23-CV-0672

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SARAH RAMEY

Plaintiff-Appellant,

v.

EDWARD F. DUNNE, JR., M.D. and
FOXHALL UROLOGY, CHTD., LLC,

Defendants-Appellees.

On Appeal from the Superior Court of the District of Columbia, Civil Division
No. 2019-CA-005730-M
Judge Shana Frost Matini

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Plaintiff in the Superior Court and Appellant in this Court is Sarah Ramey. Timothy R. Clinton and Christa Y. Nichols (Clinton & Peed) appeared for Ms. Ramey in Superior Court; Mr. Clinton and Matthew J. Peed (Clinton & Peed) appear for Ms. Ramey in this Court.

Defendants in the Superior Court and Appellees in this Court are Edward F. Dunne, M.D. and his medical practice, Foxhall Urology, Chtd., LLC. Andrew E. Vernick and Christopher J. Greaney (Vernick & Associates) appeared for Appellees in the Superior Court; Alfred F. Belcuore (Law Offices of Alfred F. Belcuore), along with Andrew E. Vernick and Christopher J. Greaney (Vernick & Associates) serving as Of Counsel, appear for Appellees in this Court.

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STATEMENT OF JURISDICTION

This court has jurisdiction under D.C. Code § 11–721. This is an appeal of a final order or judgment disposing of all of the Appellant Sarah Ramey's claims.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying Appellant's motion for judgment under Rule 50.

2. Whether the trial court erred in denying the plaintiff a new trial where: (a) the jury instructions misstated (and lowered) the standard for the discovery rule in medical mystery cases; (b) defense counsel was permitted to repeatedly tell the jury in questions and argument throughout the trial that the standard was lower still; and (c) defense counsel was permitted to introduce an improper argument regarding "inquiry notice" for the first time in rebuttal—using his own "opinion" as evidence—that the defense had waived before trial.

INTRODUCTION & SUMMARY OF ARGUMENT

In January 2003, while visiting her parents in Washington, DC over winter break during her senior year at Bowdoin College, Appellant Sarah Ramey visited Appellee, urologist Edward Dunne. She hoped that he might be able to address the persistent urinary tract infections that had plagued her for the preceding six months. After an in-office procedure known as a urethral dilation, Ramey experienced blinding pain and was hospitalized the next day with sepsis. Although there was little doubt that the procedure had triggered the acute sepsis, Ramey recovered. In the months and years that followed, however, she experienced an amorphous and progressing constellation of debilitating symptoms—e.g., terrible

pelvic pain, extreme fatigue, brain fog, aching in the muscles and joints, frequent infections, inability to have sex, and menstrual problems—that genuinely confounded the nation's top doctors. None opined that the urethral dilation Dunne performed could realistically have caused her ailments.

For the next fourteen years—spanning over 200 encounters with more than 90 medical specialists—Ramey tried in vain to uncover a plausible cause for her debilitating symptoms. Although she suspected that Dunne committed a "surgical mistake" and "slipped and punctured [the] left vaginal wall and left pelvic plexus," dozens of painful and invasive studies on the most intimate parts of her body refuted that theory. And Ramey's treating physicians either rejected it outright, acknowledged that it was a mere "possibility" not worth pursuing, or told Ramey (in effect) that no amount of medical exploration would ever be able to establish the cause of her mysterious symptoms.

Ramey persisted, however, and in 2017, a new examination under twilight sedation led for the first time to the discovery of massive scarring in Ramey's vagina and on her pudendal nerve. That scarring explained her symptoms and could only have been caused by Dunne. Ramey filed this action well within three years of that date—the first medical confirmation of a causal link to Dunne's procedure.

The trial court denied Dunne's two motions for summary judgment and set the case for trial. Before trial, Dunne successfully moved to bifurcate the trial so that the issue of the statute of limitations would be resolved first. Ramey was the only trial witness. She described the uniform lack of belief she faced by the medical

establishment for her conviction that Dunne had caused her decade-plus of debilitating symptoms, her heroic efforts to find the truth, and her "eureka" moment in 2017 when a fifth transvaginal ultrasound finally found the scar tissue at the root of her symptoms. In addition, Ramey's 3,200 pages of medical records were introduced, which documented the complete absence of any medical advice identifying Dunne's procedure as a plausible cause of her injuries.

However, several significant errors permeated the trial, ultimately misleading the jury into finding for Dunne on the statute of limitations issue. First, the trial court misinterpreted the kind of facts necessary for the defendant to meet its burden under an incorrectly defense-favorable formulation of the discovery rule. The undisputed evidence was that none of Ramey's treating physicians advised her that the causal connection was anything more than a hypothetical possibility; and those that even entertained that possibility only did so pending future tests, which came back uniformly negative. Under the correct standard, this would have led any reasonable jury to find that Ramey acted reasonably under the circumstances in delaying her case in the absence of any plausible link to Dunne's procedure.

The trial court, however, lowered the standard significantly, and permitted the defense to continuously misstate that the standard was lower still, so that a defense verdict became practically guaranteed. Specifically, the trial court transformed the applicable test (objective reasonableness under all the circumstances after receipt of medical advice of plausible causation) into a once-and-done, bright-line rule that irrevocably triggers the statute of limitations upon the receipt of a single piece of medical advice of plausible causation without regard

to the surrounding circumstances. In doing so, the trial court effectively told the jury to ignore the great weight of the evidence showing Ramey's extraordinary diligence and persistence in the face of deep and abiding skepticism from her doctors.

Compounding this error, the trial court permitted defense counsel to confuse the jury into thinking that a medical opinion could trigger the limitations period even if it merely suggested that causation was "possible." Indeed, defense counsel (a) told them two dozen times in opening (over two objections) that all he needed to prove was a subjective belief in possible causation; (b) framed all of his questions to Ramey in terms of possible causation; and then (c) told them another two dozen times in closing (over another objection) that all he needed to prove was subjective belief in possible causation. This effectively lowered the standard even more.

Worse still, the trial court then permitted the defense to raise, for the first time in rebuttal closing argument, a theory it had previously abandoned: inquiry notice. Specifically, Dunne told the jury that if only she had enlisted the help of a lawyer, that lawyer would have convinced a particular doctor (Dr. Iglesia) to perform in 2007 the transvaginal ultrasound Ramey obtained in 2017. This argument constituted opinion testimony of counsel, expressly contradicted the record, and rewarded the improper bait-and-switch gamesmanship of counsel. Ramey had no ability to respond to this improper rebuttal argument, which provided any skeptical jurors with an alternative pathway to find for Dunne even in the absence of any definitive medical advice to Ramey, based essentially on hindsight.

The trial that occurred should have ended in Ramey's favor. Even under the lowered standard adopted by the trial court, Dunne failed to introduce any evidence that Ramey received medical advice establishing a plausible linkage between her symptoms and Dunne's procedure at any point prior to 2017. Indeed, in denying Ramey's Rule 50 motion for judgment, the trial court resorted to citing the failed efforts of Ramey's *parents*—a pulmonologist and an endocrinologist—to convince her *treating* physicians to connect her symptoms to Dunne's procedure. That was error. No reasonable juror would think that a would-be plaintiff should rely on the opinions of a lung doctor—let alone her emotionally invested mother and father—to diagnose the causes of her vaginal problems, especially when all the gynecologists disagree. And the trial court further exacerbated the error by holding that the sincerity of Ramey's subjective belief in the causal connection itself gave rise to an inference that she must have received the objective medical advice that was missing from the record—effectively collapsing the objective evidence required by this court's precedents into a subjective inquiry into what a lay plaintiff *believes* after speaking with her doctors.

At the very least, this case presented a close question. On this record, the improprieties at trial were so overwhelming that, cumulatively, they gutted Ramey's case, practically (and unfairly) guaranteeing that she would lose her right to recover for a lifetime of suffering. The court should grant Ramey's judgment as a matter of law, or remand for a new trial.

STATEMENT OF FACTS

The undisputed record is that, before mid-2017, the efforts of Sarah Ramey and her parents to convince her treating physicians to adopt the theory that Dunne plausibly caused her debilitating symptoms utterly failed. Not one of her treating physicians believed that theory was more than a theoretical possibility, especially after the battery of tests performed on Ramey yielded no evidence to support it. But in 2017, a fifth transvaginal ultrasound (together with a surgical follow up) revealed what the four prior instances of that same test missed: a mass of scar tissue in Ramey's vagina and entrapping her pudendal nerve. This evidence finally confirmed Ramey's long-held suspicions, and she filed her lawsuit well within three years from that discovery—the first time it was objectively reasonable to do so.

A. On the eve of trial, the court rejected the defense's argument that the causation opinions of Ramey's experts should be excluded because of their undisputed medical novelty.

On August 19, 2022, Dunne moved to exclude Ramey's experts from opining that Dunne's urethral dilation procedure caused Ramey's injuries based upon the following undisputed facts, which remained true at that time:

- If Ramey's causation theory "is to be believed, **Ms. Ramey would, quite literally, stand alone in the annals of medicine as the first and only person to ever experience the injuries alleged here from the performance of a urethral dilation**" (JA45 (emphasis Dunne's));
- "There is **not a single** reported case study, medical journal article, piece of research, or any other independent basis or source of information **in the history of medicine** that attempts to extrapolate, hypothesize, **or even so much as speculate** that the performance of a urethral dilation can cause the injuries now alleged by Plaintiff" (JA47 (emphasis Dunne's));
- Ramey's "theory of injury has not been tested or repeatedly examined (let alone achieved consistent results) by **anyone else** in the medical

community and indeed has not even been raised for consideration or challenged as a hypothetical injury that can result from a urethral dilation anywhere at any time outside of this instant case with Ms. Ramey" (JA56 (emphasis Dunne's)); and

- "[T]he relevant professional community" does not even recognize that such a causal link is even "possible" let alone "plausible" (JA46–47 (emphasis Dunne's)).

In opposition, Ramey explained that the absence of supporting medical literature is neither surprising nor dispositive. Ramey's expert opined that Dunne's procedure had triggered a complex series of processes only now understood by bleeding-edge medical research: complex cascades after urosepsis; the effects of neuro-inflammation at the terminal endplates in the urethra; and neuromuscular feedback to nearby muscles. JA71–72. Dunne's own experts acknowledged that Ramey's treating physicians had good reason to question the connection between the procedure and the symptoms that followed, because scientific "understanding of female pelvic pain has improved or increased rapidly over the past 20 years," and the conditions Ramey suffered "were all areas that were under-researched and underfunded" previously. JA74 (citing one of Dunne's experts). Ramey also argued that the fact Ramey's "'case may have been the first of its exact kind, or that [her] doctors may have been the first alert enough to recognize such a case, does not mean that the testimony of those doctors, who are concededly well qualified in their fields, should not have been admitted.'" *Id.*(quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1536 (D.C. Cir.), *cert denied* 469 U.S. 1062 (1984)). The trial court agreed with Ramey and denied the motion to exclude Ramey's experts on causation. JA104.

B. The trial court bifurcated the trial to protect Dunne from potential jury confusion about the difference between "plausible causation" and causation proven within a reasonable degree of medical certainty.

One week later, Dunne moved to bifurcate the trial into separate statute-of-limitations and merits phases to prevent the jury from "inappropriate intermingling or conflation" of his statute-of-limitations argument (i.e., Ramey knew or should have known that causation was plausible) with its causation argument (i.e., Ramey cannot prove causation by a preponderance within a reasonable degree of medical certainty). Mem. In Support of Defs. Mot. to Bifurcate Trial, 1 (Nov. 15, 2022). According to Dunne, permitting the jury to hear his "at-least-plausible" arguments together with his "not-more-likely-than-not" arguments would involve "**wholly unnecessary, damning, and potentially fatal prejudice to Defendants' presentation of the case to the jury**." *Id.* at 1–2 (emphasis Dunne's). *See also* Defs. Mot. to Bifurcate Trial, 2 (Nov. 15, 2022) (predicting "**certain and fundamentally significant prejudice directly upon Defendants' case and presentation to the jury**[,] [which] could prove fundamentally, and unfairly, fatal to Defendants' position with the jury . . . .") (emphasis Dunne's).

The trial court agreed that it would be "particularly prejudicial" to permit the jury to hear, and potentially to be confused by, Dunne's alternative arguments that (a) Plaintiff should have known it was plausible that the urethral dilation caused her symptoms, but (b) the procedure nevertheless was not "more likely than not" the cause, within a reasonable degree of medical certainty. JA129.

C. Dunne waived his "inquiry notice" theory to avoid apprising the jury of the medical novelty of Ramey's causation claim.

One week after that ruling, Ramey sought the trial court's permission to present the jury with party admissions by Dunne and his experts about the striking medical novelty of Ramey's causation theories. JA140. Ramey argued that, when tasked with evaluating out-of-court statements about the definitiveness with which Ramey's physicians may have spoken when they discussed with her the possible causal connection, the jury should be entitled to consider the scientific context (JA159–60); a doctor is less likely to speak with confidence about a theory that "the relevant professional community" does not even recognize is "possible" (JA46–47).[1] The trial court denied that motion, holding that the contemporaneous state of medical science was irrelevant to "what the *Plaintiff* knew about the potential cause of her injury, and when she knew it." JA165.

Ramey immediately moved for reconsideration, this time emphasizing that while she continued to contend that these admissions were relevant to "*actual* knowledge" (JA170 n.2), the trial court had not addressed the relevance of this information to "*constructive* knowledge (what Ms. Ramey *would have found* had she looked)"—a separate discovery rule trigger (JA170). At the hearing, Ramey's counsel repeatedly stated his preference to have Dunne raise an "inquiry notice" argument at trial because it would be "easier for me to knock that down" (JA184) since—if inquiry notice were raised—"we ought to be able to tell the jury

[1] Related questions obviously would be fair game if Dunne called any doctor or expert to testify. *See* JA177 (the trial court acknowledging this could "be part of cross examination"). But he failed to do so.

that . . . even if she had done 100 percent of all the diligence available to her, she wouldn't have found anything connecting urethral dilation to what she experienced . . ." (JA176).

Dunne recognized the internal tension between his positions on the discovery rule and causation; that was why he sought a bifurcated trial. So, precisely in order to keep the jury in the dark about the admitted total absence of medical science supporting Ramey's theory of causation at the time she supposedly "knew or should have known" that her theory was plausible, Dunne's counsel repeatedly disavowed any inquiry notice defense. *See* JA182 ("we are not really directly disputing . . . that [Ramey] conducted a reasonable investigation"); JA184 (making a "proffer" that "[o]ur focus will be on actual notice . . . and when she should have acted upon it."). In light of Dunne's proffer, the Court held that Ramey's reconsideration motion was "moot, given that we're not going to focus on what else could [Ramey] have done[,] [but rather] what should she have done with what she knew." JA186.[2]

D. The first morning of trial, the court rejected *Brin*'s totality-of-the-circumstances test and instructed the parties to focus on a narrower formulation patterned on *Brin's prima facie* test.

Relying on *Brin v. S.E.W. Inv'rs*, 902 A.2d 784 (D.C. 2006), Ramey had proposed a set of jury instructions that would have (1) explained that the jurors'

[2] Dunne's counsel reiterated his waiver of an inquiry notice argument on the first day of trial (JA235–36 ("inquiry notice is not at issue here")), and yet again moments before closing arguments began (JA524 (agreeing to "get[] rid of the inquiry notice element" from the verdict sheet)).

ultimate task is to "decid[e] whether Ms. Ramey acted reasonably in the circumstances," a question that "is highly fact-dependent and requires an analysis that considers all of the relevant circumstances" (JA122); (2) instructed that "[b]ecause patients must rely on their doctors," the receipt of "some medical opinion that specifically identifies the wrongdoing of the defendant . . . among the 'plausible' (not merely possible) causes of her maladies" is a "minimum" (but not sufficient) requirement subject to other circumstances that might render reliance on such advice objectively unreasonably (JA121–22); and (3) advised the jury about the permissible use of the evidence that would be admitted at trial (JA122 ("you may consider factors such as whether her attempts to determine the cause of her condition were rejected by other medical providers, or whether Ms. Ramey reasonably relied on statements from her providers discounting the plausibility that the urethral dilation caused her symptoms and conditions")). Ramey's proposed instructions ended with the pronouncement that "[u]ltimately, the answer to the question when Ms. Ramey reasonably should have discovered that the urethral dilation procedure was a plausible cause of her subsequent maladies is highly fact-dependent and requires an analysis that considers all of the relevant circumstances." *Id.*

But the court rejected Ramey's effort to capture the reasonableness/totality-of-circumstances test, referring to it as "the philosophical approach that the *Brin* case took," and urged the parties instead to work on instructions patterned after the *prima facie* formulation discussed in that case rather than the broader standard. JA226–27 (taking out from the instructions "the rationale that the Court of

Appeals put forth" and "limit[ing] it to just what the" the *prima facie* standard discussed in *Brin*).

E. In opening, Dunne consistently told the jury (over objections) that he need only prove Ramey's subjective belief in "possible" causation.

From the moment Dunne's counsel Mr. Vernick first referenced the discovery rule in his opening statement, he misstated the legal standard by claiming the statute of limitations was triggered by (1) Ramey's subjective intent; after (2) being told about a merely "possible" causal link. JA255 (the "period of time runs from when the patient was aware of injury *possibly* caused by a physician's care"). Ramey's counsel objected that he had "misstated the law." *Id.* The Court overruled the objection and simply instructed the jury that "the statements of counsel are not evidence." JA259. Mr. Vernick then proceeded to misstate the legal standard in terms of subjective belief in possible causation *twenty-one* more times in the course of his opening statement, including a final time after the trial court overruled Ramey's second objection. *See*, *e.g.*, JA263 (the clock starts "when Ms. Ramey was aware of the injury *possibly* caused by Dr. Dunne's care"); JA259–83 (repeating it 20 other times, including after another overruled objection).

F. The evidence at trial showed no objectively reasonable basis for plausible causation until a 2017 transvaginal ultrasound.

1. The undisputed medical record refuted any contemporaneous evidence of causation.

At the outset of trial, the court pre-admitted a joint set of over 3,200 pages of Ramey's medical records spanning more than 200 visits with over 90 different

providers.[3] These records documented numerous invasive and painful examinations, ultrasounds, laparascopic examinations, biopsies, MRIs, CAT scans, and other studies, that failed to show any evidence (according to Ramey's doctors) that Dunne's urethral dilation procedure caused her injury, *e.g.*:

- March 16, 2003: CT scan of abdomen and pelvis ("UNREMARKABLE STUDY") (JA713);
- June 10, 2003: Transvaginal ultrasound ("In the lower third of the vagina, just LEFT of midline anteriorly, is a 1.5 cm solid nodule. . . . This appears to be isolated with no apparent connection to the bladder or vagina. The exact nature is indeterminate, but correlation with recent MRI scanning is recommended") (JA716)
- June 17, 2003: MRI of the pelvis ("Unremarkable") (JA714);
- June 18, 2003: Transvaginal ultrasound ("We did get a better look today . . . . Previously displayed vaginal lesion may represent a thickened urethra due to repeated bladder infections from history. Strongly doubt there is any indication at this time for surgical intervention. No clear-cut finding that really would explain this patient's symptomatology.") (JA717);
- November 7, 2003: Transvaginal ultrasound ("Normal vagina and pelvic scan. Previous urethral prominence not noted in today's study. Altogether reassuring examination") (JA718);
- December 24, 2007: Abdomen MRI ("Unremarkable") (JA715);
- January 8, 2008: Diagnostic laparascopy under general anesthesia (everything appeared normal) (JA719–20);

[3] *See* JA967–69 (listing the doctors and their specialties); JA970–80 (listing the various encounters). These exhibits were not introduced as substantive evidence, but do accurately summarize the contents of the stipulated set of joint medical exhibits that were introduced. Plaintiff used one as a demonstrative during opening, closing, and Ramey's cross examination without objection, and submitted both exhibits with the motion now on appeal.

- April 18, 2008: Examination under anesthesia with sigmoidoscopy, cystoscopy, and transvaginal ultrasound, and bilateral retrograde pyelograms (everything looked normal) (JA726–28); and

- June 2, 2014: Examination under anesthesia with three vulvar biopsies and cystourethroscopy ("Normal urethra and bladder with no lesion, signs of trauma, or prior perforation. . . . Normal vaginal examination. No masses, lesions, or abnormalities noted. No areas suspicious for prior trauma.") (JA731–32).

Ramey first underwent a transvaginal ultrasound in June 2003. Normally a relatively quick, painless office procedure, hers was "extraordinarily painful" and "went on for a very, very long time," with the technician explaining that "it can be difficult to get the right angles to get a proper image of what you're looking for" in such exams. JA480. The years of examinations that followed continued to be extremely difficult and painful, while revealing nothing to support her suspicion that Dunne's urethral dilation caused her symptoms. *See* JA450–51 (describing the difficulty and pain of these examinations); JA481–82 (describing her first four transvaginal ultrasounds).

Finding no objective evidence in Ramey's body to support that causal connection, the uncontroverted, contemporaneous, written statements of Ramey's disinterested treating providers refuted the notion that her symptoms resulted from Dunne's possible negligence, *e.g.*:

- January 2008: Dr. Thomas Loughney ("Sarah's chronic pelvic pain has certainly defied a ready diagnosis") (JA723);

- March, 2008: Dr. Michael Phillips ("Pelvic pain, etiology unknown. We need to rule out a fistula of some type, although I have a very low index of suspicion that this is in fact the case. I have a very difficult time putting together labial swelling with this in the absence of a positive culture. . . . hopefully either Dr. Susan Stein and myself could make some sense out of this.") (JA724);

- April 2008: Dr. Michael Phillips ("At the present time, I am at a loss to explain her symptoms. I do not see anything on the ultrasound suggestive of a problem. We even did ultrasound of her labia which was essentially normal.") (JA725);

- July 2010: Dr. Ricki Pollycove (the causes of Ramey's complex condition "stump[ed] the stars," i.e., the leading medical experts) (JA729); and

- June 2014: Dr. Mark Abbruzzese ("WOW! Saw Sarah [and] her Mom today. Many issues and it is hard to put it all together") (JA730).

Despite the lack of corroborating evidence or support from her treating physicians, Ramey continued to believe—while recognizing her lack of medical expertise—that Dunne caused her injuries through some form of physical trauma. *See*, *e.g.*, JA328 (describing Ramey's May 2007 email that she believed Dunne "botched" the procedure and "tore a lot of things not meant to tear"); JA335 (Ramey's private journal expressing her belief that Dunne "ripped my urethral with a large metal instrument").

2. Ramey enlisted the help of her parents to advocate on her behalf with her treating physicians.

Much of Dunne's trial examination of Ramey focused on the fact that Ramey's parents—a retired pulmonary specialist and a retired endocrinologist, respectively—assisted her by "researching different possible doctors for [her] to see" (JA319); contacting some of those doctors (*id.*); conducting "medical research to assist [Ramey] and the doctors that were treating [her] about what their thoughts were and different options for [her] condition" (JA320); and helping Ramey "prepare different chronologies, statements, and histories about what had happened to [her]" to be shared with her treating physicians (JA321). The undisputed goal of these summaries was *not* for her treatment and care, but rather

"to submit to and send to doctors that were" treating her, as a way "to assist the treating physicians." JA323–26.

In many of these summaries, Ramey and her parents expressed their subjective belief that the urethral dilation was the cause of many of her complex symptoms that followed. *See*, *e.g.*, JA365–66, JA373–78, JA392–412 (discussing the summaries provided by Ramey's parents for her treating physicians). Ramey testified that she did not rely on her parents—she went to other doctors instead—because they were "not [her] treating physicians and they're not specialized in this area. They don't have any of the relevant expertise in the same way I wouldn't go to them if I had, you know, a foot problem. I wouldn't go to my pulmonologist mother. [She studies] [t]he lungs," and Ramey was unaware of any "connection between the lungs and [her] symptoms." JA453–54.[4]

Notwithstanding these collective efforts to convince her specialist doctors that the urethral dilation was the root cause of her many problems, not one of Ramey's treating physicians agreed. Indeed, at trial Ramey (the sole witness) testified that most of her physicians "were either dismissive of [her], didn't take [her] seriously or thought that [she] had a psychiatric illness." JA428–29. At most, only a few of the 90+ doctors with whom she consulted "very, very reluctantly

[4] There was no evidence at trial that either of Ramey's parents ever treated the conditions at issue in the case, although the record did reflect that at some unspecified time, Ramey's parents wrote unspecified prescriptions to treat unspecified conditions, and "[i]n the very beginning," Ramey's parents ordered unspecified imaging studies of unspecified areas to look for unspecified conditions. JA322. At least once, Ramey's mother examined her abdomen, her heart, and her pelvic area. JA322–23.

said" that a causal link between Dunne's urethral dilation procedure and Ramey's symptoms "was maybe a possibility." JA330. *See*, *e.g.*, JA993–1006 (listing every statement on which Dunne relied, which were phrased in terms of either Ramey's subjective belief or a doctor's acknowledgement of mere "possibility," "potential," or "suspicion").[5]

For example, in her August 5, 2014 intake form for a visit with one the most specialized practitioners in a field relevant to her—Dr. Richard Marvel at the Center for Pelvic Pain of Annapolis—Ramey wrote that her problems stemmed from a "surgical mistake" during the "urethral dilation" in which he "slipped and punctured [the] left vaginal wall and left pelvic plexus" (JA430)—that is, a puncture wound that miraculously left no trace in her body. Dr. Marvel could not have rejected this causal theory more emphatically: He concluded that her problems likely started "from straddle injury at age 5 [that] worsened over time

[5] It is no surprise the record Dunne developed at trial was limited in this way; every question his lawyer posed about Ramey's doctor's opinions was phrased in terms of her own subjective beliefs or a doctor's acknowledgement of mere possibility. *See*, *e.g.*, JA329 (asking if Ramey was "advised by different physicians of the potential that [Dunne] had perforated" various structures); JA330 ("Can we agree that . . . you were advised by different physicians that there was a potential"); *id.* (asking about Ramey's belief there "was possibly . . . the potential"); JA331 ("different physicians advised you about the potential perforation"; "you also believed that the potential perforation"); JA332 ("the potential for nerve injury"); JA378 (re Ramey's "understand[ing] that [she] had a potential nerve entrapment"); JA382 ("potentially there was an issue"); JA418 ("possible or feasible"); JA419 ("possible or feasible"); JA425 ("potentially ripped"); *id.* ("may have nicked a nerve"); JA427 ("potential conclusion"); JA439 ("potentially believed"); *id.* ("potentially damaged"); JA518 ("potential damage").

[and] likely developed [into pelvic floor dysfunction] all prior to urethral dilation. I DO NOT think she has a plexus injury." JA733.[6]

3. Ramey finally convinced Dr. Mario Castellanos to conduct a fifth transvaginal ultrasound, under twilight sedation, and discovered evidence in her body for the first time suggesting a causal link between her symptoms and the dilation procedure.

After years of these "normal" tests, Ramey began to focus her attention on the first three transvaginal ultrasounds performed years earlier in June and November 2003. "The first one had shown a nodule, the second one showed that they couldn't see the nodule but thought it might be a thickening of the urethra, and then the third one didn't show anything anymore. And that was one of the only—that was the only evidence of any—anything that I was aware of that had ever been performed in that entire time . . . that suggested that Dr. Dunne had tor[n] through [her] urethra and the vagina and colon," as she then believed. JA442–43 (referring to JA716–18). So beginning around 2009 (a year after a battery of tests including a fourth transvaginal ultrasound was completely normal (JA726–28)), Ramey started taking a photo from the first sonogram showing the small nodule to her doctors to ask that they try a *fifth* transvaginal ultrasound in hopes of

[6] Ironically, because the court previously held that only evidence of Ramey's "actual knowledge" was admissible (JA165), the jury never heard that Dr. Marvel was right to reject the surgical-trauma theory, and that Ramey's lay suspicions were wrong all along. Her expert was prepared to opine that Ramey's problems did not stem from surgical injury, but rather from the co-occurrence of processes only now being understood by advances in medical science: complex cascades after urosepsis, neuro-inflammation at the terminal endplates in the urethra, and neuromuscular feedback to nearby muscles. JA71–72.

gaining more insight about the nodule previously found to be insignificant. They universally responded with some variation of "I don't think that's what happened to you." JA492–93.

One doctor (Iglesia) was willing to conduct a different examination of her vagina under anesthesia, which she did in June 2014, but it found "[n]o areas suspicious for prior trauma." JA731–32. In light of that finding, Dr. Iglesia refused to conduct another transvaginal ultrasound, telling Ramey "it can be very difficult to image some of these problems, and so you're just not going to know if this is what happened to you." JA493–95. Instead, Dr. Iglesia advised Ramey to "stop trying to dig and get to the root of things" and "just focus on pain management." JA495. Nevertheless, Ramey persisted. But her doctors still resisted. *E.g.*, JA499–500 (the doctors at Tula Wellness Center refused to do the test in March 2016).

The first glimmer of hope came on August 31, 2016—less than three years from the August 30, 2019 complaint—when Ramey received an email from Dr. Marvel stating that in circumstances like Ramey's, "[w]hen a patient has pain that is very focal, always in the same place, never anywhere else, it is usually neuropathic. A good exam, not under sedation, can be very helpful. A neuroma can do this . . . ." JA501–03 (discussing Pl. Ex. 22).[7] Ramey testified that when she read this term *neuroma*, her "ears kind of perked up a little bit" because she "hadn't personally seen that or it had never stood out to me before." JA503. She wrote

[7] This is the same doctor who, two years earlier, told Ramey unequivocally that he believed all of her problems started at age five and all developed prior to the urethral dilation. JA733.

back: "Neuroma. I have never even heard that term before, but just looked it up—and that sounds pretty much exactly what I am experiencing." *Id.* Marvel referred her to Dr. Castellanos, who on July 6, 2017—based on Dr. Marvel's recommendation—performed the fifth transvaginal ultrasound. JA505. When Ramey woke up from the procedure, Castellanos informed her "we found this mass . . . , [a]nd when I pressed on that area [while you were under twilight sedation], you all but leapt off the table. It was an extremely clear response and I think that we have gotten to the root of your pain." JA505–07. Ramey testified that she viewed this conversation as "one of the most important moments of [her] life." JA507. Following that examination, Ramey convinced Dr. Lee Dellon to examine the area surgically: "he basically opened up on the side of the vagina, and went in," discovering a mass entrapping some of her pelvic nerves, which subsequent pathology confirmed was scar tissue. JA510–11.

Finally, Ramey testified that she filed suit on August 30, 2019 because, prior to the 2017 ultrasound, her "understanding [was] that you need evidence and medical corroboration in order to bring a lawsuit"; and she believed the 2017 ultrasound was enough to finally constitute "evidence [that] it was fair to bring a lawsuit." JA452. To be on the safe side, Ramey filed on August 30, 2019, within three years from the email from Dr. Marvel first making her aware of the term "neuroma," which led to the fifth ultrasound, which led to the surgery, which led to the pathological confirmation of scarring. JA513–14.

G. In closing, Dunne's counsel again argued (over an objection) that he need prove only subjective belief in possible causation.

At closing, the court again permitted Dunne's counsel to dilute the standard even further by misstating the law on the critical distinction between possible and plausible causation. During his closing argument, Dunne's counsel elided suspicion, mere possibility, and potential—insufficient to trigger the limitations period—with plausibility or reasonable possibility. At the outset, Dunne's counsel misrepresented that there were only *two* elements to prove under the discovery rule, thereby excluding the only disputed issue (causation): "[T]he filing deadline starts with basically two things: some evidence of wrongdoing by Dr. Dunne and some injury from that wrongdoing." JA540. Ramey's counsel objected "as to mischaracterizing the law," but the trial court expressly endorsed Dunne's misstatement: "I've got the law right in front of me, and I'm going to overrule the objection." *Id.* Immediately thereafter, defense counsel reiterated, again incorrectly, that the only two issues in dispute were the two issues that Ramey did *not* dispute: "And basically, what I'm going to walk with you through today is both some evidence or any evidence of wrongdoing, and then evidence of the harm from that that we have here." JA541.

From there, defense counsel continued to misstate the distinction between mere possibility or potential and plausibility or reasonable possibility. *See* JA544 ("All that is needed is some or any injury from wrongdoing, not a precise diagnosis . . . . Only *possible causes*."); JA546 (all that is needed is "*any opinions* of wrongdoing"); JA548 ("It doesn't even have to be the probable or certain or likely cause, *just a potential*."); *id.* ("only need the care of the physician to be *potential*

wrongdoing"); JA567 ("The bottom line is that in real time, numerous, several, quote 'other physicians,' closed quote, advised Ms. Ramey consistently about the *potential* of wrongdoing, wrongful conduct. That statute of limitations clock runs when she has that information."); JA569 ("Goodman's opinions of *possible wrongdoing* . . . [,] [t]hat's a problem, because I didn't file my lawsuit in time").[8]

Defense counsel left the jury with the following closing thought: "The only issue here . . . is when was Ms. Ramey [subjectively] aware of the injury *possibly* caused by Dr. Dunne's negligence." JA571. Never once did defense counsel articulate the standard in terms of "plausibility" or its equivalent.

H. Ramey's closing argument focused on the 2017 transvaginal ultrasound and the lack of medical evidence preceding it.

In closing, Ramey's counsel focused the jury's attention on the available "medical evidence to support [Ramey's] claim," noting that none of the battery of tests performed on Ramey yielded any evidence to support the notion that Dunne

[8] *See also* JA543 ("she knew that there was a *potential*"); JA547 ("The physicians were hypothesizing that this happened, but there's not a requirement that all other possible causes . . . be ruled out. Again, only need to be aware of any injury, not definitive diagnosis, and aware of some harm."); JA551 ("doctors have told me they suspect"); JA561 ("different doctors have *suggested* he *may* have"); *id.* ("*possible* wrongdoing . . . if you believe that their doctors are advising her of wrongdoing . . . , she missed the deadline"); JA565 ("all these doctors think this is a theory"); JA566 ("numerous and several doctors having these theories"); JA568 ("Remember Dr. Goodman has an opinion that there was *possible* wrongdoing"); *id.* (Ramey's dad "suspects" a causal link, and Goodman thinks the suspicion is "feasible"); JA570 ("the statement about Dr. Goodman agreeing that Dr. Dunne *may have potentially* caused harm"); JA571 ("there was consistently believed a *potential* nerve injury").

caused Ramey's symptoms. JA587–89 (describing the history of transvaginal ultrasounds and an early MRI). He noted Ramey's doctors' reluctance to perform a fifth transvaginal ultrasound that Ramey "had been trying for years to get," until finally the language about "neuroma" was enough to convince Dr. Castellanos to do a final transvaginal ultrasound in 2017, which "found it" and "validated her lay belief, which no one disputes." JA591–92. *See also* JA595–607 (marching through the medical chronology).

I. In rebuttal closing argument, the court permitted Dunne to bait-and-switch Ramey by reviving a waived "inquiry notice" theory to claim a doctor would have performed the successful 2017 transvaginal ultrasound sooner, if she had only asked a lawyer for help.

On rebuttal, defense counsel mischaracterized the legal standard in yet another way, this time arguing repeatedly that there was no need for a medical opinion whatsoever because Ramey's *subjective intent* was sufficient: "[T]he issue is what Ms. Ramey perceived. . . . It's what she perceived that starts and charges this—this deadline to file." JA619. *See also id.* (statements of Ramey's physicians in the medical "records are not the issue; it's what did Ms. Ramey perceive. That's the whole issue. . . . What did she get out of these discussions"); JA620 (medical records are "not relevant to the issue"). He then reverted to mischaracterizing the standard in terms of potentiality, not plausibility. JA621 (citing one doctor's opinion of injury "potentially from the urethral dilation"); JA621–22 ("two doctors . . . that told her that she had damage potentially from the procedure").

And then, knowing Ramey would have no opportunity to correct him, Dunne's counsel delivered the *coup de grâce*: a lengthy argument invoking the

inquiry notice theory he had previously (and repeatedly) disavowed (i.e., what Ramey *would have learned* if she had investigated more thoroughly). Specifically, Dunne's lawyer essentially testified to the jury—absent any affirmative evidence (expert or otherwise) in the record and directly contrary to the evidence excluded because of his earlier waiver—that (1) if Ramey had gone to a lawyer as early as 2007; (2) the lawyer would conduct a pre-litigation investigation; (3) which included convincing *Dr. Iglesia* to run medical tests that she previously told Ramey (in 2014) were medically unnecessary; and (4) that hypothetical investigation would have produced the 2017 transvaginal ultrasound as early as 2007:

> So what happens is Ms. Ramey walks into the lawyer's office, . . . [a]nd the lawyer gets the records . . . *and does investigation*. And Ms. Ramey has told him, "I got to tell you, . . . I'd like to have a vaginal—an ultrasound dune but I haven't been able to get a doctor to do it." "Okay. Well, I'm a lawyer; we have experts and we can get this done." . . . [Lawyers do not] file a lawsuit the second they walk in the door. *They investigate it.* . . . So Dr. Iglesia comes in and says, "Here's what my thought is. At this point in time, we haven't found it, the eureka moment, but I think she should get a vaginal ultrasound under anesthesia." . . . The doctors have been reticent to do it, so the lawyers say, we'll get it done. That's not a problem. *So they investigate it*, they do the ultrasound. And wait a second, the eureka moment isn't in 2019. It's not in 2018, '17, '16. It is from 2007 or within the statute of limitations. She's got an answer and she's got a viable lawsuit.

JA623–24.

Ramey's counsel immediately (and rather forcefully) objected: "[I]t's totally fine for him to say if she called a lawyer, the lawyer would have gotten the existing medical records . . . [a]nd then, a lawyer would have decided whether to pursue a claim." JA626. However, "[i]t's different to say that a lawyer would have gotten the medical evidence from a doctor who previously refused to do this medical

evidence. That's inquiry notice. . . . Saying there was an inquiry she should have made." *Id.* "We were not allowed the opportunity to address inquiry notice, and to raise it for the first time in rebuttal is egregious error . . . and the only reason to raise it to the jury is to get them to base their opinion on it to say that had she done X, she would have found X medical record. That's inquiry notice." JA627. The trial court overruled the objection, and then proceeded to instruct the jury not to consider "anything she may have learned after she filed the lawsuit[.]" JA629. However, the court did not tell the jury that Dunne's argument—about a hypothetical and counterfactual pre-litigation investigation—was improper. *Id.*

After the trial court overruled the objection, Dunne essentially "doubled down" on the inquiry notice theory: "And so, what I was chatting with you all about is you would go to a lawyer for that lawyer to do the investigation and determine different facts and features that you could investigate after you go to a lawyer. . . And she said to you, 'I want to have a certain procedure done that I didn't get done until 2017.' And in looking at it from the process of going to a lawyer, that's something that could be worked out at that point in time." JA630.

J. At the charging conference, the trial court repeatedly insisted that "possible" and "plausible" were interchangeable before eventually adopting a "plausibility" instruction that eliminated the totality-of-the-circumstances test.

At the charging conference after closing arguments, the parties hotly debated whether *Brin* required Dunne to prove, at a minimum, that Ramey received advice of "possible" or "potential" causation (the defense's view), as opposed to "reasonably possible" or "plausible" causation (Ramey's view). *Compare* JA527–

33 (Dunne: the statutory period runs upon Ramey's "awareness of th[e] harm and its possible relationship to the defendants") *with* JA641–49 (Dunne: all is required is "a possibility among other possibilities"; Ramey: "To take out that modifier 'reasonably' gets us back to speculation"). The trial court initially stated that "plausible cause or possible cause" are "interchangeabl[e]" and that all that is required is for Ramey to subjectively "know . . . [i]t's a possible cause." JA650. In the face of Ramey's repeated requests that "to ever say just possible cause would mislead the jury about the standard," as opposed to "reasonably possible cause or plausible cause," the trial court continued to insist, on six separate occasions, that "*Brin* uses possible cause" and that *Brin* "us[es] possible and plausible interchangeably." JA650–59.

Ultimately, the trial court agreed to use the term "plausible"; however, it did so only in the context of instructions announcing a bright-line, binary rule: the existence of any "medical opinion that the wrongdoing is a plausible cause of the known injuries will trigger the running of the statute of limitations . . . ." JA693.[9]

K. After the jury returned a defense verdict, the trial court denied Ramey's motion for judgment or in the alternative, a new trial, relying heavily on evidence of Ramey's subjective beliefs.

The jury returned a verdict in favor of the defense (JA1041), prompting Ramey to move for judgment as a matter of law, or in the alternative, for a new

[9] Having been forced to fight so hard for the bare minimum instruction ("plausible" or "reasonably possible" as opposed to merely "possible"), Ramey's counsel did not attempt to reargue the totality-of-the-circumstances test that the trial court had rejected two days earlier as the "philosophical approach that the *Brin* case took." JA226.

trial. Renewed Mot. for J. as a Matter of Law, or in the Alternative, for a New Trial (Mar. 2, 2023). The trial court denied the motion in its entirety.

In its opinion, the trial court effectively ignored all of Ramey's treating physicians and focused on her parents. In doing so, the court all but eliminated "reasonableness" from the *Brin* calculus, holding that what really mattered was that they "were both medical doctors . . . [with] a strong interest in ensuring that their own daughter received proper care" (i.e., from the *other* doctors with whom she consulted), and therefore their "opinions constituted 'some medical opinion that the perceived evidence of wrongdoing is a plausible cause of' [Ramey's] injuries." JA1019 (quoting *Brin*, 902 A.2d at 794).

In evaluating the relevance of Ramey's parents' views, the trial court found it "even more significant[] . . . that Ms. Ramey shared the opinions of her parents with doctors from whom Plaintiff was seeking treatment." JA1024. The trial court repeatedly mentioned that "Plaintiff appeared to embrace and rely on" her parents' opinions (JA1022 n.11), noting that Ramey's statements of lay belief "are relevant insofar as they are evidence that Plaintiff accepted [the legally insufficient] medical opinions." JA1023 & n.12 (citing *Brin*, 902 A.2d at 794). The opinion then expressly held that the ultimate question for the jury to decide was whether "Plaintiff accepted" certain opinions and whether she subjectively "rel[ied] on the medical opinions proffered by others," concluding that "there was evidence before the jury that Plaintiff was [subjectively] relying on" certain information "and passed that information on to other medical care providers in her efforts to receive

treatment" (JA1025). *See also* JA1032–33 (holding the relevant issue is "'what Ms. Ramey took away from her discussions with the physicians'").

ARGUMENT

For the reasons below, Ramey is entitled to remand either for the purpose of a merits trial (after judgment as a matter of law on the statute of limitations), or for a new trial on the threshold statute of limitations question.

I. Ramey is entitled to judgment pursuant to Rule 50(b).

Under Super Ct. Civ. R. 50(a) (or a renewed motion under Rule 50(b)), judgment as a matter of law is proper "when the evidence, viewed in the light most favorable to the non-moving party, permits only one reasonable conclusion in favor of the moving party," that is, "when no juror could reasonably reach a verdict for the opponent of the motion." *Levi v. District of Columbia*, 697 A.2d 1201, 1204–05 (D.C. 1997) (citations omitted). In applying this test, the court "may consider all of the evidence favorable to the position of the party opposing the motion for judgement as a matter of law as well as any unfavorable evidence that the jury is required to believe" because—insofar as it come from a disinterested party—that evidence is uncontradicted and unimpeached. Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2529 (3d ed. 2022).[10] This Court reviews "a motion for judgment as a matter of law *de novo* by applying the same standard as the trial court." *Strickland v.*

[10] Rule 50 "is identical" to its federal counterpart, and courts in the district "may look to decisions of the federal courts in interpreting the federal rule as 'persuasive authority in interpreting' the local rule." *Street v. Hedgepath*, 607 A.2d 1238, 1243 n.5 (D.C. 1992) (citing *Vale Prop., Ltd. V. Canterbury Tales, Inc.*, 431 A.2d 11, 13 n.3 (D.C. 1981)).

Pinder, 899 A.2d 770, 773 (D.C. 2006). Additionally, "[t]he court also must consider the substantive evidentiary burden of proof that would apply at trial to the nonmovant's claims," Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2524 (3d ed. 2022), and should grant the motion if "the jury would have had to speculate to reach its verdict." *Rivera v. Schlick*, 887 A.2d 492, 496 (D.C. 2005) (citations omitted). The party with the burden of proof must present "some affirmative evidence that the event in question actually occurred"; they may not "rely[] on the hope that the jury will not trust the credibility of the witnesses." Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2527 (3d ed. 2022). "If all of the witnesses deny that an event essential to the [nonmoving party's] case occurred," the court must enter judgment for the moving party. *Id.*

In this case, the trial court's key instruction to the jury was that Ramey's receipt of any "medical opinion that the wrongdoing is a plausible cause of the known injuries will trigger the running of the statute of limitations . . . ." JA693.[11] But despite the introduction of over 3,200 pages of Ramey's medical records across more than 200 visits with over 90 different providers documenting numerous invasive examinations, ultrasounds, laparascopic examinations, MRIs, CAT scans, and other studies, there was not a single examination of Ramey's body or a single statement from one of Ramey's treating physicians describing the potential causal connection between Dunne's procedure and Ramey's symptoms with the kind of definitiveness ("plausibility") required by the instructions. *See generally* Facts(F),

[11] As discussed in Section II(A) below, this standard was incorrect in a way that heavily favored the defense.

supra (citing the record). A few of Ramey's doctors "very, very reluctantly said" that a causal link between Dunne's urethral dilation procedure and Ramey's symptoms "was maybe a possibility" (JA330); most of them "were either dismissive of [her], didn't take [her] seriously or thought that [she] had a psychiatric illness." (JA428–29). This was insufficient. Dunne had the burden of proof, and thus had an obligation to present "some affirmative evidence that" Ramey received medical advice of "plausible" causation. He was not entitled to "rely[] on the hope that the jury will not trust the credibility of the witnesses." Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2527 ("If all of the witnesses deny that an event essential to the [nonmoving party's] case occurred," the court must enter judgment for the moving party). *See also* Wright & Miller, 9B Fed. Prac. & Proc. Civ. § 2529 ("the jury is required to believe . . . evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that any of that evidence comes from disinterested witnesses.").

To fill this evidentiary gap, the trial court erroneously relied on (1) the opinions of Ramey's parents; and (2) the strength of Ramey's subjective beliefs. Neither was legally proper.

Although Ramey's parents were both retired doctors, no reasonable juror would believe that they were qualified to opinion the potential causes of her vaginal pain and pelvic dysfunction because their areas of expertise—as a retired pulmonologist and endocrinologist, respectively—were unrelated to her conditions. As Ramey testified, they were "not [her] treating physicians and they're not specialized in this area. They don't have any of the relevant expertise in

the same way I wouldn't go to them if I had, you know, a foot problem. I wouldn't go to my pulmonologist mother. [She studies] [t]he lungs," and Ramey was unaware of any "connection between the lungs and [her] symptoms." JA453–44. *See also* JA319–26 (describing the parents' limited role in advocating for her with her treating physicians). Moreover, courts should be hesitant to permit inferences about the objective reliability of the medical opinions of one's parents as a matter of policy. "In general, physicians should not treat . . . members of their own families. . . . When the patient is an immediate family member, the physician's personal feelings may unduly influence his or her professional judgment . . . [and] [t]hey may also be inclined to treat problems that are beyond their expertise or training." Am. Med. Assoc. Code of Ethics Opinion 1.2.1, *Treating Self or Family*, *available at* https://perma.cc/84R2-WENP.

Finally, the trial court, in circular fashion, held that although Ramey's "lay-belief or suspicion is insufficient, [her] statements [expressing her belief in her parents' causal opinions] are relevant insofar as they are evidence that Plaintiff accepted her parents' medical opinions." JA1023 & n.12 (citing *Brin*, 902 A.2d at 794). Presumably, the trial court inferred that because she subjectively "accepted her parents' medical opinions," she must have had an objectively reasonable basis for doing so. *See also* JA1024 (finding it "even more significant[] . . . that Ms. Ramey shared the opinions of her parents with doctors from whom Plaintiff was seeking treatment."); JA1022 n.11 ("Plaintiff appeared to embrace and rely on" her parents' opinions); JA1023 (finding it significant that Ramey shared these theories "with various friends"). But "the basic question" that *Brin* answered (and

the trial court's instruction attempted to capture) was that subjective beliefs were enough, and "accrual was dependent on [her] receipt of [certain] medical advice . . . ." *Brin*, 902 A.2d at 792. It was legally improper, in the absence of proof that Ramey received sufficient medical advice, to infer from Ramey's subjective belief that she must have done so. "A layman's subjective belief, regardless of its sincerity or ultimate vindication, is patently inadequate to go to the trier of fact." *Helinski v. Appleton Papers*, 952 F.Supp. 266, 271 (D. Md. 1997) (endorsed by *Brin*, 02 A.2d at 798–800) (quotation marks omitted).

Construed generously, the most one could say is that Dunne introduced sufficient evidence to place the evidence in equipoise as to whether the confidence with which *any* of Ramey's physicians spoke was meant to convey mere possibility or plausibility. In these circumstances, Ramey is entitled to judgment as a matter of law. *See Hastings v. Asset Acceptance, LLC*, No. 1:06-CV-418, 2008 WL 11454814, at *3 (S.D. Ohio May 1, 2008) ("Had the evidence been in equipoise at the close of presentation of evidence, judgment for the plaintiffs [on an issue where the defense has the burden] would have been appropriate"); *see also Pineda v. Hamilton Cnty., Ohio*, 977 F.3d 483, 491 (6th Cir. 2020) (party cannot meet its evidentiary burden "when, even after viewing the evidence in their favor, the record is in 'equipoise' or 'evenly balanced' on an essential element's existence.") (citations omitted).

II. Ramey is entitled to a new trial.

Rule 59 provides that "[t]he court may, on motion, grant a new trial . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court or District of Columbia courts." Super. Ct. Civ. R.

59(a)(1)(A). Under this rule, the trial court may exercise broad discretion to grant a new trial to prevent injustice, such as when "the verdict is against the weight of the evidence . . . , the trial was unfair, or there was a prejudicial legal error in the proceedings." *Bell v. Westinghouse Elec. Corp.*, 483 A.2d 324, 327 (D.C. 1984) (citing *Barber v. Buckley*, 322 A.2d 265, 266 (D.C. 1974) and Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2805, at 27–38 (1978)). "[T]he trial court has broad latitude in ruling on a motion for a new trial," as well as "*the duty* to grant a new trial if the verdict is against the clear weight of the evidence or *if for any reason or combination of reasons justice would miscarry if the verdict were allowed to stand.*" *Scott v. Crestar Fin. Corp.,* 928 A.2d 680, 687 (D.C. 2007) (emphasis in original) (quotation marks and citations omitted). This Court reviews the decision to deny a new trial for abuse of discretion. *Railan v. Katyal*, 766 A.2d 998, 1013 (D.C. 2001).[12]

[12] Ramey's Rule 50(b) and 59 motions permit this court to apply "normal appellate review" to improper jury instructions notwithstanding Rule 51, since she "made all necessary arguments to preserve the issues raised in [her] appeal in [her] Rule 50(b) motion for judgment as a matter of law or alternately for a new trial." *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174–75 (6th Cir. 1996) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 118–20 (1988) (holding that where "the same legal issue was raised both by [Rule 50 and 59] motions and by the jury instruction, the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict."). Should the Court nevertheless conclude that Ramey failed adequately to preserve the jury instruction issue (Section II(A)) below, it may still reverse for plain error that "affect[s] substantial rights," which occurs if "there is a reasonable probability . . . [the error] had a prejudicial effect on the outcome of [the] trial"), and "the error seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *Thomas v. District of Columbia*, 942 A.2d 645, 650 (D.C. 2008).

A. The trial court's jury instructions prejudicially transformed *Brin*'s totality-of-circumstances test into a bright-line binary rule that effectively instructed the jury to ignore most of the evidence.

Jury instructions "should be formulated carefully to explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case to enable the jury to comprehend and appreciate the fine distinction to which it is required to adhere." *Goodman v. Nogan*, No. CV 16-4591 (JMV), 2019 WL 6271815, at *12 (D.N.J. Nov. 25, 2019) (quotation marks omitted). "Clarity is as important as accuracy given the limitations of jurors' comprehension." *Balthazar v. City of Chicago*, 735 F.3d 634, 638 (7th Cir. 2013). The existence (as here) of a "vigorous dispute" about a material factual issue "makes the need for clarity in the jury instruction all the more important." *United States v. Black Cloud*, 590 F.2d 270, 273 (8th Cir. 1979).

We do not dispute that the trial court tried very hard to capture the essence of the standard laid out in *Brin*. But that effort failed. The bedrock principle on which this Court's discovery-rule jurisprudence rests is the point at which it is objectively reasonable, under all of the circumstances, to require the plaintiff to file a lawsuit within three years. As the Court of Appeals explained when it first adopted the discovery rule in medical malpractice cases, "the discovery rule is designed to prevent the accrual of a cause of action before an individual can reasonably be expected to discover that he has a basis for legal redress." *Bussineau v. President & Dirs. of Georgetown Coll.*, 518 A.2d 432, 430 (D.C. 1986). "[I]t would be inconsistent with notions of justice to find that a plaintiff's claim accrued before she would reasonably know of any wrongdoing." *Brin*, 902 A.2d at 792 (citing

Bussineau, 518 A.2d at 428). *Brin* also expressly endorsed the approach taken by other courts incorporating concepts of reasonableness. *See*, *e.g.*, *Schiro v. Am. Tobacco Co.*, 611 So. 962, 965 (Miss. 1992) (cited favorably at *Brin*, 902 A.2d at 800 n.21) (accrual begins when "plaintiff can reasonably be held to have [sufficient] knowledge"); *Cannon v. Mid-S. X-Ray Co.*, 738 So. 2d 274, 277 (Miss. Ct. App. 1999) (same) (plaintiff "could not reasonably be expected to diagnose a disease on which the scientific community has yet to reach an agreement"); *Childs v. Haussecker*, 974 S.W.2d 31, 33 (Tex. 1998) (same) (accrual starts when the circumstances "would put a reasonable person on notice"). "'In all cases to which the discovery rule applies, the inquiry is highly fact-bound and requires an evaluation of all of the plaintiff's circumstances.'" *Brin*, 902 A.2d at 795 (quoting *Diamond v. Davis,* 680 A.2d 364, 372 (D.C. 1996)).

One of the main issues in *Brin*—a summary-judgment appeal—was the minimal showing a defendant must make in a medical mystery case before the Court would allow the jury to engage in this fact-bound reasonableness inquiry. The discovery rule is designed to address the concern that, in medically complicated cases, it may often be "impossible for [a plaintiff], 'as a lay [person] unskilled in medicine, *reasonably* to understand or appreciate that actionable harm has been done to him.'" *Bussineau*, 518 A.2d at 434 (quoting *Waldman v. Rohrbaugh*, 215 A.2d 825, 830 (1966)) (emphasis added). Thus, "[s]ince patients must rely on their doctors [to prove their case], a person cannot reasonably be expected or required to act until that person has some medical advice to support a linkage between a known injury and wrongdoing of which the person has some

evidence." *Brin*, 902 A.2d at 793. As a matter of law, then, the *prima facie* showing for this statute-of-limitations defense is the plaintiff's receipt of such advice.

But the receipt of such medical advice does not automatically trigger the statute of limitations; such advice is *necessary* but not *sufficient*. The *sine qua non* of the inquiry is not the mere receipt of certain medical advice, but the reasonableness of the plaintiff's reliance upon it under all of the circumstances. "'The quantum of knowledge sufficient to put one on notice of [his] claims against another' will vary depending on the facts of a case . . . ." *Santos v. Geo. Wash. Univ. Hosp.*, 980 A.2d 1070, 1074 (D.C. 2009) (quoting *Brin*, 902 A.2d at 793). For example, *Brin* itself discussed "factually and legally relevant questions about how the physician conveyed the information to the patient and what emphasis the physician placed on the potentially tortious cause of over causes," which would affect whether it is objectively reasonable to require the plaintiff to rely on that doctor. *Brin*, 902 A.2d at 798 (quotation marks omitted). Other cases relied upon by *Brin* endorse the relevance of a plaintiff's reasonable reliance on statements "to the contrary . . . of a possible causal relationship," *Helinski*, 952 F. Supp. at 272 (citing *Dawson v. Eli Lilly & Co.,* 543 F. Supp. 1330, 1334 (D.D.C. 1982)), as well as "the reasonableness of the plaintiff's reliance on the defendant's conduct and misrepresentations.'" *Santos*, 980 A.2d 1070, 1074 (D.C. 2009) (quoting *Diamond*, 680 A.2d at 379). In the end, *Brin* recognizes that the circumstances will vary from case to case, and ultimately reminds that the "standard is far from a precise one . . . , is highly fact-bound[,] and requires an evaluation of all of the plaintiff's circumstances." *Brin*, 902 A.2d at 794–95 (quotation marks and citations omitted).

Such a rule makes perfect sense, since it would not be fair to force a would-be plaintiff to file simply because one doctor said a causal link was plausible days before receiving new information (like the results of a test) that caused her to unequivocally retract that opinion. Nor would it be fair to force that same plaintiff to file suit after one doctor said, "I believe causation is plausible, but you should check with Dr. X, who is more qualified than me to opinion on the subject"; and Dr. X unequivocally states that the causal link is *not* plausible.

Of course, *Brin* does not permit a would-be plaintiff to wait until they have enough evidence to meet the "applicable standard of ultimate proof required of the plaintiff," i.e., proof based "upon a reasonable degree of medical certainty, that a defendant's negligence is more likely than anything else to have been the cause (or a cause) of a plaintiff's injuries." *Brin*, 902 A.2d at 794 (quotation marks omitted). That is because, in most cases, one could reasonably expect that evidence of only plausible causation would be subject "to the further amplification that, for example, discovery might unearth." *Id.* This rationale was compelling in *Brin*, because the plaintiff there contended that the "discovery" occurred when she obtained certain air-quality reports about the building in which she worked, which had been produced in discovery in a related case and then allowed her doctors to provide more definitive diagnosis regarding whether her conditions were caused by the air in that building. *Brin*, 902 A.2d at 791. In Ramey's case, however, no amount of discovery would provide that missing link. Such information was hidden inside Ramey's body, and was discovered only because Ramey doggedly kept looking when her doctors told her to stop, and she finally convinced someone to

perform a fifth painful and invasive examination when the first four had turned up nothing. While the law should not wait for plaintiffs to obtain a *Daubert*-qualified expert before filing a lawsuit, there should be some reasonable basis for them to believe that one *might* be found before forcing them to sue. Anything else would be an exercise in futility, and "'the law does not require the doing of a futile act.'" *Allen v. United States*, 603 A.2d 1219, 1233 (D.C. 1992) (quoting *Ohio v. Roberts,* 448 U.S. 56, 74 (1980)).

Ultimately, the trial court instructed the jury that all the defendant need prove is the plaintiff's receipt of any "medical opinion that the wrongdoing is a plausible cause of the known injuries," because such an opinion "will [irrevocably] trigger the running of the statute of limitations . . . ." JA693. The instruction that the receipt of any such an opinion—regardless of the circumstances—allowed the jury to disregard almost all of the evidence in Ramey's defense, including:

- The 90+ doctors who either rejected the causal link or concluded it was unknowable;
- The battery of painful tests Ramey underwent over a decade that failed to show any evidence of this suspected causal link;
- The fact that Ramey kept searching for evidence to support a causal link years after doctors told her to give up;
- The fact that doctors who reluctantly acknowledged the *potential* causal link retracted their opinion after extensive testing found no evidence to support it;
- The relative qualifications of Ramey's parents as compared to the treating physicians with whom they shared their opinions, who rejected them; and
- That the 2017 transvaginal ultrasound is what provided the missing link, not anything learned in discovery.

See Facts(F) (describing the trial record). This error seriously affected the fairness and integrity of the trial and practically guaranteed a defense verdict. Accordingly, this error alone is grounds for reversal and a new trial.

B. The trial court erroneously believed that the dispositive distinction between "possible" and "plausible" were interchangeable until it was too late to prevent jury confusion.

As this Court made clear in *Brin*, a medical opinion phrased in terms that are "'neutral, hypothetical, or phrased in terms of mere possibility'" would be legally insufficient *ever* to trigger the statute of limitations, 902. A.2d at 794, 799 (quoting *Helinski*, 952 F.Supp. at 271); but Dunne had at least to prove that Ramey "received medical advice that specifically identifie[d] the alleged wrongdoing of the defendants to be included among the reasonably possible [i.e., "plausible"], causes of her maladies." *Brin*, 902 A.2d at 794. Indeed, the *Brin* court devoted the majority of its opinion to exploring the dispositive importance of this line, distinguishing various formulations—*e.g.*, mere suspicion, possibility, reasonable possibility, plausible cause, and probable cause—drawing the line at "plausible cause" after engaging in a detailed analysis of the policy reasons for doing so. *See id.* at 793–800 (analyzing this Court's discovery-rule jurisprudence; comparing cases from Wisconsin, New Jersey, Indiana, and Maryland).[13]

[13] This dispositive distinction is vital, because merely "possible" causation would be dead on arrival. *See*, *e.g.*, *Comer v. Wells Fargo Bank, N.A.*, 108 A.3d 364, 376–77 (D.C. 2015) (affirming Rule 12(b)(6) dismissal because allegations lacked "a minimum amount of information . . . [to] cross[] the line from stating a claim that [is] possible to one that is facially plausible") (quotation marks omitted).

To place this dispositive possible/plausible line in context, it may be helpful to briefly review the continuum of causation-related information that the parties must prove throughout the lifecycle of a medical mystery case:

		Evidence of Causation	Burden to Prove	Legal Consequences	Increasing evidence of causation →
0		No suspicion	n/a	No duties	
1		Plaintiff has objective reason to suspect *possible* causation	Def.	Duty to reasonably inquire further	
2	**(a)**	Plaintiff's receipt of reasonable medical advice of *plausible* causation	Def.	Minimum necessary for statute of limitations defense to survive summary judgment	
	(b)	Objectively reasonable under circumstances to believe causation is *plausible*	Def.	Statute of limitations accrues	
3		Qualified expert opinion of causation within reasonable degree of medical certainty	Pl.	Plaintiff survives summary judgment	
4		Proof by a preponderance that the plaintiff's expert is correct	Pl.	Plaintiff trial victory[14]	

[14] The legal basis for this chart includes: (1) *Brin*, 902 A.2d at 794 (a plaintiff is on "inquiry notice" upon receipt of "facts . . . sufficient to trigger the obligation to make a reasonable investigation into the possible existence of a cause of action."); (2a) *id.* at 793–94 ("a person cannot reasonably be expected or required to act," as a matter of law, "until that person has some medical advice to support a linkage between a known injury and wrongdoing of which the person has some evidence," that is, has "received medical advice that specifically identifies the wrongdoing of the defendant to be included among the reasonably possible causes of her maladies"); (2b) *Santos*, 980 A.2d at 1074 (quoting *Brin*, 902 A.2d at 793; *Diamond*, 680 A.2d at 379) ("'The quantum of knowledge sufficient to put one on notice of [his] claims against another' will vary depending on the facts of a case" including the objective reasonableness of reliance on the information received);

In the context of medical mystery cases like *Brin* and this one, the lines between these various points of knowledge are "far from . . . precise," 902 A.2d at 793, creating a heightened risk of jury confusion and unfair prejudice if the trial court fails adequately to police them. *See United States v. Black Cloud*, 590 F.2d 270, 273 (8th Cir. 1979) (a "vigorous dispute" about a material factual issue "makes the need for clarity in the jury instruction all the more important."); *Goodman*, No. CV 16-4591 (JMV), 2019 WL 6271815, at *12 (clear jury instructions are particularly important in cases involving "fine distinction[s]"). Indeed, the fine distinction between "possible" and "reasonably possible" is far more likely to result in jury confusion than the distinction that compelled the trial court to bifurcate the trial in the first place. The trial court bifurcated trial to avoid the "particularly prejudicial" risk that the jury would conflate Dunne's twin arguments that (a) Plaintiff should have known causation was plausible but (b) causation was not more likely than not the case within a reasonable degree of medical certainty. JA129. But by the end of closing arguments, the trial court itself was confused about the dispositive difference between "plausible cause or possible

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Brin, 902 A.2d at 795 ("the inquiry is highly fact-bound and requires an evaluation of all of the plaintiff's circumstances.") (quotation marks omitted); (3) *Hinch v. Lucy Webb Hayes Nat'l Training Sch.,* 814 A.2d 926, 929 n. 4 (D.C. 2003) ("Evidence is adequate to establish proximate cause in malpractice cases if [a qualified] expert states an opinion, based on a reasonable degree of medical certainty, that a defendant's negligence is more likely than anything else to have been the cause (or a cause) of a plaintiff's injuries.") (quotation marks omitted); (4) *Giordano v. Sherwood*, 968 A.2d 494, 502 (D.C. 2009) (plaintiff must prove the expert is correct by a preponderance).

cause," repeatedly asserting that the two terms are "interchangeabl[e]" and that all that is required is for Ramey to subjectively "know . . . [i]t's a possible cause." JA650. *See also* JA650–59 (the court insisting "*Brin* uses possible cause" and that *Brin* "us[es] possible and plausible interchangeably."). Although the court ultimately corrected itself by inserting a single sentence in its instructions about "plausible" causation (JA693), this instruction was too little, too late.

It is well established that a single "false statement by counsel to the jury, left uncorrected by the judge . . . can undermine the reliability of the verdict even if there is no actual error in the instructions." *Balthazar*, 735 F.3d at 638. Here, over Ramey's repeated objections, the court failed not only to correct "a false statement by counsel to the jury," it failed to correct Dunne when he misrepresented these dispositive principles (in terms of Ramey's subjective intent, based upon advice of merely "possible" causation) *nearly fifty times*; and twice told the jury that Dunne was right. *See* Facts(E), (H), (J), *supra* (providing examples in opening, closing, and rebuttal). And these misstatements came in the context of a trial in which Dunne's questions to his sole witness—Ramey herself—were phrased in terms of her own subjective beliefs or a doctor's acknowledgement of mere possibility. *See* note 5, *supra* (string-citing examples). *See*, *e.g.*, *Brown v. United States*, 766 A.2d 530, 542 (D.C. 2001) ("Where the case is close, prejudice [from improper argument in closing] cannot be avoided by mild judicial action.") (quotation marks omitted).

Here, Dunne told the jury in opening all he needed to prove was Ramey's belief in possible causation; then at trial he set out to prove Ramey's belief in possible causation; then he told the jury in closing that he had succeeded in proving

Ramey's belief in possible causation. Throughout all of this, the trial court overruled three objections and told the parties that "possible" and "plausible" were interchangeable, before finally changing its mind and offering a single-sentence instruction on plausibility. The risk that the jury based its verdict on a mere showing of belief in possibility cannot be understated in these circumstances.

C. The final nail in the coffin came when the trial court permitted defense to execute a bait-and-switch by raising a previously waived "inquiry notice" theory for the first time in rebuttal.

The trial court delivered the fatal blow to Ramey by permitting Dunne not only to raise a key legal theory he had waived before trial (inquiry notice), but to do so in the form of testimonial opinions by Dunne's counsel contrary to both the existing record and the overwhelming evidence Dunne succeeded in excluding precisely by waiving that legal issue. The unfairness of permitting this argument to stand cannot be overstated.

The trial court has broad discretion to limit rebuttal closing argument that "would 'misrepresent the evidence or the law, introduce irrelevant prejudicial matters, or otherwise tend to confuse the jury.'" *Wash. Inv. Ptnrs. Of Del., LLC v. Sec. House*, 28 A.3d 566, 583 n.25 (D.C. 2011) (quoting *Smith v. United States*, 330 A.2d 519, 521 (D.C. 1974)). "[I]n closing argument, counsel is permitted to make arguments and commentary as long as it is in the general nature of argument, and not an outright expression of opinion." *Bost v. United States*, 178 A.3d 1156, 1190 (D.C. 2018) (internal quotation marks omitted). Improper arguments by counsel "are looked upon with special disfavor when they appear in the rebuttal because at that point [opposing] counsel has no opportunity to contest or clarify what the

[opponent] has said." *Lee v. United States*, 668 A.2d 822, 830 (D.C. 1995) (quotation marks omitted).

Here, the trial court—over Ramey's strong objection—allowed the defense counsel to make an argument for the first time in rebuttal closing argument that (1) reflected the defense counsel's own opinion; (2) contrary to the record; (3) contrary to the party admissions that Dunne excluded by agreeing to waive "inquiry notice"; (4) in support of the "inquiry notice" theory that Dunne had repeatedly waived specifically to exclude those admissions:

> So what happens is Ms. Ramey walks into the lawyer's office, . . . [a]nd the lawyer gets the records . . . *and does investigation*. And Ms. Ramey has told him, "I got to tell you, . . . I'd like to have a vaginal—an ultrasound dune but I haven't been able to get a doctor to do it." "Okay. Well, I'm a lawyer; we have experts and we can get this done." . . . [Lawyers do not] file a lawsuit the second they walk in the door. *They investigate it.* . . . So Dr. Iglesia comes in and says, "Here's what my thought is. At this point in time, we haven't found it, the eureka moment, but I think she should get a vaginal ultrasound under anesthesia." . . . The doctors have been reticent to do it, so the lawyers say, we'll get it done. That's not a problem. *So they investigate it*, they do the ultrasound. And wait a second, the eureka moment isn't in 2019. It's not in 2018, '17, '16. It is from 2007 or within the statute of limitations. She's got an answer and she's got a viable lawsuit.

JA623–24.

Ramey's counsel objected based on Dunne's prior, unambiguous concession of an "inquiry notice" argument. JA625 ("Mr. Vernick is now introducing inquiry notice arguments that he waived. . . . had she done this, she would have—that's inquiry notice. That's an issue he's waived. That's error and all of it should be stricken. . . . He said, if she did more, she would have found more information. . . . That's inquiry notice and the whole rebuttal argument should be

stricken."). The trial court overruled the objection and then instructed the jury, effectively, that Dunne's argument about a hypothetical pre-litigation investigation was entirely proper: "[T]he issue for the jury to decide is what Ms. Ramey knew of her injury, the cause of her injury and some evidence of wrongdoing by the defendants, and not anything she may have learned *after she filed the lawsuit through that process.*" JA629 (emphasis added).

After the trial court overruled the objection, Dunne emphasized the inquiry notice theory again: "And so, what I was chatting with you all about is you would go to a lawyer for that lawyer to do the investigation and determine different facts and features that you could investigate after you go to a lawyer. . . And she said to you, 'I want to have a certain procedure done that I didn't get done until 2017.' And in looking at it from the process of going to a lawyer, that's something that could be worked out at that point in time." JA630.

This argument was grossly improper several times over. It was prejudicially unfair to invoke a legal standard (inquiry notice) at a time when Ramey had no opportunity to respond. It was particularly unfair to do so after Dunne waived that argument *specifically* to keep the jury from learning about Dunne's own factual admissions about the contemporaneous state of medical science at the time Dunne was claiming Ramey should have rushed out to sue, including:

- If Ramey's causation theory "is to be believed, Ms. Ramey would, quite literally, stand alone in the annals of medicine as the first and only person to ever experience the injuries alleged here from the performance of a urethral dilation" (JA45 (emphasis removed));
- "There is not a single reported case study, medical journal article, piece of research, or any other independent basis or source of

information in the history of medicine that attempts to extrapolate, hypothesize, or even so much as speculate that the performance of a urethral dilation can cause the injuries now alleged by Plaintiff" (JA47 (emphasis removed));

- Ramey's "theory of injury has not been tested or repeatedly examined (let alone achieved consistent results) by anyone else in the medical community and indeed has not even been raised for consideration or challenged as a hypothetical injury that can result from a urethral dilation anywhere at any time outside of this instant case with Ms. Ramey" (JA56 (emphasis removed)); and

- "[T]he relevant professional community" does not even recognize that such a causal link is even "possible" let alone "plausible" (JA46–47 (emphasis removed)).

Indeed, if there were any doubt that allowing Dunne to invoke this theory were prejudicial, Dunne himself admitted that the introduction of those statements—which he avoided only by waiving inquiry notice—would have resulted in "**direct . . . and material prejudice to Defendants' position**." JA155 (emphasis Dunne's). And to make matters worse, Dunne not only invoked a legal theory he waived; his argument about that theory was based entirely on his personal opinion about a hypothetical interaction with one of Ramey's treating physicians, Dr. Iglesia, and the medical judgment Dr. Iglesia would have exercised in that hypothetical scenario. *Cf. Bost*, 178 A.3d at 1190 ("[I]n closing argument, counsel is permitted to make arguments and commentary as long as it is . . . not an outright expression of opinion.").

His opinion testimony to the jury was even more improper because the scenario he described—a situation in which a hypothetical lawyer would have convinced Dr. Iglesia to perform a test that she deemed medically unnecessary—would not only be unethical, it was thoroughly contradicted by the record. In June

2014 (after three transvaginal ultrasounds in 2003 and a fourth in 2008 failed to show any evidence of trauma), Dr. Iglesia performed an extensive examination of Ramey under general anesthesia, along with three vulvar biopsies and a cystourethroscopy. JA731–32. The result of that extensive examination was: "Normal urethra and bladder with no lesion, signs of trauma, or prior perforation. . . . Normal vaginal examination. No masses, lesions, or abnormalities noted. No areas suspicious for prior trauma." *Id.* After those tests, Dr. Iglesia refused to conduct another transvaginal ultrasound, telling Ramey "it can be very difficult to image some of these problems, and so you're just not going to know if this is what happened to you." JA493–95. Indeed, Dr. Iglesia told Ramey to "stop trying to dig and get to the root of things" and, instead, "just focus on pain management." JA495. The notion that a *lawyer* would have changed her mind—and somehow taken her back in time seven years to do so—is patently absurd, and to suggest it at a time when Ramey could not address it was horribly improper.

But the prejudice did not stop there. Dunne's improper, opinion-testimony-of-counsel argument about the previously waived legal theory was not just *any* argument, but rather was a direct answer to the *central theory* presented in Ramey's own closing. Moments earlier, Ramey's counsel carefully walked the jury through Ramey's history of invasive and painful medical examinations that revealed *zero* evidence of plausible causation (JA587–89 (describing the history of examination); JA595–607 (walking the jury through the chronology of examinations)) until Ramey finally convinced a doctor to try one more time, and obtained the 2017 transvaginal ultrasound that finally "validated her lay belief." JA591–92. Permitting Dunne to

argument improperly was that *this specific test*—the "eureka moment"—would have happened as early as 2007 (even though identical tests conducted in 2003 and 2008 yielded negative results), practically obliterated Ramey's defense. JA623–24.

It is difficult to conceive of a universe in which this several-ways-improper argument did not dramatically impact the jury's consideration of the case and render the outcome fundamentally unfair.

CONCLUSION

For these reasons, the court should (a) reverse the decision denying Ramey judgment as a matter of law on Dunne's affirmative statute-of-limitations defense and remand for a merits trial; or in the alternative; (b) remand for a new trial in which the jury is instructed about the appropriate standard.

Dated: April 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 17, 2024, I served a copy of this opening brief on all counsel of record through the Court's ECF system.

/s/ Timothy R. Clinton
Timothy R. Clinton

District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended April 17, 2024), this certificate must be filed in all cases with all briefs and motions 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. This form only needs to be filed once and should be filed under "Redaction Certification Form" on Ctrack.

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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

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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.

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23-CV-0672
Case Number(s)

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April 17, 2024
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