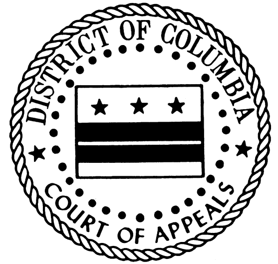
24-CV-0654



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DISTRICT OF COLUMBIA COURT OF APPEAL

24-CV-0654

Robert Newton

Appellant

v. 2023-CAB-007227

Annette Grajny (Dorfman), et al

Appellee

Appeal from the Superior Court of the District of Columbia, Civil Division

Hon. Yvonne Williams

APPELLANT'S REPLY BRIEF IN RESPONSE TO APPELLEES' BRIEF

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RULE 28(a)(2)(A) STATEMENT

That the Judges of this Court may evaluate the need for recusal, undersigned counsel submits. As presently advised, the following are the parties and counsels from the below trial proceedings and/or the present appellate proceedings.

Rachel I Viglianti Barry A. Harris	Medical Faculty Associates Inc., and Annette Grajny (Dorfman) M.D., Charles Samenow, M.D. The George Washington University
K. Nichole Nesbit Ifeanyi O. Ezeigbo	District Hospital Partners, LP d/b/a The George Washington University Hospital
Crystal S. Deese Benjamin S. Harvey	Neurology Center, PA, Philip Pulaski, M.D., and Ezra Cohen, M.D.

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Pursuant to **D.C. App. R. 28** and this Court's briefing schedule, Appellant Robert Newton, by and through undersigned counsel, submits this Reply Brief to address the misstatements, omissions, and erroneous legal interpretations presented in the Appellees' Brief filed on April 25, 2025.

I. INTRODUCTION

This appeal turns on a narrow procedural issue: whether the trial Court abused its discretion in denying Appellant's motion for leave to file a late notice of appeal, where Appellant did not receive timely notice of the dismissal order and relied on erroneous guidance from Court personnel. The trial Court's failure to properly consider all relevant facts and controlling law warrants reversal.

II. ARGUMENT

A. The Trial Court Erred in Denying Relief Under D.C. App. R. 4(a)(5) and 4(a)(7)

Appellees erroneously claim that the trial Court lacked discretion to permit late filing of a notice of appeal under **Rule 4(a)(7)** because Appellant did not file within 14 days of receiving notice. However, **D.C. App. Rule 4, subd. II (a)(4)** states that when a judgment is entered without notice to the parties, time to appeal begins to run three days after mailing. Here, no mailing or e-service occurred and on April 12, 2024, Appellant appeared in person and was handed the order **(Appellant Br. at 6; Appx. 1-2)**.

Although Appellant filed his motion within 180 days of the order's entry, the motion was filed more than 14 days after receiving notice on April 12, 2024. Therefore, the trial Court could not reopen the appeal period under Rule **4(a)(7)(B)**. Nevertheless, Appellant respectfully submits that under **Rule 4(a)(5)** and controlling law, including ***Pioneer Investment Services Co. v. Brunswick Associates,*** **507 U.S. 380 (1993),** the Court should excuse any minor delay based on excusable neglect and good cause.

B. Appellant Demonstrated Excusable Neglect and Good Cause

The trial Court failed to analyze the Pioneer factors that govern excusable neglect: prejudice, length of the delay, reason for delay, and good faith. Appellant's motion and supporting evidence establish:

1. **No Prejudice to Appellees** – The motion was filed less than 30 days after actual notice. There is no disruption to Court operations or unfairness to Appellees.
2. **Minimal Delay** – A 28-day delay in the context of lack of notice and Pro Se reliance is minimal and reasonable. The Appellant in good faith believed he had 30 days from the

date he received the order to file an appeal. Undersigned counsel filed the motion to late file notice of Appeal as soon as she was retained by Appellant. In fact, Appellant wanted to file the notice of appeal without the motion per the clerk's instruction. It was undersigned counsel that advised Appellant that the proper way to go about it is to file a motion for extension of time to file notice of appeal and attaching the notice and ask the Court to deem it filed.

3. **Cause of Delay** – The delay was caused by the Court's failure to notify Appellant. USPS records confirm no mailings from the Court between March 11, 2024, and April 12, 2024. Appellant has presented evidence even confirmed by the Court clerk that the email they sent to Appellant bounced back to them and no notice from the Court e-service was sent to his email between March 11, 2024, and April 12, 2024, even though the clerks keep changing their story. **(Appellant Br. at 7; Appellants Appx. 1-2 (Notarized Affidavit of Ms. West), Appellants Appx. 7-70 (USPS Letter and Verified Correspondence), Appellants Appx. 5-6 (Law Clerk's Email). See also Appellees' Appx. Tab 10 (Godwin Email).** The Appellant should not be prejudiced for the failure on the Court's part.
4. **Good Faith** – Appellant diligently attempted to track his case. He inquired of Court staff on March 22, 2024, if there was any new filing on the docket and relied in good faith on clerk information that there was no new filing and also the clerk's advice that he had 30 days from April 12, 2024, when he received notice, to file his appeal. **(Appellant Br. at 10-13).**

C. Appellees' Reliance on Frazier is Misplaced

Appellees cite ***Frazier v. Underdue-Frazier,*** **803 A.2d 443 (D.C. 2002*)*** to argue that clerk misinformation cannot establish excusable neglect. The Frazier ruling was concerned with

unsworn, uncorroborated statements from an unidentified individual. Here, Ms. Barbara West's sworn affidavit confirms the advice was given by the Clerk, Ms. Clark, and Appellant took immediate action in reliance. Moreover, the Court-issued handbook omitted **Rule 77(d)** and **Rule 4(a)(7)** deadlines, reinforcing Appellant's misunderstanding. It is reasonable for the Appellant, who was acting Pro Se, to believe Ms. Clark's statement that he had 30 days from April 12, 2024, since 30 days was also mentioned in the hand book the Appellant received. The Appellees continue to refer to the handbook, "Representing Yourself in a Civil Appeal" in their brief when in fact the Appellant in his brief referred to the Handbook, "District of Columbia Handbook for People Who Represent Themselves in Civil Cases." The Appellant was never given the Handbook, "Representing Yourself in a Civil Appeal". How the Appellees came up with this is anybody's guess.

D. Appellees Improperly Rely on Irrelevant and Prejudicial Evidence While Omitting Critical Facts About the 2015 Complaint

Appellees repeatedly argue that the underlying claims are "frivolous." **(Appellees' Br. at 6, 12, 21.)** However, the issues on appeal concerns only the trial Court's procedural denial of Appellant's motion for leave to file a late notice of appeal—not the merits of the underlying case. By introducing collateral and speculative allegations, Appellees improperly confuse the procedural posture of this case, violating due process principles and the standards articulated in ***Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380 (1993).**

Appellees heavily rely on a July 15, 2015, complaint filed in the District Court for the Eastern District of Virginia under the **Administrative Procedure Act (APA). Appellees' Br. at 6.** However, Appellees omit critical context. Although George Washington University Hospital and the Neurology Center were mentioned speculatively in the body of the 2015 complaint, they

were never named as defendants in the case caption, and no claims were formally asserted against them. The only formal defendant was Ray Mabus, Secretary of the Navy and co-workers. Under D.C. law, consistent with federal standards, a party must be named in the caption and properly served to be considered a defendant. ***D.C. Metro. Police Dep't v. FOP,*** **997 A.2d 65 (D.C. 2010)**

Appellees argue that Appellant's statute of limitations began to run in 2015 based on the speculative employment-related filing referencing potential RFID implantation. **(Appellees' Br. at 6.**This argument is legally and factually flawed. First, the 2015 administrative complaint was based solely on preliminary suspicions arising from Appellant's own limited research and symptoms, not on confirmed medical evidence. Recognizing the speculative nature of his concerns, Appellant sought diagnostic imaging, which on September 23, 2015, revealed no foreign object or supporting evidence. In good faith, Appellant voluntarily withdrew the 2015 complaint just six days later, on September 29, 2015. **(See Reply Appx., Certified Copy of 2015 Withdrawa**l). This immediate withdrawal upon receipt of negative imaging results demonstrates that Appellant lacked actual knowledge of any injury in 2015. **(See Reply Appx. 2, Certified Copy of the 2015 Negative Imaging Report**).

Under District of Columbia law, the statute of limitations for medical malpractice claims begins to run when the Plaintiff either discovers or, through the exercise of reasonable diligence, should have discovered the injury. Mere suspicion or speculative belief does not trigger the statute of limitations. ***Brin v. S.E.W. Inv'rs,*** **902 A.2d 784 (D.C. 2006) See also** ***Wagner v. Sellinger,*** **847 A.2d 1151 (D.C. 2004).** (holding that "the limitations period begins to run when the plaintiff has 'knowledge of facts sufficient to put him on notice' of the injury"). Appellant's voluntary

withdrawal of the 2015 complaint after negative diagnostic findings confirms that no actual injury had been discovered at that time, nor could it have been discovered through reasonable diligence.

In the District of Columbia, the statute of limitations is not triggered by mere suspicion or speculative belief of wrongdoing. Instead, it requires actual or inquiry notice of an injury, its cause, and some evidence of wrongdoing. Courts have emphasized that the discovery rule governs the commencement of the statute of limitations, requiring a plaintiff to exercise reasonable diligence in investigating potential claims. The determination of whether the statute of limitations has been triggered is often a fact-intensive inquiry which none happened in the case at bar.

Appellant did not obtain evidence of actual injury until years later, when further medical intervention—specifically exploratory surgery and forensic analysis—identified foreign material consistent with RFID implantation. Only after these findings could Appellant, exercising due diligence, have been placed on notice of the actionable injury giving rise to the present claims.

Accordingly, Appellees' assertion that the 2015 filing triggered the statute of limitations is legally unsound and factually misleading. The trial court's reliance on such a mischaracterization further highlights the procedural and substantive errors warranting reversal.

Further, Appellees omit a material fact that fatally undermines their argument: Appellant voluntarily withdrew the 2015 complaint on September 29, 2015, just **six days** after receiving negative diagnostic imaging results on September 23, 2015. Appellant filed the 2015 matter during a period when he was experiencing unexplained health symptoms and acted out of

caution. Upon learning through objective medical testing that his concerns were unsubstantiated, Appellant promptly and in good faith withdrew the administrative action.

By failing to disclose the voluntary withdrawal, Appellees create a materially misleading and incomplete picture of the record. This omission unfairly prejudices the Court by suggesting that Appellant pursued baseless claims when in fact he took immediate corrective action upon receiving clarifying evidence. Such selective presentation of the record distorts the procedural history and undermines the integrity of Appellees' arguments.

Additionally, Appellees attempt to bolster their position by citing a 2015 report authored by Ben Colodzin, Ph.D., which is inadmissible under the ***D.C. Rules of Evidence.*** Mr. Colodzin's report is based on incomplete information based on his own admission and inadmissible hearsay. Moreover, the **California Board of Psychology** determined that Mr. Colodzin was never licensed as a psychologist, disqualifying him from serving as a qualified expert under D.C. evidentiary standards. Expert testimony founded on speculation and unsupported assumptions is inadmissible. ***Russell v. Call/D, LLC,*** **122 A.3d 860 (D.C. 2015)**, where the D.C. Court of Appeals held that the testimony of an expert was properly excluded because it was entirely speculative, lacked necessary training, experience, and knowledge, and was unsupported by adequate data. The court emphasized that expert testimony must have a reliable basis steeped in fact or adequate data, rather than mere conjecture. (**See Reply Appx. 3, Email from the CA Board of Psychology) See also (Appellees' Appx. Tab 4 Colodzin's Report at Page 8, where he stated "4/15: (Dr. Farrier, Los Angeles Ca, Physical Exam for Foreign Bodies, Mr. Newton reports foreign bodies identified. Exam Report pending) 5/15: (Dr. Brunicardi,**

UCLA Medical Center, Westwood, CA, Mr. Newton reports surgical removal of foreign body. Surgical Report pending)"

Under **D.C. Rules of Evidence 401 and 402**, neither the 2015 employment complaint nor Mr. Colodzin's report nor any attachments constitutes relevant evidence bearing on the procedural issues properly before this Court. Even assuming arguendo any marginal relevance, this must be excluded under **D.C. Rule of Evidence 403** because any probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the Court. Admission of such evidence would improperly shift focus from the central appellate question—whether Appellant demonstrated excusable neglect and good cause for the timing of his notice of appeal—to collateral, speculative matters never adjudicated on their merits and involving parties who were not defendants in the 2015 proceeding. Accordingly, the 2015 employment complaint and the Colodzin report should be excluded from consideration.

Also, the Appellees use their renewed Motion for Summary Affirmance to distract the Court from the questions at issue in this Appeal i.e. whether the Judge abused her discretion in denying Appellant's motion for extension of time to file notice of Appeal. Appellant requests this Court not to consider the renewed motion for Summary Affirmance because it basically argues the merits of this case which was never argued in the lower Court.

E. Appellant Did Not Waive Arguments

Appellees argue that Appellant waived his reliance on the clerk's advice and the handbook, "Representing Yourself in a Civil Appeal Handbook" by not raising these issues in the original motion. First and foremost, Appellant never made reference to "Representing yourself in court in a civil appeal handbook". This was a formulation of the Appellees. Appellant only referred to

"District of Columbia Handbook for People Who Represent Themselves in Civil Cases." Appellant's Motion for Leave expressly referenced the lack of notice and reliance on Ms. Clark's representations and was supported by sworn affidavits attached as exhibits **(Appellant Br., Appendix at 1–2, 5–6).** Accordingly, these issues were properly preserved in the record and are subject to full consideration on appeal.

F. Appellees Misstate the Relevance of Counsel's Involvement in the Filing Timeline

Appellees argue that Appellant cannot invoke clerk misinformation or omissions in court-issued materials to establish excusable neglect because he was represented by counsel at the time of filing. **(Appellees' Br. at 22.)** This argument is both factually incorrect and legally unsupported. Appellant was unrepresented at the time he received procedural guidance from D.C. Superior Court staff on April 12, 2024. **(See Affidavit of Barbara West, Appellant's Appx. at 1-2.)** The clerk advised Appellant that he had 30 days from receipt of the dismissal order to file a notice of appeal. Appellant relied in good faith on this advice, and on the Court-issued handbook for pro se litigants, which omitted any mention of **D.C. Appellate Rule 4(a)(7)** or **Superior Court Rule 77(d).** Appellant received actual notice of the judgment on April 12, 2024, and retained counsel on May 10, 2024.

On May 10, 2024, Appellant's attorney, Ms. Chidinma Iwuji, entered her appearance and filed a motion for leave to file a late notice of appeal. **(See Appellees' Br. at 5.)** Her filing was based on the facts and timeline that originated while Appellant was acting Pro Se. Appellant did not delay because of counsel; he sought counsel specifically to resolve confusion created while he was unrepresented.

Excusable neglect under ***Pioneer Investment Services Co. v. Brunswick Associates*, 507 U.S. 380 (1993),** is not limited to whether an attorney was present at the time of filing. The standard looks to the cause of the delay, including factors such as the reason for delay, the length of delay,

whether the movant acted in good faith, and whether the opposing party was prejudiced. Here, Appellant's delay was the direct result of clerk misinformation and omissions in court-issued materials, all occurring while he was Pro Se. Appellant was diligent in making sure that he gets all the Orders issued by the Court when he actually and actively tried to monitor the docket by asking the clerk, Ms. Clark if there were new Court filings. Appellees' attempt to use subsequent representation to negate prior excusable neglect misstates the law and the record.

The relevant timeline is as follows:

- Clerk interaction when appellant asked for new filings in the docket (March 22, 2024)
- Order issued on (March 11, 2024)
- Receipt of March 11, 2024, Order from Clerk on (April 12, 2024)
- Counsel appearance, (May 10, 2024)
- Motion for Extension of time and notice of appeal, (May 10, 2024)

G. Appellees Improperly Assume Appellant Had Constructive Notice Based on a Court Handbook That Omitted the Governing Rules

Appellees argue that Appellant had constructive notice of the appellate deadline based on the "District of Columbia Handbook for People Who Represent Themselves in Civil Cases", which both parties submitted. However, this argument is factually unsupported and legally flawed. First, both the version Appellant received, and the version submitted by Appellees **omit any reference to D.C. Appellate Rule 4(a)(7)** and **Superior Court Rule 77(d)**—the very rules Appellees now claim Appellant failed to follow. Neither version provides any instruction regarding how the time to appeal is affected by the failure to receive notice of entry of judgment, nor do they warn that reliance on clerk advice could be insufficient under those rules. Appellees' assertion that Appellant had constructive knowledge of these technical provisions through the handbook is therefore baseless.

Second, even if the handbook had included the relevant rules (which it did not), Appellees present no evidence that Appellant read or relied on the specific language they cite. Their entire constructive notice theory rests on the assumption that Appellant received the same version of the handbook they presented or should have understood appellate-specific rules omitted from the handbook he actually received. Therefore, Appellees' argument fails as a matter of fact and law. **See Appellant's Response Appendix 5 and Appellees Appendix 12-13.**

H. Appellant Provided Sufficient Evidence of Non-Receipt of the March 11, 2024, Dismissal Order

Appellees argue that Appellant "provided no proof that he did not receive the Order" **(Appellees' Br. at 14)**, but this argument mischaracterizes both the evidentiary record and applicable law. Appellant submitted sworn affidavit **(Appx. 1–2),** screenshots from his e-service accounts **(Appx. 3–4),** and third-party confirmation from the United States Postal Service **(Appx. 7–70)** that no physical mail was delivered from the Court between March 11 and April 12, 2024. Under ***District of Columbia v. Watkins*, 684 A.2d 395 (D.C. 1996)**, Courts credit such corroborated evidence of non-receipt when evaluating excusable neglect. Appellant's evidence, including the clerk's failure to inform him on March 22, 2024, and the email from Judge Williams' chambers confirming that the order was not sent—demonstrates both a good-faith attempt to track the case and a breakdown in notice that supports **Rule 77(d) relief**. See Appellees' Appendix 10 and Appellant's Appendix 3. Both Appendixes should be read together.

I. Appellees' Notice Argument Is Undermined by the Court's Own Missing Envelope Number

Appellees assert that Appellant received notice of the dismissal order entered on March 11, 2024. **(Appellees' Br. at 14, 22.)** However, this claim is unsupported by any definitive proof of transmission or receipt. Appellant requested the envelope number associated with the March 11,

2024, Court order to confirm its delivery, but Chambers staff could not produce it. In a series of emails dated April 28–29, 2025, the court's law clerk admitted:

"I cannot discern the snail mail envelope number from the Court's mailroom. Further, despite the representations from 'Mr. Jerry' at Tyler Technologies, I am personally not aware of any process for discerning the envelope number from an electronic filing…"

See Plaintiff's Reply Appx. 6, (Correspondence with Mr. Banaitis).

Yet, Tyler Technologies — the service provider for D.C. Superior Court's Enterprise Justice system — confirmed that every filing, including filings by Court staff, generates a unique envelope number, and that Court personnel have the ability to view it in their system.

Mr. Jerod Batt stated, "I can confirm: if you would like to obtain the envelope number for a filing you did not submit to a case (i.e. a filing submitted by another Party on the case), you would have to ask either that Party or the Court clerks for that information (if the Court is allowed to provide that information). We at Tyler Technologies can only provide the envelope numbers for filings you submitted (i.e. we can confirm information you already have**)." See Appellant's Reply Appx. 78-80, (Jerod Bat, Tyler Technologies Customer Service Support, Email dated April 29, 2025).** This means that every filing automatically generates an envelope number. (**See Appellant Reply Appx. 72-73, Appellants Junk Mail and Deleted Mails.) See also (Appellant's Reply Appx. 74-77, emails correspondence with Court Clerk), and (Reply Appx. 78-80, Email Correspondence to and from Tyler Technologies, Jerod Batt.)**

III. CONCLUSION

For the foregoing reasons, the trial Court abused its discretion in denying Appellant's motion for leave to file a late notice of appeal. Appellant respectfully requests that this Court reverse the trial Court's decision and remand with instructions to reinstate Appellant's appeal as timely filed.

Respectfully submitted,

______________/s/__________

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served on the attorneys for the Appellees through the D.C. Court of Appeals e-filing system this 1st day of May 2025.

_______________/s/________________

Chidinma Iwuji, Esq.