at 342 n.6; *see also Hamilton v. Needham*, 519 A.2d 172, 175 (D.C. 1986) ("This case falls within this line of 'common knowledge' exceptions to the normal requirement of expert testimony. It raises no complex issue. A lawyer who admits that he omitted from a will a residuary clause requested by the testator and thereby causes the residual estate to pass by intestate succession has facially demonstrated an obvious lack of care and skill. No expert need guide the factfinder here."). In short, the court erred in simply assuming that Tovar must produce expert testimony to prevail on malpractice claim.

Finally, because judgmental immunity is an affirmative defense as to which the *Lawyers had the burden of proof on summary judgment*, Defendants' Motion could not have been granted based on Plaintiff's failure to present expert testimony unless *Defendants* themselves first introduced expert evidence that "the alleged error is one of professional judgment, and (2) the attorney exercised reasonable care in making his or her judgment." *Biomet*, 967 A.2d at 666. Because Defendants failed to adduce expert testimony in seeking summary judgment on their judgmental

---

inform Tovar—that they would not be presenting the entire category of future medicals to the jury. (Appx. 1269:14-23.) This simple question of whether a client has to right to be informed about a major litigation decision that would affect any damages award is easily understandable by a jury without the aid of an expert under *O'Neil*.

immunity defense (for which they had the burden of proof), Defendants hardly can fault Tovar for not adducing rebuttal expert testimony on that issue.

At bottom, under any scenario it was improper for the trial court to address—let alone grant—the Lawyers' request for summary judgment before they even pled their affirmative defenses, before Tovar's experts had to be identified, and in the face of clearly disputed issues of material fact. Accordingly, the Order cannot be affirmed on the alternative basis that summary judgment was warranted.

D. The Court Abused its Discretion in Failing to Allow Discovery

Finally, the trial court could not have granted summary judgment in the face of Tovar's request for additional discovery. Summary judgment is disfavored unless and until the parties have been given time to take relevant discovery. *See Jones,* 29 F. Supp. 3d at 16 ("Defendant [] filed the instant motion [for summary judgment] before the parties had much opportunity to conduct discovery. … '[S]ummary judgment is premature unless all parties have 'had a full opportunity to conduct discovery,'" *quoting Liberty Lobby*, 477 U.S. at 257 (additional citations and punctuation omitted)); *see also Cook v. Babbitt*, 819 F. Supp. 1, 25-26 (D.D.C. 1993) ("only where a non-movant has produced no evidence that could be reduced to an admissible form—*after ample time for discovery* and after being put on notice, by the movant's briefs, of its failure of proof—that the court must enter summary judgment against the non-movant," emphasis added).

In response to the summary judgment portion of the Lawyers' Motion to Dismiss, Tovar informed the trial court:

> Without discovery, Plaintiff is unable to probe the Defendants' decision-making process, nor is Plaintiff able to submit Defendants' reasoning to a standard of care expert for an opinion on whether it was "reasoned and informed," where, as here, the decision-making process is not documented in Defendants' document production and where Plaintiff does not have any personal knowledge as to Defendants' reasoning and analysis. Depositions of the medical providers, the lawyers with whom Defendant Cornoni consulted, and the Defendants should uncover this missing information. As a result, pursuant to D.C. Super. Ct. R. Civ. P. 56(d) Plaintiff requests that this Honorable Court deny the Defendants Motion and permit this matter to proceed so that Plaintiff may develop the record sufficiently before the Honorable Court considers summary judgment on judicial immunity.

Appx. 918; *see also* Appx. 1089, ¶ 13 (Tovar Rule 56(d) affidavit stating in part: "Discovery would be necessary, including depositions, in order to evaluate the Defendants' assertions that they made a reasoned and informed decision when abandoning my claim for future TBI-related care"); Appx. 1248-49 (during the Motion hearing, counsel for Tovar reminded the trial court that discovery was needed based upon the Tovar affidavit and Rule 56(d).)

Tovar provided specific examples of the types of discovery he needed and the information he would have sought, including, for example, the names of the D.C. Bar members with whom Defendant Cornoni purportedly consulted in deciding not to seek future medical damages (as well as the contents of their communications and when they occurred), particularly since Defendants failed to identify those

individuals in their discovery responses. (*E.g.,* Appx. 1117-22 (answer to interrogatory 2), 1127 (answer to interrogatory 15).) Tovar also requested discovery to learn the identities of Tovar's medical providers "many, if not most" of whom Defendants claimed would not support a claim for future medical damages. (Appx. 916; 1089-90, ¶¶ 13, 18.) Although the Lawyers sought to score an early victory by moving for summary judgment before they filed an answer and before discovery was completed, and despite Tovar's request for additional discovery in his brief, affidavit, and during the Motion hearing, the trial court wrongly ignored Tovar's Rule 56(d) request.

Under Superior Court Civil Rule 56(d), when the non-moving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may" defer or deny the motion for summary judgment, allow time to take discovery, or issue another appropriate order. In addition, under Superior Court Civil Rule 56(e), if the non-moving party cannot support or deny an assertion of fact, the trial court is permitted to provide the party with an opportunity to address the fact.

In *Grimes v. D.C.*, 794 F.3d 83, 92 (D.C. Cir. 2015), the court observed that the "2010 Advisory Committee Note to Federal Rule 56(e) states that 'afford[ing] an opportunity to properly support or address [a] fact' is 'in many circumstances ... the court's preferred first step [before granting summary judgment].' Complementary

to Rule 56(e)(1), Rule 56(d) establishes a mechanism for nonmovants who lack the facts they need to seek an opportunity to gather more information before responding to a motion for summary judgment. Fed. R. Civ. P. 56(d); *see Convertino v. U.S. Dep't of Justice,* 684 F.3d 93, 99 (D.C. Cir. 2012) (discussing then-Rule 56(f), which is now Rule 56(d)).” Like the federal rules, Super. Ct. Civ. Rule 56(d) obligates the trial court to “ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment.” *Travelers Indem. Co. v. United Food Commercial Workers Int'l Union*, 770 A.2d 978, 994 (D.C. 2001) (citation omitted).

Here, the record was not complete. The Lawyer's request for summary judgment rested on their contested factual assertions and evidence presented for the first time in the Motion to Dismiss. (E.g., Appx. 262-72.) Tovar thus was entitled to take the additional discovery he sought before having to respond to Defendants' alternative request for summary judgment. The trial court abused its discretion in not granting that request. In short, the trial court's *dictum* that it would have granted summary judgment for Defendants if it had reached the issue was erroneous.

VII. CONCLUSION

The question presented by this appeal is *not* whether Tovar ultimately should prevail on the merits of his legal malpractice claim against Defendants. Instead, the question for this Court is merely whether the trial court erred in removing resolution

of Tovar's malpractice claim—and the fact-finding function necessary to decide that issue—from the jury and dismissing Tovar's claim with prejudice. Under this Court's precedents, the answer is a resounding "yes."

In ruling on a motion to dismiss under Rule 12(b)(6), the trial court cannot consider extra-record evidence and must accept as true all of the complaint's allegations. On summary judgment, the court cannot resolve disputed issues of material fact or make decisions about credibility because these determinations are up to a jury. In granting Lawyers' Motion to Dismiss, the trial court violated both Rule 12 and Rule 56. As a result, this Court should reverse the trial court's Order and remand this case for further proceedings.

Respectfully submitted,

By: /s/ *Benjamin R. Ogletree*
Benjamin R. Ogletree, Esq. (D.C. Bar # 475094)
Faith Kalman Reyes, Esq. (D.C. Bar # 1531299)
VERDI & OGLETREE PLLC
1325 G Street, N.W., Suite 500
Washington, D.C. 20005
Telephone: 202.449.7703
Facsimile: 202.449.7701
Email: bogletree@verdiogletree.com

Certificate of Filing and Service

I hereby certify that on September 5, 2023, I filed the Brief of Appellant with the Clerk of the District of Columbia Court of Appeals and served the Brief of Appellant on this same date via the D.C. Court of Appeals E-filing system.

/s/ Benjamin R. Ogletree

ADDENDUM

(Superior Court Rules 12, 56)

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General*. Unless another time is specified by this rule or an applicable statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer within 21 days after being served with the summons and complaint.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *The United States or the District of Columbia and the Agencies, Officers, or Employees of Either Sued in an Official Capacity*. The United States or the District of Columbia or an agency, officer, or employee of either sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia).

(3) *United States or District of Columbia Officers or Employees Sued in an Individual Capacity*. A United States or District of Columbia officer or employee sued in an individual capacity for an act or omission occurring in connection with the duties performed on the United States' or the District of Columbia's behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney (in suits involving the United States) or the Attorney General for the District of Columbia (in suits involving the District of Columbia), whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(5) *Entry of Default*. Unless the time to respond to the complaint has been extended as provided in Rule 55(a)(3) or the court orders otherwise, failure to comply with the requirements of this rule will result in the entry of a default by the clerk or the court sua sponte.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;
(2) lack of personal jurisdiction;
(3) [Omitted];
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted;
(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULTS OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitations on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived*. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 12*, as amended in 2007 and 2009, except for: 1) the substitution of “applicable statute” for “federal statute” in subsection (a)(1); 2) the deletion of inapplicable federal limitation periods in subsection (a)(1)(A); 3) the addition of references to “the District of Columbia” in subsections (a)(2) and (a)(3); 4) the retention of subsection (a)(5) regarding the automatic entry of default against a defendant who does not timely respond to the complaint; and 5) the omission of subsection (b)(3), which deals with improper venue and is not applicable in the District of Columbia.

COMMENT

SCR-Civil 12(a) is rearranged to reflect the format established by the federal rule revisions of December 1993. Federal limitation periods are altered to comport with those in the existing Superior Court rule. Additionally, a paragraph (5) has been added to preserve the existing Superior Court rule of automatic entry of default against a defendant who does not timely respond to the complaint.

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT.

(1) *In General*. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(2) *Consumer Debt Collection Actions*. In an action initiated by a debt collector to collect a consumer debt as defined in D.C. Code § 28-3814, the plaintiff must provide all documentation and information required by D.C. Code § 28-3814 prior to entry of summary judgment.

(b) TIME TO FILE A MOTION; FORMAT.

(1) *Time to File.* Unless the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(2) *Format: Parties' Statements of Fact*.

(A) *Movant's Statement*. The movant must file a statement of the material facts that the movant contends are not genuinely disputed. Each material fact must be stated in a separate numbered paragraph.

(B) *Opponent's Statement*. A party opposing the motion must file a statement of the material facts that the opponent contends are genuinely disputed. The disputed material facts must be stated in separate numbered paragraphs that correspond to the extent possible with the numbering of the paragraphs in the movant's statement.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.
(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
(1) give an opportunity to properly support or address the fact;
(2) consider the fact undisputed for purposes of the motion;
(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or
(4) issue any other appropriate order.
(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:
(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.
(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.
(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

COMMENT TO 2022 AMENDMENTS

This rule has been amended to highlight new requirements included in emergency, temporary, and permanent legislation amending D.C. Code § 28-3814. Consistent with the 2022 amendment to Rule 12-I, the reference to a memorandum of points and authorities was deleted from Rule 56(b)(2)(A).

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 56*, as amended in 2010, except that 1) a reference to local district court rules is omitted from the language in subsection (b)(1) and 2) subsection (b)(2), which is unique to the Superior Court rule, requires parties to submit statements of material facts with each material fact stated in a separate, numbered paragraph (a requirement previously found in Rule 12-I(k)). In 2010, the federal rule underwent substantial revisions in order to improve the procedures for presenting and deciding summary judgment motions, but the standard for granting summary judgment remained unchanged. Parties and counsel should refer to the Federal Rules of Civil Procedure Advisory Committee Notes for a detailed explanation of these amendments.

COMMENT

Identical to *Federal Rule of Civil Procedure 56* except for the provision in paragraphs (a) and (b) of Rule 56 that the time period for filing the motion shall be set by Court order. For further requirements with respect to summary judgment procedure, see Rule 12-I(k).

REDACTION DISCLOSURE FORM
(ATTACHED)

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

23-CV-165
Case Number(s)

Faith Kalman Reyes
Name

8/31/23
Date

freyes@verdiogletree.com
Email Address