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

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE ROGER TOVAR

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PRELIMINARY STATEMENT[1]

The Lawyers weave several false themes throughout their Opposition Brief. *First*, without the slightest embarrassment, Defendants trivialize the severity of Tovar's auto accident and resulting injuries in an effort to paint him as a "money-grab[bing]" scoundrel (Opp. 4) who is pursuing a baseless malpractice claim. (*E.g.*, Opp. 2 ("Tovar was involved in a modest [] automobile accident"); *id.* at 5 ("[Tovar] was discharged from the hospital that same day after less than 2 hours").)

In the Underlying Matter, however, Defendants sang a very different tune. At trial, they argued "how violent this collision was" (Appx. 801:1-2), lauded Tovar's "integrity" (Appx. 797:7), and stressed "how severe his injuries were." (Appx. 785:3; 785:19-788:20.) The Lawyers also emphasized that Tovar's TBI was the "biggest harm" (Appx. 787:4-5) which "left him with permanent deficits." (Appx. 787:12-13.) To be clear, Tovar is the victim (not the villain) whom Defendants failed to advise could have claimed significantly more recovery that he will need for his lifelong medical care. Despite the Lawyers' tactless attempt to denigrate him, Tovar has every right to perfect his malpractice claim in discovery and present it to a jury.

Second, Defendants (like the trial court (Appx. 1254:20)) claim Tovar knew the Lawyers could have but did not seek future care costs in the Underlying Matter

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[1] The terms defined in Tovar's Opening Brief ("Open Br.") shall be applied herein. Defendants' Opposition Brief will be referred to in citations as "Opp."

because "[he] attended all 6 days of trial, where no such evidence or testimony was submitted and no such claim was made." (Opp. 26, 9, 14.) But this is belied by Defendants' own words to the jury in closing arguments: "*[O]n*e *of the reasons why we didn't have Mr. Tovar in here during this trial*, you'd look at him and you think he's fine, but it's obviously not good for him to hear what everyone is saying about him." (Appx. 804:23-805:2 (emphasis added).) And, even if Tovar had attended the full trial and was not cognitively impaired, as Defendants argued (Appx. 788:17), he would not have known that their failure to seek future care costs was problematic because they never told him that such a claim was available. (Appx. 1088 ¶¶ 6-7.)

Finally, Defendants say Tovar did not need further discovery below, despite his request for it, because Defendants produced their "entire client file." (Opp. 32, 12, 18 n.1.) But Defendants may not dictate the discovery Tovar needs, nor was Tovar limited to whatever they chose to include in their "client file" in prosecuting his case. The Lawyers sought immediate dismissal based on Mr. Cornoni's affidavit containing new factual assertions not reflected in the "client file." Tovar thus needed further discovery to probe those assertions, especially given that Defendants' initial discovery responses omitted critical information regarding the affirmative defenses raised in their already-filed motion. (Open Br. 11; Appx. 915-16.) At bottom, Defendants endeavored to hit a game-winning homerun before Tovar got a fair turn at bat. The law does not countenance such gamesmanship; neither should this Court.

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

A. The Complaint Pleaded Proximate Causation

In seeking dismissal for failure to state claim, Defendants did not argue, and therefore the trial court did not address, whether the *allegations* in the Complaint did not meet Rule 12(b)(6)'s standard for pleading proximate causation.[2] (Appx. 1220-23.) Instead, Defendants erroneously argued that given *the size of the jury's verdict* in the Underlying Matter, it was legally impossible for Tovar—no matter what he alleged—to establish that the verdict would have been higher had the Lawyers asserted a claim for future medicals. (Appx. 45-46, 52-53, 909.) In their Opposition Brief at 21-25, Defendants now argue, for the first time, that the Complaint's causation averments themselves are too "speculative" to state a malpractice claim.

This argument is waived. Had Defendants disputed the sufficiency of the Complaint's proximate-cause allegations below, Tovar could have addressed this argument and/or sought leave to amend to cure any pleading defects. This argument therefore should not be considered for the first time on appeal. *See Easter Seal Soc'y for Disabled Children v. Berry*, 627 A.2d 482, 488-89 (D.C. 1993).

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[2] Although the Order includes a section entitled "Speculation" that summarizes the parties' proximate causation arguments, the trial court did not rule that Tovar failed to allege this element of his claim. Instead, the trial court mistakenly found in this section of the Order that the Complaint failed to state a claim under Rule 12(b)(6) based on the judgmental immunity defense that the Lawyers raised *only* in support of their motion for summary judgment. (Appx. 1220-23; Open Br. 16 n.3, 28.)

Even if the Court were to consider Defendants' contention, it has no merit. *First*, this Court has long held that "[i]t is well-settled that proximate cause . . . is ordinarily a question of fact for the jury," and "[i]t is only in cases where it is clear that reasonable [people] could draw but one conclusion from the facts alleged that . . . proximate become[s] [a] question of law. These cases have been said to be 'exceptional.'" *Hill v. McDonald*, 442 A.2d 133, 137 (D.C. 1982) (citations omitted); *Beach T.V. Prop., Inc. v. Solomon*, 324 F. Supp. 3d 115, 127 (D.D.C. 2018) (applying this "exceptional" rule in finding that a legal-malpractice plaintiff adequately pleaded proximate cause to defeat a motion to dismiss). (Appx. 909.)

In their Opposition Brief, Defendants do not (and cannot) claim that this is an "exceptional" case. Nor do they argue that reasonable people only could conclude from the Complaint's allegations that Defendants' failure to assert a claim for Tovar's future medical care at trial was not the proximate cause of the jury not awarding that relief. *See Hill*, 442 A.2d at 137. The Lawyers' failure to make this argument shows that they have no legal foundation upon which to seek dismissal of the Complaint on this basis; that should be the end of the matter.

Second, the Complaint adequately pled proximate causation. To establish this element, a legal-malpractice plaintiff need only aver that it is more likely than not that he would have "fared better" absent the attorney's negligence. *See Steele v. Salb*, 93 A.3d 1277, 1281 (D.C. 2014); *Chase v. Gilbert*, 499 A.2d 1203, 1212 (D.C.

1985). After alleging that Tovar and Defendants had an attorney-client relationship (Appx. 17, ¶ 32), and that "Defendants breached the applicable duty of care owed to [Tovar] under the same or similar circumstances when they failed to present a claim for future medical care associated with [his] TBI" (Appx. 17 ¶ 33), the Complaint properly pled proximate causation by alleging that:

> [A]s a direct and proximate result of Defendants' failure to present a claim for [Tovar's] future TBI-related costs and other accident-related medical expenses, [Tovar] is foreclosed from seeking compensation for his future medical care and associated expenses from [the] McKesson [defendants in the Underlying Matter]. *Had Defendants presented a claim for [Tovar's] future medical care at trial, [Tovar], more likely than not, would have been awarded and would have collected the full value of his future care in addition to the award of $500,000 for bodily injuries and $3,297,573 in lost future earnings*.

(Appx. 16 ¶ 29 (emphasis added); 17 ¶ 34 (same)); *Edelberg v. Roberts*, No. Civ. A. 04-1992(JDB), 2005 WL 1006000, at *3 (D.D.C. Apr. 29, 2005) (finding similar proximate cause allegations sufficient to state a malpractice claim under D.C. law).

In addition, Tovar's proximate-cause theory is supported by other allegations:

> (1) Tovar proved at trial that his TBI was permanent and thus he never would be able to work again (Appx. 15 ¶¶ 24, 25); (2) Tovar's medical providers opined that Tovar's TBI-related symptoms had worsened (*id.*); (3) at least one medical provider believed Tovar's TBI will necessitate lifetime care (Appx. 16 ¶¶ 27); and (4) the jury awarded $3,297,573 for lost *future* earnings (Appx. 16 ¶ 28.)—indicating that the jury found Tovar's injury stemming from his accident to be on-going, thus making it more likely than not that the jury would have awarded Tovar's future medical expenses as well.[3]

[3] Contrary to the Lawyers' assertion (Opp. 23), Tovar's allegations must be taken as true because they are well-pled *facts*, not mere "[t]hreadbare recitals of the elements

The Complaint thus gave Defendants fair notice of "both what actions [Tovar] believes [Defendants] should have taken when representing [him] and the damage [that Tovar] believes [Defendants'] failure to act caused [him]." *Beach TV Prop., Inc.*, 324 F. Supp. 3d at 127. Nothing more was required to state a malpractice claim. *See Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 963 (D.C. 2008) (applying *In re Curseen*, 890 A.2d 191, 194 (D.C. 2006)).

Third, Tovar's theory of proximate causation is not speculation. The Lawyers dub as "speculative" Tovar's averments that the jury in the Underlying Matter would have awarded him his future medical costs if Defendants had pursued them at trial. (Opp. 24-25.) But that is not the sort of speculation that bars a malpractice claim because whether Tovar would have fared better, or how much more the jury would have awarded him if his future medical care had been submitted for its consideration, are precisely the questions that a jury in *this* lawsuit must decide under the "case within a case" doctrine utilized in malpractice actions. *See Steele*, 93 A.3d at 1281-83; *Hickey v. Scott*, 796 F. Supp. 2d 1, 4 (D.D.C. 2011) ("it is for the fact-finder in the legal malpractice action to resolve whether a reasonable fact-finder in the underlying suit would have arrived at a different result but for the attorney's negligence" in failing to pursue a claim (quotation cleaned up)).

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of [his] cause of action" or "unadorned, the-defendant-unlawfully-harmed-me accusations." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015).

Finally, Defendants' cited cases do not help them. (Opp. 21, 23.) In *Herbin v. Hoeffel*, 806 A.2d 186, 196 (D.C. 2002), and *Mount v. Baron*, 154 F. Supp. 2d 3, 9 (D.D.C. 2001), the complaints failed to allege *any* nexus between the attorney's negligence and the client's injury—thus leaving the court to "speculate" or "guess" whether or how the attorney harmed the client. That is hardly the situation here.

Likewise, *Pietrangelo v. Wilmer Cutler Pickering Hale & Dore, LLP*, 68 A.3d 697, 709-10 (D.C. 2013), is nothing like this case. (Opp. 23-24.) In *Pietrangelo*, a former client alleged that but for the law firm's filing of a brief (on behalf of other parties) asking the U.S. Supreme Court to deny the former client's *pro se* petition for certiorari review of the "Don't Ask, Don't Tell" statute, the Supreme Court would have granted the former client's petition for certiorari, ruled in his favor on the merits, remanded the case to the district court, which then would have ordered his reinstatement into the military. Given the many layers of "compound speculation" in the former client's causation theory, this Court ruled that he could not show that "but for" the law firm's filing he would have achieved his goal of resuming military service. *See id.* at 710.

By contrast, Tovar's proximate cause allegations do not rest on "compound speculation" because Tovar's injury—no recovery for his future medical care—was a direct and foreseeable consequence of Defendants' failure to seek that relief at trial in the Underlying Matter. Tovar properly pleaded proximate causation.

B. The Lawyers' Arguments Regarding the Release Are Wrong

In their Opposition Brief at 25-27, Defendants do not dispute Tovar's point that the trial court erred by misreading the Release as discharging Tovar's claims against the Lawyers even though it explicitly released only the McKesson defendants in the Underlying Matter.[4] (Appx. 1184-85; Open Br. 24-25, 38.)

Instead, Defendants argue that the Release bars Tovar's malpractice claim because he settled the Underlying Matter for the amount of the jury's verdict, and thereby released all claims of future damages not asserted at trial, even though he knew that Defendants had not asserted a claim for future medical care. (Opp. 26-27.) Defendants' argument fails because its premise is wrong—nothing in the Complaint remotely suggests that Tovar "knew" that he could assert a claim for future medicals in the Underlying Matter.[5] The trial court therefore could not have dismissed the Complaint on that ground under Rule 12(b)(6).

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[4] Defendants claim the court properly considered the Release in deciding the Rule 12(b)(6) motion because "it is central to Tovar's claim and referenced in [paragraph 28 of] the Complaint." (Opp. 25.) However, the Complaint ¶ 28 does not mention the Release nor does Tovar's claim depend on it. (Open Br. 24.) Defendants also claim that Tovar did not object to the Release being considered on the Rule 12(b)(6) motion. (Opp. 25 n.2.) In his opposition below, however, Tovar noted that if "matters outside the pleadings are presented to and not excluded by the court," which included the Release, the Rule 12(b)(6) "motion must be treated as one for summary judgment" (Appx. 899)—which the trial court explicitly did not do. (Appx. 1188.)

[5] Defendants' reliance on *Venable LLP v. Overseas Lease Group, Inc.*, Civil Case No. 14-02010 (RJL), 2015 WL 4555372, at *3 (D.D.C. July 28, 2015), and *Vogel v.*

In addition, Defendants' Opposition Brief at 26 cites materials outside the pleadings in arguing (incorrectly) that Tovar knowingly released his claim for future medicals when he settled the Underlying Matter. But the trial court could not have granted summary judgment on this ground (even if Defendants had requested it) because in his affidavit Tovar—whose evidence must be believed at the summary judgment stage—denied knowing that he could have claimed future care costs at trial when he signed the Release, thus creating a disputed issue of fact. (Appx. 1087-88 ¶¶ 4-8; 907 n.5; 1258:16-20.) *See Anderson v. Ford Motor Co.*, 682 A.2d 651, 654 (D.C. 1996) (on summary judgment, "[t]he evidence of the non-movant [*i.e.,* here, Tovar] is to be believed, and all justifiable inferences are to be drawn in his favor"). Either way, the Release was not a basis to dismiss Tovar's Complaint.

C. Defendants Concede the Trial Court Erred in its Rule 12(b)(6) Dismissal of Tovar's Claim Based on Judgmental Immunity

Defendants do not dispute, and thus concede, that the trial court erred in dismissing Tovar's Complaint under Rule 12(b)(6) based on judgmental immunity. (Open Br. 27-32.) In sum, the Order dismissing Tovar's malpractice action for failure to state a claim was wrongly decided. The Order therefore must be reversed.

Toughy, 828 A.2d 268, 290 (Md. Ct. Spec. App. 2003) (Opp. 26-27), is misplaced. Both cases dismissed malpractice claims where the client learned of their attorney's malpractice *before* entering into a settlement agreement. That did not happen here.

II. THE TRIAL COURT COULD NOT HAVE GRANTED SUMMARY JUDGMENT FOR DEFENDANTS

The trial court stated that it did not reach or grant Defendants' alternative request for summary judgment (Appx. 1188), yet Defendants insist that it did.[6] (Opp. 1 ¶ A(2), 16, 18.) Even if the trial court had reached the summary judgment issue, Defendants fail to show any basis upon which the court could have granted it.

A. The Trial Court Could Not Have Granted Summary Judgment Based on the Judgmental Immunity Doctrine

Under the judgmental immunity doctrine, Defendants must show that (1) their alleged error was one of professional judgment and (2) they exercised reasonable care in making their judgment. *See Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 666 (D.C. 2009). Because judgmental immunity is an affirmative defense, Defendants had the burden in seeking summary judgment to show the absence of a genuine issue of material fact. (Open Br. 33-34.) Defendants, however, fail to refute Tovar's point that disputed issues regarding both elements of this defense—and his request for further discovery—would have precluded summary judgment. *See, e.g., Jones v. Lattimer*, 29 F. Supp. 3d 5, 16-17 (D.D.C. 2014).

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[6] Defendants argue that the trial court's summary judgment discussion is not *dictum* which, they say, "refers to a statement by a court's opinion that is 'entirely unnecessary for the decision in the case.'" (Opp. 40 (quoting *Albertie v. Louis & Alexander Corp.*, 646 A.2d 1001, 1005 (D.C. 1994)).) But this only confirms that the trial court's discussion is *dictum* because the court itself said that "reach[ing] Defendants' alternative request for Summary Judgment" was unnecessary given the court's dismissal of the Complaint pursuant to Rule 12(b)(6). (Appx. 1188.)

1. Whether Defendants Made a "Strategic Decision" Is a Disputed Issue of Material Fact

As to the first element, the Opening Brief at 36-38 showed that Tovar controverted Defendants' claim that they made a strategic choice not to seek future medical damages by citing at least four different documents in the Underlying Matter in which the Lawyers took the opposite position, stating that Tovar's future medicals were important issues for trial. (Appx. 915 n.10; 1157 ¶ 10.) Tovar also noted that while Defendants obtained his approval to not seek his *past* medical costs and for other strategy decisions, Defendants never discussed with him their decision to forego his *future* medical costs. (Open Br. 39 (citing Appx. 1087-88 ¶¶ 4-9; 293-95).) Whether Defendants' failure to pursue future medicals was a strategic decision or malpractice therefore was a hotly disputed fact issue that would have precluded summary judgment based on judgmental immunity.[7] (Appx. 1250:5-1257:18.)

Defendants fail to show otherwise. *First*, Defendants' only "evidence" that Tovar agreed to their decision to not seek future medicals are two unauthenticated, hearsay e-mails that Defendants belatedly attached to their reply brief below (Opp.

[7] The Lawyers misleadingly claim (Opp. 32) that Tovar "conceded" this point in his opposition below by stating: "Tovar does not dispute that, *to the extent that Defendants actually made a conscious decision to forego a claim for future care*, such a decision would be an exercise of professional judgment." (Appx. 914 (emphasis added).) But on the very next page of his opposition (and in his Statement of Disputed Material Facts (Appx. 1157 ¶ 10)), Tovar "dispute[d] that [Defendants'] omission of a claim for future care was a conscious decision," (Appx. 915 n.10).

9, 38-39 (citing Appx. 1168-69)) to which Tovar objected. (Appx. 1256:16-1257:18.) In the first e-mail sent on the morning of June 5, 2018, Defendant Cornoni's assistant, Tina Edwards, wrote to Mr. Cornoni: "[Tovar] called [sic] he would like to ask you whether we should request a report from his treating physician(s) regarding future care costs. He also wanted to ask about having Dr. Ross—or one of his other doctors rebut Dr. Schretlen's report." (Appx. 1168.) In the second e-mail sent minutes later, Ms. Edwards asked Tovar: "Do you have any time tomorrow to talk with Paul [Cornoni]?" (Appx. 1169.) Soon thereafter, Tovar responded: "I just spoke with Paul :) (he's at lunch). Questions addressed." (*Id.*)

As the trial court observed at oral argument, the e-mails do not establish that the Lawyers informed Tovar about the possibility of seeking future medical damages or ever discussed with him their decision not to pursue such a claim at trial. (Open Br. 35 (citing Appx. 1234:1-8).) Indeed, there is no record-evidence of what was discussed on the June 5, 2018 phone call, much less any indication that Mr. Cornoni advised Tovar that Defendants would not pursue a claim for his future medical care. Notably, Mr. Cornoni's affidavit omits any mention of the e-mails or phone call. (Appx. 262-72.) Most importantly, Tovar denied that Defendants ever advised him they would not seek future care costs. (Appx. 1087 ¶ 4.) *See Anderson*, 682 A.2d at 654 (on summary judgment, "[t]he evidence of the non-movant is to be believed"). Thus, even if the inadmissible e-mails could have been considered, they simply

confirm that this is a disputed issue.[8] *See Zakka v. Palladium Int'l, LLC*, 298 A.3d 319, 329 (D.C. 2023) (a court "must leave any material disputed facts regarding the availability of an affirmative defense for resolution at trial" (footnote omitted)).

Second, Defendants cite two documents that purportedly show Tovar "undoubtedly knew" that he could assert a claim for his future care (Opp. 38): (1) an interrogatory answer prepared by the Lawyers stating that "[Tovar] has permanent injuries and is seeking further medical treatment; therefore, this itemization [of his medical bills below] will need to be updated periodically" (Appx. 942-43); and (2) a January 26, 2014 journal entry in which Tovar, apparently after having watched an unidentified and no-longer accessible YouTube video, wrote: "The doctor treating me must provide an opinion regarding what I will need in terms of future medical treatment so that it can be claimed." (Appx. 230 (video link no longer available).)

Importantly, neither document supports Defendants' claim that *they made a strategic decision not to pursue Tovar's future medicals or informed Tovar of that decision*.[9] The documents thus are irrelevant to the judgmental immunity defense.

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[8] Defendants cite Mr. Cornoni's averment that "[d]uring the pre-trial mediations that Mr. Tovar attended, it was clear that we were not pursuing a life care plan in this matter." (Opp. 39 (citing Appx. 267 ¶ 19).) Mr. Cornoni did not attest or show, however, that this was made "clear" to *Tovar*, who disputed it: "During mediations, [the mediator] never commented on whether I should or should not assert a claim for future TBI related care at trial in the Underlying Matter." (Appx. 1090 ¶ 17.)

[9] The January 2014 journal entry predated Tovar's retention of the Lawyers (on May 13, 2014) by nearly four months. (Appx. 15 ¶ 21.)

The documents also do not establish that Tovar "undoubtedly knew" he could assert a claim for his future medical care. Although Tovar's interrogatory answer confirms that *Defendants* "undoubtedly knew" Tovar could seek future care costs and that Defendants intended to do so, it does not prove that *Tovar*—a non-attorney—knew of his legal right to pursue such a claim merely because the Lawyers drafted the interrogatory response to say that the costs of Tovar's "further medical treatment" would be "updated periodically" in his itemization of medical bills. (Appx. 942-43.) In any event, because the parties cite the same interrogatory answer in support of their respective positions (*compare* Open Br. 37 *with* Opp. 38, 39), any inferences to be drawn from it are for the jury to construe. *See Anderson*, 682 A.2d at 654 ("drawing [] legitimate inferences from the facts are jury functions, not those of the judge" (cleaned up)).

As for Tovar's journal statement, Defendants did not rely on it in moving for summary judgment below, so Tovar had no opportunity to address or explain the statement nor did the trial court consider it. This Court therefore should not consider it either. *See Berry*, 627 A.2d 488-89. Moreover, the Lawyers may not pluck this statement from a single page of Tovar's 101-page journal (Appx. 161-261) and ask this Court to assume that their interpretation of the statement is correct and construe it against Tovar, because the Court must "resolve all inferences in favor of the non-moving party [*i.e.,* Tovar]." *Crawford v. Katz*, 32 A.3d 418, 427 (D.C. 2011).

Even if this Court were to consider Tovar's journal statement, it is facially ambiguous because it does not specify whether Tovar wanted a medical opinion regarding his future treatment so that those costs could "be claimed" *in court in the Underlying Matter* (which had not yet been filed (Appx. 76)) or asserted elsewhere. And the absence of the YouTube video, which may (or may not) have prompted Tovar to write this statement in his journal, only amplifies the uncertainty. At most, the statement shows that whether Tovar knew he could assert a claim for future medicals in the Underlying Matter is a disputed fact issue for the jury to decide.

Finally, the Lawyers quibble that Tovar's affidavit did not comply with Rule 56(d) because it failed to "demonstrate precisely how additional discovery will lead to a genuine issue of material fact." (Opp. 33.) To the contrary, as explained in the Opening Brief at 47-48, in his affidavit (Appx. 1089-90 ¶¶ 13-19), opposition (Appx. 914-18), and at the motion hearing (Appx. 1248:22-1253:8), Tovar gave detailed examples of discovery he needed on Defendants' assertion of judgmental immunity, including the names of D.C. Bar members with whom Defendant Cornoni purportedly consulted in deciding not to seek future medical damages,[10] and the

[10] Oddly, Defendants say Tovar has no need to discover and depose these D.C. Bar members because "[t]here is no evidence that [they] could provide that would demonstrate that the strategy employed [by Defendants] was not a reasonable exercise of professional judgment." (Opp. 34.) Obviously, that is wrong. For example, if it turns out that Defendant Cornoni never consulted with some or all of these attorneys or failed to disclose relevant facts in seeking their advice, or if they

identities of Tovar's medical providers "many, if not most," of whom Defendants said would not support such a claim. (Appx. 265-66 ¶ 16(a), (j).) Importantly, Defendants responded to Tovar's discovery *after* they filed their motion below, yet their responses tactically omitted this and other information pertinent to the motion. (Open Br. 11.) Under the circumstances, Tovar sufficiently apprised the trial court of his need for further discovery. *See Travelers Indem. Co. of Ill. v. United Food & Commercial Workers Int'l Union*, 770 A.2d 978, 996 (D.C. 2001) ("Travelers' opposition to [the] motion for summary judgment and outstanding discovery request, filed in conjunction with its Rule 56[(d)] affidavit, sufficed to alert the trial court of the need for further discovery").[11]

In sum, disputed facts regarding the first judicial immunity element would have foreclosed summary judgment. This Court therefore can end its analysis here.

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disagreed "with [his] assessment that a life care plan would be a terrible idea" (Appx. 266 ¶ 16 (j)), such testimony would refute Defendants' judgmental immunity defense and provide evidence with which to impeach Mr. Cornoni at trial. Defendants' bizarre contention only underscores that further discovery is needed. *See Jones*, 29 F. Supp. 3d at 16-17 (discovery was necessary under similar circumstances).

[11] Defendants chide Tovar for not serving written discovery beyond his initial requests (Opp. 33) and for not seeking to depose Defendants Cornoni and Regan. (Opp. 34.) Tovar did not receive Defendants' deficient discovery responses until *after* Defendants filed their motion below. (Open Br. 11.) Thus, Tovar's application for further discovery was properly presented in his opposition. Likewise, Tovar understandably did not depose Messrs. Cornoni and Regan prior to obtaining Defendants' discovery responses and, even if he had done so, he would have had to retake their depositions anyway given the new information they asserted in support of their motion claiming judgmental immunity. (Appx. 915-16.)

2. The "Reasonableness" of Defendants' Alleged Strategic Decision Is a Disputed Issue of Material Fact

Disputed issues of material fact as to the second element of judicial immunity also would have barred summary judgment. In his opposition below, Tovar cited testimony from two of his treating physicians, Drs. David Ross and Ruben Cintron (Appx. 1090 ¶ 19), that his TBI left him with permanent deficits. (Appx. 787:6-788:20; 402:20-403:1; 404:7-9.) This evidence put the reasonableness of Defendants' unilateral "decision" to not seek future treatment costs for Tovar's permanent injuries in dispute. (*E.g.,* Appx. 1251:8-17.) And, as explained above, Tovar's request for discovery on this point, including the bases of the newly-asserted justifications for Defendants' decision set forth in Defendant Cornoni's affidavit, (Appx. 914-18; 1089-90; 1250:19-1251:17), likewise precluded summary judgment.

Defendants claim this element is not disputed because the "Complaint failed to allege that [their] underlying litigation strategy and decision was not reasonable." (Opp. 35.) As explained in the Opening Brief at 30, however, Tovar had no duty to negate Defendants' affirmative defenses, including judgmental immunity, in his pleading. In short, summary judgment on judgmental immunity was impermissible.

B. Lack of Expert Evidence Was Not a Basis for Summary Judgment

Tovar was not required to present expert evidence to defeat judgment (Opp. 44-45) because Defendants did not seek summary judgment based on his inability to tender an expert. (Appx. 46-53.) Rather, Defendants ambushed Tovar by raising

this issue for the first time in their reply brief below. (Appx. 1165-67; Open Br. 41-43 & n.12.) Defendants' other arguments are refuted in the Opening Brief at 41-46.

C. The Trial Court Could Not Have Granted Summary Judgment for Defendants Based on Lack of Proximate Causation

The Lawyers' contention that the trial court should have granted them summary judgment based on lack of proximate causation (Opp. 44-45) is wrong for the reasons explained *supra* Section I(A).

III. DEFENDANTS' CROSS-APPEAL HAS NO MERIT

In their cross-appeal, Defendants argue that the trial court erred in not dismissing Tovar's Complaint as time-barred. (Opp. 45-48.) A legal malpractice claim has a three-year statute of limitations. *See* D.C. Code § 12-301. Under the continuous representation rule, a "malpractice cause of action does not accrue until the attorney's representation concerning the particular matter in issue is terminated."[12] *R.D.H. Communications, Ltd. v. Winston*, 700 A.2d 766, 768 (D.C. 1997). The date when the representation terminated is a question of fact. *Id.*

In their motion to dismiss below, the Lawyers argued that Tovar's Complaint, filed on May 9, 2022 (Appx. 11), was untimely under any of three accrual dates: (1) June 26, 2018—the last day of trial in the Underlying Matter; (2) April 25, 2019—the settlement date; and (3) May 7, 2019—the date the Praecipe of Satisfaction was

[12] Defendants argued below that the continuous representation rule does not apply to this case (Appx. 1160), but they abandon that argument on appeal. (Opp. 45-48.)

filed with the court. (Appx. 41.) The trial court found that Tovar's lawsuit was timely under any of Defendants' proposed accrual dates based on the Superior Court's orders tolling statutes of limitation during the COVID pandemic. (Appx. 1180-83.) Defendants argue that the court's ruling was wrong because the tolling orders do not apply to Tovar's claim. (Opp. 47-48.)

Even without tolling,[13] the trial court's denial of Defendants' motion to dismiss based on the statute of limitations was correct. *First*, the Complaint was not subject to dismissal under Rule 12(b)(6) because it alleges that Defendants' representation continued as late as May 28, 2019, fewer than three years before this case was filed on May 9, 2022. (Appx. 16 ¶ 28; 902.) *See Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1020 (D.C. 2013) ("At the Rule 12(b)(6) stage, a court should not dismiss on statute of limitations grounds unless the claim is time-barred on the face of the complaint.").

Second, even if Defendants had sought summary judgment on this ground, it could not have been granted because the issue of when the Lawyers' representation of Tovar ended was a material fact in dispute that would have precluded summary judgment. (Appx. 902-03; 1242:4-1243:14; 1246:19-22.) In his opposition below, Tovar asserted—with supporting evidence—that his Complaint was timely because

[13] Tolling applies, however, because the Superior Court has rejected Defendants' restrictive interpretation of its COVID tolling orders. *See Berg v. Hickson*, 2021-CA-001977-V (8/19/21 Order at 3-4.) (Addendum hereto at 34.)

Defendants continued to represent him until August 1, 2019, at the latest, and May 9, 2019, at the earliest. (Appx. 902.) On May 9, 2019, Defendants sent Tovar the first portion of the settlement proceeds but made clear that their representation was ongoing: "[W]e are finalizing the medical lien amounts, and should there be any reductions, the difference will be paid to you in its entirety." (Appx. 1102; 903.) From May 9, 2019 to August 1, 2019, Defendants negotiated with lienholders on Tovar's behalf to resolve their claims against the settlement proceeds. (Appx. 903; 1090-91 ¶¶ 21-26; 1100 n.3; 1104-09.) On August 1, 2019, Defendants sent Tovar the last of the settlement proceeds, stating: "It has been our pleasure representing you and we wish you all the best for the future." (Appx. 1111; 1242:4-1246:22.)

Moreover, even if the May 7, 2019 accrual date proposed by Defendants applied, this case still was timely. Three years from May 7, 2019 was *Saturday*, May 7, 2022; thus, under Super. Ct. Civ. Rule 6(a)(1)(C), Tovar's filing of his Complaint on Monday, May 9, 2022 was within the limitations period. (Appx. 903.) *See Berry*, 627 A.2d at 485-87; *Poole v. Lowe*, 615 A.2d 589, 592 n.6 (D.C. 1992). In sum, the trial court's refusal to dismiss the Complaint as time-barred was correct.

CONCLUSION

For the reasons set forth above, the Lawyers' cross-appeal should be denied. With respect to the issues raised in Tovar's appeal, the Court should reverse the trial court's Order and remand this case for further proceedings.

Respectfully submitted,

By: /s/ *Benjamin R. Ogletree*

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 27, 2023, I filed the Reply Brief of Appellant/Cross-Appellee Roger Tovar with the Clerk of the District of Columbia Court of Appeals and served the Reply Brief of Appellant/Cross-Appellee Roger Tovar on this same date via the D.C. Court of Appeals E-filing system.

/s/ Benjamin R. Ogletree

ADDENDUM

Superior Court Rules 6, 12, 56; D.C. Code § 12-301; *Berg* Order (Attached)

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) COMPUTING TIME. The following rules apply in computing any time period specified in these rules, in any court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit*. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or a legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *“Legal Holiday” Defined*. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.’s Birthday, Washington’s Birthday, District of Columbia Emancipation Day, Memorial Day, Juneteenth, Independence Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day; and

(B) any day declared a holiday by the President or Congress, or observed as a holiday by the court.

(C) [Omitted].

(b) EXTENDING TIME.

(1) *In General*. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if the request is made, before

the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) TIME FOR SERVING AFFIDAVITS. Any affidavit supporting a motion or opposition must be served with the motion or opposition unless the court orders otherwise.

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMENT TO 2022 AMENDMENTS

Subsection (a)(6)(A) has been amended to include District of Columbia Emancipation Day and Juneteenth in the definition of legal holiday.

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 6*, as amended in 2007, 2009, and 2016, except for 1) deletion of reference to local rules; 2) modification of subsection (a)(6)(B) to include holidays observed by the court, which made federal subsection (a)(6)(C) inapplicable; and 3) in section (c) (formerly section (d)), retention of language reflecting District of Columbia practice for service of affidavits in support of a motion or opposition. As explained in the Advisory Committee Notes to the federal rule, the 2009 federal amendments were intended to simplify and clarify the process for computing deadlines.

COMMENT

Rule 6 identical to *Fed. Rule of Civil Procedure 6* except for deletion from section (a) of reference to local rules of district courts and states in which district courts are held, deletion from section (b) of reference to Federal Rule 74(a), which prescribes the method of appeal from a judgment of a magistrate, and revision of section (d) in accordance with local practice respecting service of motions and affidavits. In addition, section (a) of the Superior Court Rule, like Superior Court Criminal Rule 45(a), has been modified to permit an extra day for the computation of time for the filing of legal papers only when the office of the clerk has been ordered closed.

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).

🕮 **Code of the District of Columbia**

§ 12–301. Limitation of time for bringing actions.

[(a)] Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:

(1) for the recovery of lands, tenements, or hereditaments— 15 years;

(2) for the recovery of personal property or damages for its unlawful detention— 3 years;

(3) for the recovery of damages for an injury to real or personal property— 3 years;

(4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment— 1 year;

(5) for a statutory penalty or forfeiture— 1 year;

(6) on an executor's or administrator's bond— 5 years; on any other bond or single bill, covenant, or other instrument under seal— 12 years;

(7) on a simple contract, express or implied— 3 years;

(8) for which a limitation is not otherwise specially prescribed— 3 years;

(9) for a violation of § 7-1201.01(11)— 1 year;

(10) for the recovery of damages for an injury to real property from toxic substances including products containing asbestos— 5 years from the date the injury is discovered or with reasonable diligence should have been discovered;

(11) for the recovery of damages arising out of sexual abuse that occurred while the victim was less than 35 years of age— the date the victim attains the age of 40 years, or 5 years from when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later;

(12) for the recovery of damages arising out of sexual abuse that occurred while the victim was 35 years of age or older—5 years, or 5 years from when the victim knew, or reasonably should have known, of any act constituting sexual abuse, whichever is later.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ALYSSA BERG	:	Case Number: 2021 CA 001977 V
	:	
v.	:	Judge: Shana Frost Matini
	:	
EVERETT HICKSON	:	

ORDER

Before the Court is Defendant's Motion to Dismiss and/or for Summary Judgment ("Mot.") and Memorandum in Support ("Memo."), filed July 20, 2021. Plaintiff filed her Opposition to Defendant's Motion ("Opp.") on July 29, 2021. Defendant was permitted to file a Reply to Plaintiff's Opposition by Superior Court Civil Rule 12-I(g), but none was filed and the time to do so has passed. After reviewing the parties' briefs, the applicable law, and the record in this case, the Court denies Defendant's motion.

Background

This case arises out of a vehicle accident. *See* Compl. ¶ 8. Plaintiff alleges that on April 5, 2018, she was struck by Defendant's vehicle while riding her bicycle in the intersection of 11th Street SE and G Street SE in the District of Columbia. *See* Compl. ¶¶ 6-8. Plaintiff filed the instant action om June 11, 2021, alleging that the Defendant was negligent in her operation of her vehicle. *See generally* Compl. Defendant now moves to dismiss, claiming that Plaintiff's negligence claim is barred by the applicable statute of limitations. *See generally* Mot.

Analysis

"At the Rule 12 (b)(6) stage, a court should not dismiss on statute of limitations grounds unless the claim is time-barred on the face of the complaint." *Logan v. Lasalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1020 (D.C. 2013). The statute of limitations for negligence actions in the District of Columbia is three years. *See* D.C. Code § 12-301(a)(8). Defendant asserts that Plaintiff had until

April 5, 2021 to file her personal injury lawsuit, and failed to do so until after the statute of limitations had expired. *See* Memo. at 3.

Due to the COVID-19 public health emergency, on March 18, 2020, the Chief Judge of the Superior Court for the District of Columbia ordered "all deadlines and time limits in statutes, court rules, and standing and other orders issued by the court . . . suspended, tolled, and extended during the period of the [COVID-19] emergency," including statutes of limitations. Chief Judge Order (Mar. 18, 2020) at 2. This tolling period was extended by subsequent Orders issued by the Chief Judge on March 19, 2020, May 14, 2020, June 19, 2020, August 13, 2020, and November 5, 2020. *See* Chief Judge Order (Jan. 13, 2021) at 1. Then on January 13, 2021, the Chief Judge issued an amended order stating "[s]uspension, tolling, and extension will continue to the extent specified in this Order until at least March 31, 2021." *Id.*

On January 21, 2021, the Honorable Anthony Epstein issued an Amended Addendum to the General Order Concerning Civil Cases, which states in relevant part that "[i]f no exception in the January 13 order or in the Chief Judge's prior orders applies, the date on which the period of tolling ends is currently March 31, 2021…" Amended Addendum to the General Order Concerning Civil Cases (Jan. 21, 2021) at 2. The Addendum also stated that "[i]f an event before the start of the tolling period triggered a deadline that falls within the tolling period, the number of days remaining before the original deadline on March 18 are added to the end of the tolling period." *Id.* On March 30, 2021, the Chief Judge Ordered that "[u]nless otherwise ordered by the Court, no deadlines and time limits in statutes (including statute of limitations), court rules, and standing and other orders issued by the Court are suspended, tolled or extended during the period of emergency…" Chief Judge Order (Mar. 30, 2021) at 3.

Here, Defendant argues that because the event triggering the statute of limitations was the April 5, 2018 accident, resulting in the April 5, 2021 statute of limitations deadline falling outside the Court's March 18, 2020 through March 30, 2021 tolling period, the tolling period does not apply to the present case. Memo. at 4. In support of her assertion, Defendant cites to the language in Judge Epstein's Addendum which specifies that "the number of days remaining before the original deadline on March 18 are added to the end of the tolling period" for "a deadline *that falls within the tolling period*[.]" *Id.* (citing to Amended Addendum to the General Order Concerning Civil Cases (Jan. 21, 2021) at 2 (emphasis in Memo.)).

The Court does not agree with the Defendant's interpretation and finds that the tolling period should apply to the statute of limitations in the instant action. Defendant argues that the Court did not intend to forever alter all statutes of limitations in civil cases through its administrative orders; however, the Court did mean to toll all statutes of limitations *from March 18, 2020 through March 30, 2021. See* Memo. at 4; Chief Judge Order (Mar. 30, 2021). "The term 'tolling' means that, 'during the relevant period, the statute of limitations ceases to run.'" *Christensen v. Philip Morris USA, Inc.*, 162 Md. App. 616, 639 n.9 (2005) (quoting *Chardon v. Fumero Soto*, 462 U.S. 650, 652 n.1 (1983)). Accordingly, the statute of limitations as to Plaintiff's claim in the instant case was paused during the tolling period, meaning that the proper deadline for Plaintiff to bring her claim can be found by adding the 388 days between March 18, 2020 and March 30, 2021 to the Plaintiff's original deadline of April 5, 2021. *See* Addendum to the General Order Concerning Civil Cases (Jan. 21, 2021) at 2.

Here, the language cited by the Defendant from the Addendum is not an exclusive list of the applications of the tolling period, rather just one example. There is also no language in the Chief Judge's Order which indicates that the tolling period does not apply to deadlines that occurred after

March 30, 2021. *See generally* Chief Judge Order (Mar. 30, 2021). The intent here was clearly that tolling meant tolling—that the statute of limitations temporarily ceased to run, and began again once the tolling period was lifted. To find otherwise would result in a clear injustice as any litigant whose claim arose on April 1, 2018, for example, would be extremely prejudiced and unlikely to file suit under Defendant's interpretation, while a litigant whose claim arose on March 29, 2018 would have until April 2022 to file suit. *See* Opp. at 2. Moreover, a litigant would have the right to rely on the Chief Judge's assurance that the Court would "provide at least 60 days' notice before ending all suspension, tolling, and extension of deadlines." Chief Judge Order at 1 (Jan. 13, 2021).

For these reasons, the Court finds that Plaintiff's complaint was timely filed. Accordingly, it is this 19th day of August 2021, hereby:

ORDERED that Defendant's Motion to Dismiss and/or for Summary Judgment is **DENIED**.

SO ORDERED.

Judge Shana Frost Matini
Superior Court of the District of Columbia

Copies electronically served upon all counsel of record

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.

Benjamin R. Ogletree
Signature

23-CV-165
Case Number(s)

Benjamin R. Ogletree
Name

11/27/23
Date

bogletree@verdiogletree.com
Email Address