DISTRICT OF COLUMBIA
COURT OF APPEALS

ROGER TOVAR, **Appellant/Cross-Appellee,** **v.** **REGAN ZAMBRI LONG, PLLC, *et al*.,** **Appellees/Cross-Appellants.**	**APPEAL NO.: 23-CV-165**

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

BRIEF OF APPELLEES/CROSS-APPELLANTS PATRICK M. REGAN, PAUL J. CORNONI AND REGAN ZAMBRI LONG, PLLC,

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LIST OF PARTIES

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to District of Columbia Court of Appeals Rule 26.1, Appellee/Cross-Appellant Regan Zambri Long, PLLC, through undersigned counsel, certifies that Regan Zambri Long, PLLC is a professional limited liability company and has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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I. STATEMENT OF ISSUES

A. Issues for Appeal

1. The trial court did not err in granting Defendants' Super. Ct. Civ. R. 12(b)(6) motion to dismiss because the Complaint did not plead sufficient facts to support a plausible cause of action and allowing Plaintiff to amend his Complaint, when no request to amend was made, would be futile;

2. The trial court did not err in granting Defendants' Super. Ct. Civ. R. 56 motion for summary judgment because Plaintiff failed to establish that there was a genuine issue of material fact; and

3. The trial court did not abuse its discretion in denying Plaintiff's request for additional discovery prior to granting Defendants' summary judgment motion as Defendants' fully answered Plaintiff's discovery requests and produced their entire file, including correspondence, such that Plaintiff had all the information necessary to submit evidence creating a genuine issue of fact and to procure an expert opinion.

B. Issues for Cross-Appeal

1. The trial court erred in its calculation of the Covid Tolling period for the statute of limitations under D.C. Code § 12-301 pursuant to the Superior Court of the District of Columbia's General Order Concerning Civil Cases and the Addendums thereto; and

2. The trial court erred in denying Defendants' Motion to Dismiss and/or for Summary Judgment to Plaintiff/Appellant's Complaint on the statute of limitations pursuant to Super. Ct. Civ. R. 12(b)(6).

II. STATEMENT OF CASE

This is an appeal of a baseless legal malpractice claim asserted by the winner of one of the largest auto-tort verdicts in D.C. history against the attorneys who secured him that verdict.

Appellant/Cross-Appellee, Roger Tovar filed a $10 million Complaint against Appellees/Cross-Appellants Regan Zambri Long, PLLC, and two of its attorneys, Patrick M. Regan and Paul J. Mr. Cornoni (collectively "RZL"). Tovar was involved in a modest rear-end automobile accident on April 26, 2012, which lead to a six-day jury trial and a verdict of $3,797,573 on June 26, 2018. ("Underlying Matter"). Liability was not contested, but damages claimed by Tovar relating to the automobile accident were vigorously disputed.

Tovar claimed a traumatic brain injury ("TBI") and injuries to virtually every part of his body that he related to the automobile accident over the ensuing six years. He saw at least 50 healthcare providers in that timeframe. He terminated many of them for not agreeing that his injuries were related to the accident, and even fired his first counsel who had filed suit in the Superior Court of the District of Columbia. Tovar was an active and engaged participant during discovery and trial in the Underlying Matter.

Tovar rejected all settlement offers prior to trial. Mr. Cornoni tried the case. His strategy was to focus on the effect Tovar's injuries had on his well-being as well as on his future lost wages since Tovar and his doctors indicated he could no longer work in the IT security field. RZL believed, and opposing counsel Mr. Hesselbacher opined in an Affidavit, that if the jury had focused on Tovar's past or future medical bills, the issue of Tovar having "doctor shopped" would have significantly

undermined his credibility before a jury and would likely have resulted in a much lower verdict. Even Tovar's physicians did not support a life-care plan.

RZL's extensive trial preparation, trial tactics, and strategy convinced the jury to award Tovar $3,297,573 for lost wages and $500,000 for bodily injury. Tovar was ecstatic with the verdict. He stated in an email to Mr. Cornoni shortly after the trial the following: "You do realize that you're the winning attorney behind the largest DC Superior Court verdict for auto collisions since available court records show, going back to 2007." He also stated that he wanted the firm to get "every penny" of the $1.2 million it was owed, assuming his math was correct. As expected, the McKesson Defendants appealed. Through this Court's mediation program, on April 25, 2019, the matter settled on appeal for the exact amount of the verdict. With post-judgment interest, the amount due when Tovar settled the case on appeal was slightly less than $4 million – the amount he wanted prior to trial.

On November 26, 2018, in an email discussing the potential for McKesson filing an appeal following post-trial motions, Tovar engaged in a bizarre four-page rant identifying himself as a "Shaman". Tovar suggested in this email that many of his post-accident troubles were related to his other-worldly struggles as a Shaman. Equally disturbing to RZL, prior to trial, Tovar had expressed concerns that the McKesson Defendants had hired "warlocks" for $43,000 to kill him.

Two days after the applicable statute of limitations period expired, Tovar filed a Complaint alleging legal malpractice against RZL for their alleged failure to assert a claim for future medical expenses at trial. RZL provided Tovar's counsel with their entire file and filed a Motion to Dismiss and/or for Summary Judgment. Tovar was provided with all documents and correspondence in RZL's possession in advance of a response date to their Motion which obviated the need for additional discovery in the case. RZL also timely responded to Interrogatories propounded by Tovar.

This legal malpractice claim is atypical in two respects. First, there is a complete record that Tovar and the Court had, including discovery in the underlying matter and a trial record. Second, Tovar argues he got an outstanding result at trial. He is only saying it may have been better if a different strategy had been implemented. RZL is entitled to judgmental immunity, a clearly recognized legal principle in the District of Columbia that bars a hindsight attack from a disgruntled client. The principle equally applies to clients who recognize that the result obtained was outstanding – the best ever reported for an auto tort recovery in the District of Columbia up to that point. Now, more than ten years after his auto accident, more than four years after his verdict, and more than three years after settlement on appeal, Tovar returns to Court in a money-grab attempt to extract even more money from the lawyers who produced what he believed was a phenomenal result.

Tovar had ample opportunity to present evidence and expert testimony in opposition to the request for summary judgment. He did not. It is irrelevant that the expert deadline had not yet passed as Tovar had everything he needed to elicit an expert's opinion on the standard of care in opposition to summary judgment. Accordingly, on February 3, 2023, the Superior Court granted RZL's Motion to Dismiss and/or for Summary Judgment. Tovar's appeal followed, with new counsel, on March 1, 2023. RZL filed their cross-appeal on March 14, 2023.

III. STATEMENT OF FACTS

A. The Automobile Accident and Immediate Medical Treatment

Tovar was involved in a modest automobile accident on April 26, 2012, when rear ended at a red light on New York Avenue and First Street in the District of Columbia. (**Appx. 13 ¶¶ 8-9**). The defendant driver, Steven Hayden was in the course of his employment with McKesson Corporation. (**Appx. 13 ¶ 10**). The EMTs arrived approximately 45 minutes after the accident and Tovar was transported via ambulance to Georgetown University Hospital. (**Appx. 13 ¶ 11**). For some reason, Tovar took two selfies on the way to the hospital in the ambulance. (**Appx. 139-40**). He was discharged from the hospital that same day after less than 2 hours. (**Appx. 147-48**). The nature and extent of Tovar's damages proximately caused by the accident were vigorously contested throughout the Underlying Matter; however, liability was never seriously contested.

Tovar's initial medical visit after the accident was with his primary healthcare provider, Dr. Henslee, on April 28, 2012. He suggested conservative treatment based on his exam which included a finding of a good range of motion with the upper extremities, neck, and back but with a diagnosis of back and neck pain. (**Appx. 278 at 12:18-20; 279 at 13:19-14:11**). Dr. Henslee prescribed Naprosyn and a muscle relaxant as needed for what he described as a "whiplash type injury". (**Appx. 279 at 14:8-20**). Two visits later, Tovar requested a referral to a neurologist. (**Appx. 279 at 15:20-16:18**). Over the next two years, Tovar's doctor shopping took off, as described in his 102-page journal and evidenced in his Preliminary Expert Designation, and he saw at least fifty separate health care providers. (**Appx. 161-261; 117-29**).

Tovar's journal covers April 26, 2012, to July 1, 2014, and demonstrates Tovar self-directing his health care over this period and discharging those doctors who did not provide a diagnosis to his liking. (**Appx. 161-261**). For example, he saw no less than five chiropractors during this period of time. (**Appx. 220**). He also recounted his first IME visit with Dr. Schretlen which lead to him terminating Michael Strong as his attorney. (**Appx. 249-53**). As described in his journal, Tovar kept adding to his litany of physical and emotional complaints over a period of two years. Tovar complained of injuries to virtually every part of his body—head, neck, shoulders, back, knees, digestive system, eyes, ears, TMJ, and complaints of PTSD.

After RZL became counsel of record for Tovar in May 2014, they dismissed the lawsuit filed by Attorney Michael Strong without prejudice and refiled it on July 11, 2014. (**Appx. 80, 106**).

Almost two years after the accident, Tovar first saw Dr. Ross on January 27, 2014, who diagnosed him with traumatic brain injury ("TBI"). (**Appx. 380 at 10:8-10**). From that point on, Dr. Ross became one of his primary doctors relating to his claimed TBI and associated cognitive problems. Tovar complained he could no longer work in the IT security field due to his mental and physical condition, and this formed the basis for his lost wage claim.

Through the course of discovery, there were at least fifteen depositions taken by defense counsel (**Appx. 267 ¶ 18**) and two independent medical examinations conducted on behalf of defendants by Dr. Abend (orthopedist) and Dr. Schretlen (neuropsychologist). Dr. Schretlen's report was highly critical of the causal relationship between Tovar's claimed injuries and the automobile accident. (**Appx. 296**). Dr. Schretlen did not believe that Tovar had TBI, but if he did, it was a mild case. (***Id***.). As he testified at trial, in the overwhelming majority of patients with neurocognitive problems, similar to Tovar, symptoms resolve within 7 to 10 days and the rest within 1 to 3 months. (**Appx. 716-17 at 55:22-56:22**). Dr. Batipps, defense neurologist, testified at trial consistent with Dr. Schretlen's testimony. (**Appx. 589-661**).

B. Settlement Discussions

The parties agreed to mediate the case before retired Superior Court Judge Shuker. These mediations took place on 8/7/15 and 6/24/16, which led to a settlement offer of $650,000. (**Appx. 267 14 ¶ 19**). As of October 11, 2017, Tovar indicated his demand for settlement purposes was $4 million. (**Appx. 292**). The McKesson Defendants did not offer a higher settlement figure until the week before trial, at which point $750,000 was offered to settle the case. (**Appx. 267 ¶ 20; Appx. 320; Appx. 885 ¶ 7**). Tovar rejected it, so the case proceeded to trial on June 18, 2018. (**Appx. 320, 112**).

C. Trial Strategy

RZL obtained records from and met with or spoke to all critical healthcare providers for Tovar in discovery. Many would not support that the damages claimed by Tovar were related to the automobile accident, which presented a challenge in deciding what witnesses to call for trial. (**Appx. 265-66 ¶¶ 16, 17**). For example, Dr. Henslee, Tovar's most longstanding doctor, would not support a finding of traumatic brain injury ("TBI"). (**Appx. 275**).

On February 26, 2018, RZL confirmed with Tovar that at trial, he would not be introducing evidence of past medical bills, but rather was looking to anchor the jury with a much higher figure of over $2 million for future lost wages. (**Appx. 293-95, 265 ¶¶ 16-17**). RZL wanted to focus the jury on the seriousness of TBI and

other injuries, and not equating those injuries to the relatively modest medical bills. (**Appx. 293-95, 265 ¶¶ 16-17**). RZL was also concerned the defense would make an argument that Tovar had doctor shopped. (**Appx. 293-95, 265 ¶¶ 16-17**). Tovar agreed with the strategy not to include past medical bills. (**Appx. 293-95**). Thirteen days prior to the start of trial, on June 5, 2018, Tovar raised the issue regarding future care costs. (**Appx. 1168**) ("Roger called. He would like to ask you whether we should request a report from his treating physician(s) regarding future care costs."). This request was made on June 5, 2018, at 10:44 a.m. (***Id***.). At 10:50 a.m., Mr. Cornoni's assistant asked Tovar if he had time tomorrow to speak with Paul [Cornoni]. (**Appx. 1169**). Tovar responded at 11:27 a.m., "**I just spoke with Paul (he's at lunch). Questions addressed**." (***Id***.) (emphasis added).

RZL tried the case on behalf of Tovar for six days beginning June 18, 2018, which Tovar attended and where no evidence regarding future medicals was presented. (**Appx. 112-14; Appx. 268 ¶ 23**). RZL's trial strategy incorporated the following:

(1) Focus on TBI's effect on Tovar's daily life by calling friends and family who could not be cross-examined on the medical aspects of the case;

(2) Get Tovar on and off the stand as quickly as possible in order to minimize questions about his "doctor shopping" and myriad of complaints related to the automobile accident. RZL also had concerns about the potential

for bizarre testimony based on Tovar's journal and history of discussions he had with him;

(3) Not putting into evidence medical bills for the same reason. Any effort to do so would lead to questions about why Tovar had seen so many healthcare providers and whether their treatment was, in fact, related to the accident;

(4) Focus the jury on Tovar's lost income through testimony of a vocational rehabilitation expert and economist. The defense had no such experts to refute the testimony; and

(5) Undermine by aggressive cross-examination defense experts, and in particular, Dr. Schretlen.

(**Appx. 262-72**).

The trial strategy and judgment exercised by RZL was spot on. The trial transcript for Tovar's testimony consisted of 19 pages of direct examination and 27 pages of cross-examination. (**Appx. 430-80**). Witnesses who knew Tovar before and after the accident filled in the details of what he was like before and after without him having to do so. (**Appx. 356-70, 556-661**). Mr. Melberg's and Dr. Borzilleri's testimony went unrebutted, and the lost wages suggested by Dr. Borzilleri were awarded by the jury. (**Appx. 481-532**). Finally, RZL aggressively cross-examined Dr. Schretlen. (**Appx. 859-883**).

On June 26, 2018, the jury returned a verdict for Tovar in the amount of $3,797,573. (**Appx. 130**). Simply put, the strategy employed by RZL paid off resulting in what Tovar acknowledged was the highest automobile tort verdict based on records maintained by the Superior Court for the past 11 years. (**Appx. 322**) ("You do realize that you're the winning attorney behind the largest DC Superior Court verdict for auto collisions since available court records show, going back to 2007."). Mr. Tovar was ecstatic with the verdict and repeatedly congratulated the law firm and its attorneys on their efforts.

D. Post-Trial Settlement on Appeal

The McKesson defendants filed post-trial motions which were denied. (**Appx. 115, 323, 1097**). RZL anticipated an appeal and advised Tovar of this. (**Appx. 321**). With respect to the appeal, in an email with RZL on November 26, 2018, Tovar bizarrely explained that he expected an appeal, based on his supernatural experiences as a Shaman which he became in 2014. (**Appx. 341-44**). Tovar correctly pointed out that if RZL was aware of all of his Shaman activities before the trial, the attorneys would have pushed even harder for a settlement. (***Id***.).

Tovar continued to resist settlement overtures on appeal, however the defendants ultimately paid full dollar on the verdict by way of a Settlement Agreement signed on April 25, 2019. (**Appx. 131**). Tovar agreed to fully and finally release all claims against defendants for past, present and future medicals, or other

damages that he could claim. (***Id***.). On May 7, 2019, a Praecipe of Satisfaction of Judgment was filed with the court indicating that the case was "settled, paid, and fully satisfied". (**Appx. 115, 353-54**).

E. The Current Lawsuit

On May 9, 2022, Tovar filed the present lawsuit against RZL alleging that, if a claim for his future medical expenses had been raised at trial, the jury "more likely than not," would have awarded him a multi-million-dollar verdict to account for his future medical care, in addition to the nearly $4 million that was awarded for bodily injuries and lost future earnings. (**Appx. 16-18 ¶¶ 29, 34**). Tovar's Complaint alleges that his lawyers, who in his view secured him the highest motor vehicle accident verdict in D.C. history, were ultimately negligent because they did not submit evidence through his treating physicians or a life care planner of his alleged need for future medical treatment. (**Appx. 16 ¶ 27; Appx. 322**).

On July 29, 2022, RZL filed a Motion to Dismiss and/or for Summary Judgment. (**Appx. 27-28**). The Motion to Dismiss argued that: (1) Tovar's legal malpractice claim was barred by the statute of limitations; (2) Tovar's voluntary and knowledgeable settlement precluded his claim against his trial attorneys; and (3) the Complaint failed to assert a claim as it was based on pure speculation and lacked the required proximate cause element. (**Appx. 40-46**). RZL provided their entire file on Tovar, including the pleadings, trial transcripts, correspondence, discovery, and

memoranda to Tovar's counsel at the outset of this litigation obviating any request or need to conduct discovery in the instant case. (**Appx. 63 ¶ 42; 271-72 ¶ 34**). RZL also fully answered Interrogatories propounded by Tovar. (**Appx. 1116-54**). Accordingly, RZL argued that dismissal was further justified when considering these arguments under the summary judgment standard. (**Appx. 46**). In addition, RZL argued that summary judgment was proper because: (1) the judgmental immunity doctrine bars Tovar's malpractice claim; (2) Tovar consented to the underlying trial strategy and is foreclosed from asserting a claim based on his retrospective disagreement with that strategy; and (3) Tovar cannot establish proximate cause, a necessary element of any legal malpractice claim. (**Appx. 46-53**).

Tovar filed an opposition to RZL's motion on August 26, 2022, and attached 18 exhibits and a Statement of Genuinely Disputed Material Facts. (**Appx. 922-1159**). On October 21, 2022, the Superior Court held a hearing on RZL's Motion but did not make any factual findings or render a decision at that time. (**Appx. 1225**). During the October 21 hearing, Judge Scott discussed the District of Columbia precedent that courts are precluded from "second-guessing after the fact" the professional judgment of trial counsel. (**Appx. 1247:7-10**). Additionally, Judge Scott addressed and noted her skepticism concerning Tovar's argument that the alleged malpractice was a mistake by trial counsel as opposed to a reasonable strategic decision. (**Appx. 1250-53**). Judge Scott also observed that Tovar was a very

active participant in the underlying litigation, and that the Court was having a difficult time reconciling Tovar's high level of participation and attendance at a 6-day trial with the argument that he was unaware that a claim of future medical expenses would not be pursued. (**Appx. 1254-56**).

The Superior Court, on February 3, 2023, issued an order granting RZL's Motion to Dismiss and/or for Summary Judgment. (**Appx. 1174**). The Court held that Tovar's knowing and voluntary settlement and release of all claims arising out of the underlying matter, including future medical expenses, constituted a waiver of his ability to seek those expenses from RZL after settlement. (**Appx. 1185**). Judge Scott correctly ruled that "the record does not support a finding that [RZL] breached a duty owed to [Tovar] as [RZL's] decision not to present a lifecare planner was 'a protected exercise of legal judgment and not a basis for legal malpractice.'" (**Appx. 1187**) (quoting *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 665 (D.C. 2009) citing *Nat'l Sav. Bank v. Ward*, 100 U.S. 194, 198 (1880)). The Court ruled that the question whether to present evidence of Tovar's future medical care at trial was indisputably a reasonable, tactical ligation judgment call, which "[Tovar] was aware of", and for which RZL could not be held liable. (**Appx. 1185, 1187-88**). On this issue, Judge Scott explained that dismissal under Rule 12(b)(6) was proper as Tovar's Complaint failed to allege the elements of a legally viable malpractice claim because the alleged error is not actionable as a matter of law. (**Appx. 1188**).

While the Court disposed of the legal malpractice claim on these grounds, Judge Scott recognized alternative grounds for granting RZL's Motion for Summary Judgment:

> based upon the record, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law, given the Court's findings that: (1) Defendants cannot be held liable for legal malpractice because the decision not to present a lifecare planner was reasonable, and a protected exercise of legal judgment and not a basis for legal malpractice; (2) Plaintiff's knowledgeable and voluntary settlement of the underlying matter precludes his claim for legal malpractice; (3) Plaintiff consented to, and participated in, the trial strategy at issue; and (4) The record does not support a finding that Defendants breached a duty owed to Plaintiff, and Plaintiff failed to produce an expert to bolster this claim.

(**Appx. 1188**).

Finally, Judge Scott considered three potential accrual dates for Tovar's legal malpractice claim: (1) June 26, 2018 – the date of the jury verdict in the underlying matter; (2) April 25, 2019 – date of settlement; and (3) May 7, 2019 – date Praecipe of Satisfaction of Judgment was filed. (**Appx. 1181-82**). The Court ruled that the date that the Praecipe of Satisfaction of Judgment was filed – May 7, 2019 – "represents the last date upon which [Tovar] should have been on notice of the existence of a legally cognizable claim." (**Appx. 1183**). However, the Court held that, under any of the three accrual dates, Tovar's Complaint was timely based on what RZL contends was a misapplication of the D.C. Superior Court Covid Tolling

Orders. (**Appx. 1181-83**). Accordingly, due to this error, the Court denied RZL's Motion to Dismiss and/or for Summary Judgment on the statute of limitations argument. (**Appx. 1183**).

V. SUMMARY OF ARGUMENT

The only error made by the District of Columbia Superior Court was the denial of RZL's Motion to Dismiss and/or for Summary Judgment on statute of limitations grounds. The Order, in all other respects, was properly decided and should be affirmed. Under the standard of review of a Rule 12(b)(6) motion, dismissal must be affirmed for 3 reasons: (1) the Complaint failed to state a plausible claim upon which relief can be granted based on the speculative nature of the allegations; (2) the Superior Court correctly held that Tovar's settlement and release of all future costs incurred as a result of his accident precludes this malpractice claim; and (3) Tovar's claim is barred by the statute of limitations.

The Superior Court's grant of RZL's request for summary judgment should not be disturbed because: (1) the judgmental immunity doctrine bars this suit as the trial tactics employed by RZL was a reasonable exercise of professional judgment; (2) the Order's holding on summary judgment issues was not dictum; (3) Tovar's failure to submit expert testimony is fatal to the survival of his malpractice claim; and (4) there can be no proximate cause based on pure speculation in the absence of proof linking the alleged negligence to an actual harm.

VI. ARGUMENT

A. The Trial Court Properly Granted RZL's Motion to Dismiss

Tovar contends that the trial court erred when it treated the arguments raised in RZL's Rule 12(b)(6) motion to dismiss as a Rule 56 motion for summary judgment by engaging in fact finding and considering matters outside the Complaint. (**Tovar's Brief Section VI.B**). The trial court set forth the legal standard for a motion to dismiss and for summary judgment but continued to style its ruling as dismissal under Rule 12(b)(6). (**Appx. 1179-80, 1188**). In such circumstances, where the court considered extraneous documents as part of its decision on a motion to dismiss but did not convert it to one for summary judgment, this Court "treat[s] the dismissal as a grant of summary judgment." *Taylor v. Akin, Gump, Strauss, Hauer & Feld*, 859 A.2d 142, 146 (D.C. 2004); *see also GLM P'ship v. Hartford Cas. Ins. Co.*, 753 A.2d 995, 997 n.6 (D.C. 2000) (citing *Kitt v. Pathmakers, Inc.*, 672 A.2d 76, 79 (D.C.1996)); *Wemhoff v. Inv'rs Mgmt. Corp. of Am.*, 455 A.2d 897, 899 (D.C. 1983).

Conversion to summary judgment is proper if "all parties [are] given a reasonable opportunity to present material relevant to the Rule 56 motion before it is decided.'" *Kitt*, 672 A.2d at 79 (quoting *Vincent v. Anderson*, 621 A.2d 367, 372–73 (D.C.1993)). Tovar makes no claim that he did not have a sufficient opportunity to respond to RZL's motion for summary judgment or to present all evidence

pertinent to such motion. In fact, Tovar was given an opportunity to present, and did present, a Statement of Genuinely Disputed Material Facts, 18 exhibits, including an affidavit, and presented argument on summary judgment issues at the October 21 hearing. (**Appx. 890-1159, 1225-81**). Tovar was afforded full notice that the trial court could apply summary judgment standards to RZL's Motion and was thus not prejudiced by the grant of summary judgment. Accordingly, the trial court's dismissal – treated as a grant of summary judgment – was not in error and should be affirmed.[1]

Even if the trial court erred in considering matters outside of the pleadings, the dismissal may be affirmed where the complaint itself, without reference to those outside materials, fails to state a claim upon which relief can be granted. *See Washkoviak v. Student Loan Mktg. Ass'n*, 900 A.2d 168, 180 (D.C. 2006). Additionally, "[w]here there will be no procedural unfairness, '[this Court] may affirm a judgment on any valid ground, even if that ground was not relied upon by the trial judge or raised or considered in the trial court." *Nat'l Ass'n of Postmasters of U.S. v. Hyatt Regency Washington*, 894 A.2d 471, 474 (D.C. 2006) (quoting *In re Walker*, 856 A.2d 579, 586 (D.C.2004)).

[1] Tovar's argument that summary judgment was premature lacks merit. This legal malpractice case differs from most in that the entire record was available to the parties and the Court and RZL produced their entire file to Tovar, obviating the need to defer judgment until more discovery had been completed. Moreover, Super. Ct. Civ. R. 56(b)(1) provides that "a party may file a motion for summary judgment ***at any time*** until 30 days after the close of all discovery." (emphasis added).

As demonstrated below, whether the trial court considered the issue in the context of a motion to dismiss or a motion for summary judgment, the outcome is the same.

B. Tovar's Complaint Failed To Plead A Plausible Claim For Legal Malpractice

1. Pleading Standard Required to Survive a Motion to Dismiss Under D.C. Superior Court Rule 12(b)(6)

The standard of review of a trial court's decision to dismiss a complaint for the failure to state a claim is *de novo*. *Oparaugo v. Watts*, 884 A.2d 63, 75 (D.C. 2005). This Court has adopted the pleading standard articulated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) for purposes of evaluating a Rule 12(b)(6) motion to dismiss. *See Potomac Dev. Corp. v. D.C.*, 28 A.3d 531, 544 (D.C. 2011). Under this standard, a complaint must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (quoting *Iqbal*, 556 U.S. at 678). Facial plausibility means that the complaint alleges sufficient factual content which enables a reasonable inference to be drawn that the defendant is liable for the acts or omissions alleged. *See Id*. (quoting *Iqbal*, 556 U.S. at 678). "The plausibility standard is not akin to a 'probability requirement,' but it

asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

A pleading that offers "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do[es] not suffice" nor do "'naked assertions' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 555, 570) ("Factual allegations must be enough to raise a right to relief above the speculative level."). Likewise, where the facts alleged to not support a reasonable inference that liability is plausible, the complaint fails to state a claim upon which relief can be granted and it must be dismissed. *See Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007); Super. Ct. Civ. R. 12(b)(6). In addition to the allegations in the Complaint, the Court may consider, under Rule 12(b)(6), documents referenced therein that are central to Tovar's claim and matters of public record and records of prior litigation. *Oparaugo*, 884 A.2d at 76; *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010).

Here, the reviewable documents include the Complaint (**Appx. 11**), the dockets and filings in the underlying litigation (**Appx. 75-130, 323-40, 353-54, 1062-85, 1093-98**), trial testimony (**Appx. 356-887**), and the Settlement Agreement (**Appx. 131-34**). An examination of these documents, even when accepting Tovar's factual allegations as true, demonstrates that the Complaint does not state a claim to relief that is plausible on its face.

2. The Superior Court Appropriately Dismissed the Complaint Because Tovar Did Not Allege Sufficient Facts Establishing a Reasonable Inference That RZL's Purported Breach was the Proximate Cause of Any Harm

In the District of Columbia, a plaintiff must allege facts to support each element of his legal malpractice claim: (1) that there is an attorney-client relationship; (2) that the attorney neglected a reasonable duty; and (3) that the attorney's negligence resulted in and was the proximate cause of a loss to the plaintiff. *Mills v. Cooter*, 647 A.2d 1118, 1123 (D.C. 1994). In the context of causation, "[a] plaintiff must link up the breach of duty to the loss he claims to have sustained." *Herbin v. Hoeffel*, 806 A.2d 186, 194-96 (D.C. 2002). Conclusory allegations of the harm do not suffice to support causation. At the pleading stage, where conclusory allegations do "not 'set forth a plausible description of a lost [claim] that, absent the attorney's alleged neglect, would have assured the plaintiff success,' the trial court [is] left to speculate." *Id.* (quoting *W. Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 677-79 (7th Cir. 2016)).

This Court "decline[s] to find proximate cause where [it] would have to speculate about a legal result." *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 710 (D.C. 2013). The allegations in Tovar's Complaint are devoid of any facts to support proximate cause and merely alleges that a potential harm

resulted from RZL's alleged breach, requiring the Court to speculate about the plausibility of the claim asserted.

The Complaint alleges that at trial, RZL pursued claims for Tovar's lost future earnings and bodily injuries, established by his treating physicians' and experts' testimony that his injuries were permanent. (**Appx. 15 ¶ 24**). Tovar further alleges that RZL did not present a claim for, or evidence of, his future medical treatment and/or expenses at trial through his physicians or a life care planner and did not request the jury to award him any sum for these future expenses. (**Appx. 16 ¶ 27**). Tovar claims RZL did not advise him that was the strategy. (**Appx. 15-16 ¶ 26**). At the close of the 6-day trial, the jury found in favor of Tovar and awarded him $500,000 for bodily injuries and $3,297,573 for lost future earnings. (**Appx. 16 ¶ 28**).

Tovar asserts that he is precluded from seeking and recovering future medical treatment and expenses from the McKesson Defendants as a result of RZL's failure to assert such a claim at trial. (**Appx. 16 ¶ 29**). As to proximate cause, the Complaint alleges: "But for [RZL's] breaches . . . [Tovar] would have, more likely than not, presented evidence of his need for extensive future medical treatment and care at trial, would have been successful, received a multi-million-dollar award to compensate [him] for the life time of future care, and would have collected said award from the defendants in the Underlying Matter." (**Appx. 16-17 ¶ 34**). "This

alleged outcome is predicated upon mere speculation." *Pietrangelo*, 68 A.3d at 710 (dismissing legal malpractice claim on Rule 12(b)(6) motion under similar alleged facts); *see also Mount v. Baron*, 154 F. Supp. 2d 3 (D.D.C. 2001).

Tovar argues that his Complaint sufficiently pled facts in support of the proximate cause element and directs the Court to allegations asserting that "but for" RZL not presenting a claim for future medical care to the jury, Tovar "would have, more likely than not," presented such evidence at trial, the jury would have found in his favor, he would have received a multi-million-dollar award for future medical care, and he would have collected the award from the defendants in the Underlying Matter. (**Tovar's Brief at 7**) (quoting **Appx. 17-18 ¶¶ 33-34**). The allegations that RZL breached their duty by not presenting such a claim at trial and that such alleged breach was the proximate cause of his alleged damages are not factual allegations entitled to the presumption of truth. *See Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1128–29 (D.C. 2015) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.") (quoting *Iqbal*, 556 U.S. at 678).

Contrary to Tovar's arguments, his Complaint did not plead any facts that, if true, plausibly demonstrate that the decision not to pursue a claim for future medicals at trial was the proximate cause of his claimed damages. The Complaint's allegations are similar to those asserted in *Pietrangelo* where the plaintiff alleged "that 'but for'

WilmerHale's filing, the Supreme Court would have granted certiorari, found in his favor on the merits, and remanded the case to the federal district court, which would have ordered Pietrangelo's reinstatement into the military." *Pietrangelo*, 68 A.3d at 710. This Court, in that case, found that "[s]uch compound speculation is insufficient as a matter of law to support a claim for breach of fiduciary duty" and that there were no facts alleged "from which proximate cause and injury can be inferred." *Id*. Here, the facts alleged are such that Tovar is unable establish the existence of anything more than the possibility that he is entitled to the relief sought. The result of this case should follow the result in *Pietrangelo* – dismissal of Tovar's claims under Rule 12(b)(6).

It is entirely speculative to infer that had RZL presented evidence and testimony to support a claim for future medical treatment in the underlying trial, that the opposing parties would not have submitted evidence rebutting the claim, that the jury would have found for Tovar and would have awarded him an amount in excess of the roughly $3.8 million he in-fact received. Moreover, it calls for pure speculation to assume that the jury, in their deliberations, did not account for the evidence that Tovar's TBI was permanent (as such evidence was presented) and include future treatment costs in their calculation of the bodily injury award. It is also speculative to assume that the McKesson Defendants would not have included an argument in their Motion for New Trial or, in the Alternative, for Remittitur based

on the assumed award for future medicals, and that it would not have been granted. Lastly, it is conjecture to conclude that the case would settle on appeal for the amount of a potential higher verdict, or that Tovar would win on appeal.

Moreover, Tovar's uncertainty that he would even present a claim for future medical expenses further demonstrates that his legal malpractice claim is based on conjecture. (**Appx. 17 ¶ 34**) ("[Tovar] would have, ***more likely than not***, presented evidence of his need for extensive future medical treatment and care at trial. . .") (emphasis added). These allegations do not meet the Rule 12(b)(6) standard for pleading sufficient facts to state a claim of legal malpractice on which relief can be granted. Accordingly, the dismissal of Tovar's Complaint under D.C. Super. Ct. Civ. R. 12(b)(6) is proper and the trial court's Order should be affirmed as the Complaint failed to allege facts linking the alleged error to his claimed damages.

3. The Trial Court's Dismissal Based on Tovar's Settling the Matter on Appeal was Proper

As stated above, the Superior Court properly considered the Settlement Agreement on the Motion to Dismiss because it is central to Tovar's claim and referenced in the Complaint.[2] *See Oparaugo*, 884 A.2d at 76 n.10; *see also* (**Appx. 16 ¶ 28**). Tovar bases his malpractice claim on the fact that a claim for future medical treatment and expenses was not asserted at trial. (*See generally* **Appx. 11-18).** While

[2] Tovar's Opposition to RZL's Motion did not contest the consideration of the Settlement Agreement on the Motion to Dismiss argument. (**Appx. 890-921**).

the appeal of the Underlying Matter was pending, Tovar and the McKesson Defendants entered into a Settlement Agreement whereby Tovar would receive the full amount of the verdict in exchange for his release of "any and all past, present or *future* actions, causes of action, *claims*, demands, liabilities, suits, *damages, costs, expenses*, or obligations of any kind whatsoever, which Tovar ever had, now has, or may ever have against the Releasees," arising out of the April 2012 accident. (**Appx. 131-32**) (emphasis added).

Prior to and during trial, Tovar knew he would potentially face future medical expenses due to his injuries. (**Appx. 83, 86-87, 92-93, 97, 119, 127**). Tovar attended all 6 days of trial, where no such evidence or testimony was submitted and no such claim was made. Despite having such knowledge, Tovar carefully read and understood the terms of the Release that precluded him from pursuing a claim for future medical expenses and proceeded to execute the Release forever subjecting himself to its terms. (**Appx. 132**). While he could have, at any time, expressed disagreement with the terms of the Release, he did not. By signing the Settlement Agreement on April 25, 2019, Tovar accepted the full value of the verdict, which RZL obtained for him, believing it to be fair and reasonable. (**Appx. 132-33**). Only later did Tovar claim that his attorneys' trial tactics and advice were arguably flawed and the settlement/verdict inadequate. Similar to *Venable* and *Vogel*, Tovar's willing and knowledgeable release of all future damages and costs precludes this

malpractice claim. *See Venable LLP v. Overseas Lease Group, Inc*., D.D.C. No. CV 14-02010 (RJL), 2015 WL 4555372, at *3 (D.D.C. July 28, 2015) (dismissing legal malpractice claim on motion to dismiss where plaintiff settled underlying claims aware of possible insufficiencies); *Vogel v. Touhey*, 828 A.2d 268, 290 (Md. Ct. Spec. App. 2003) (granting motion for summary judgment).

Tover would derive an unfair advantage if permitted to proceed with this action for legal malpractice. By endorsing the settlement agreement armed with the knowledge that the agreement released all claims of future damages even though not asserted at trial, Tovar created the circumstances that preclude him from attempting to recover the subjective, self-serving value he now claims his case is worth. Tovar could have declined settlement, continued with the appeal and, if successful, could have obtained a more favorable result with additional post-judgment interest. Alternatively, if remanded on appeal, Tovar could have insisted that his counsel pursue future medical expenses at a retrial. However, by settling the claim on appeal and waiving the additional post-judgment interest, Tovar foreclosed his ability to obtain the result he now desires through this malpractice claim.

Accordingly, the Superior Court's dismissal of Tovar's Complaint on this basis was proper and should not be disturbed.[3]

[3] Considering the entire record, summary judgment was warranted on the grounds that Tovar's own conduct in voluntarily settling while on appeal precludes him from seeking damages from his former counsel.

C. The Trial Court's Dismissal – Treated as Granting Summary Judgment – was Proper and this Court may Affirm on Summary Judgment Grounds

1. Standard of Review on Summary Judgment

The granting of a motion for summary judgment is reviewed *de novo*. *Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 312 (D.C. 2006). Under Rule 56 of the District of Columbia of Civil Procedure, summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(a). Theoretical speculations, unsupported assumptions, and conclusory allegations do not create a genuine issue of fact. *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994); *Smith v. Washington Metro. Area Transit Auth.*, 631 A.2d 387, 390 (D.C. 1993). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Super. Ct. Civ. R. 56(c); *Phelan v. City of Mount Rainier*, 805 A.2d 930, 936 (D.C. 2002). Moreover, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Although the party moving for summary judgment has the burden of demonstrating the absence of any issues of material fact and the right to judgment as a matter of law, the movant is not obligated to present supporting evidence. *Ferguson v. District of Columbia*, 629 A.2d 15, 19 (D.C. 1993). Instead, the moving party need only assert that there is a lack of necessary evidence to support the non-moving party's case. At that point, the burden shifts to the non-moving party to show the existence of a genuine issue of material fact. *Id*.; *Smith v. Washington Metro. Area Transit Auth*., 631 A.2d 387, 390 (D.C. 1993). Summary judgment is appropriate here as the material facts are not in dispute.

2. The Doctrine of Judgmental Immunity Precludes Tovar's Legal Malpractice Claim and the Trial Court Did Not Err in Its Holding

The judgmental immunity doctrine stands for the proposition that "an informed professional judgment made with reasonable care and skill *cannot be the basis* of a legal malpractice claim." *Biomet*, 967 A.2d at 666 (emphasis added). It is well established that the process of litigating a claim and determining which arguments are best raised is a strategic, litigation decision subject to an attorney's professional judgment. *Id*. The doctrine "prohibits hindsight attacks that are based on unsettled legal questions 'about which reasonable attorneys could disagree,' as was the case here in regard to how a [jury] would evaluate [Tovar's] case." *Rocha v. Brown & Gould, LLP*, 101 F. Supp. 3d 52, 77 (D.C. Cir. Mar. 30, 2016) (quoting

Encyc. Britannica, Inc. v. Dickstein Shapiro, LLP, No. CIV.A. 10-0454 JDB, 2012 WL 8466139, at *16 (D.D.C. Feb. 2, 2012)). The Court in *Mills* held that "where reasonable attorneys could differ with respect to the legal issues presented, the second-guessing after the fact of [RZL's] professional judgment [is] not a sufficient foundation for a legal malpractice claim." *Mills*, 647 A.2d at 1121.

The rule of judgmental immunity precludes a malpractice claim premised on the attorney's good faith tactical decision in the process of litigating a claim. *See Biomet*, 967 A.2d at 666. This is the law in the majority of jurisdictions. *See e.g., Frank v. Bloom*, 634 F.2d 1245, 1256-57 (10th Cir. 1980) ("[I]t is the duty of the attorney who is a professional to determine trial strategy. If the client had the last word on this, the client could be his or her own lawyer."); *Cecala v. Newman*, 532 F. Supp. 2d 1118, 1139 (D. Ariz. 2007) ("[M]alpractice liability will not attach for tactical decisions made in good faith in the course of preparing or trying a case."); *Merch. v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300, 304 (D. Colo. 1995) ("This principle permits a court to determine, as a matter of law, that an attorney was not negligent based on an error in professional judgment because the law was unsettled on the issue or the attorney made a tactical decision from among equally viable alternatives."); *Crosby v. Jones*, 705 So. 2d 1356, 1358 (Fla. 1998) ("Good faith tactical decisions or decisions made on a fairly debatable point of law are generally not actionable under the rule of judgmental immunity."); *Halvorsen v.*

Ferguson, 735 P.2d 675, 681 (Wash. Ct. App. 1986) ("[M]ere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice."); *Berman v. Rubin*, 227 S.E.2d 802, 805 (Ga. Ct. App. 1976) ("[T]he tactical decisions made during the course of litigation require, by their nature, that the attorney be given a great deal of discretion."); *Baker v. Beal*, 225 N.W.2d 106, 112 (Iowa 1975) (dismissing legal malpractice claim that the attorney-defendant was negligent in failing to assert an additional cause of action in the underlying proceeding); *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 981 P.2d 236, 240 (Idaho 1999) ("[A]n attorney will not be held liable for a mere error in judgment or trial tactics if the attorney acted in good faith and upon an informed judgment."); *Bergstrom v. Noah*, 878, 974 P.2d 531, 556 (Kan. 1999) ("[A]n attorney does not have a duty to insure or guarantee the most favorable outcome possible. . . . [W]hen the proposition is one on which reasonable lawyers could disagree or which involves a choice of strategy, an error of informed judgment should not be gauged by hindsight or second-guessed by an expert witness.") (quoting MALLEN AND LEVIT, LEGAL MALPRACTICE § 215, p. 311); *Ackerman v. Kesselman*, 100 A.D.3d 577, 579, (N.Y. 2012) ("Under the attorney judgment rule, an attorney's 'selection of one among several reasonable courses of action does not constitute malpractice.'").

This Court, in *Biomet*, set forth set forth a "reasonableness" standard that allows an attorney sued for malpractice to prevail upon demonstrating that "(1) the

alleged error is one of professional judgment, and (2) the attorney exercised reasonable care in making his or her judgment." 967 A.2d at 666. RZL has met this standard here.

i. RZL's Alleged Error is One of Professional Judgment Upon Which Reasonable Minds Could Differ

Tovar's charge that certain claims and testimony should have been presented is nothing more than an assertion that another attorney might have conducted the trial differently, a matter of professional opinion that does not allege violation of the duty to perform as a reasonably competent attorney. In his brief, Tovar argues that the decision to not pursue future medical damages was not a strategy decision. (**Tovar Brief VI.C.2.a**.). This is contrary to the concession made by Tovar in his opposition to summary judgment in the lower court. "[Tovar] does not dispute that, to the extent that [RZL] actually made a conscious decision to forego a claim for future care, such a decision would be an exercise of professional judgment." (**Appx. 914**).

Tovar acknowledges that RZL produced their entire client file to his counsel at the outset of this litigation. (**Appx. 914, 915 n. 11, 1157 ¶ 9**). Nevertheless, Tovar argues that discovery is necessary to determine whether the omission was in fact a reasonable exercise of professional judgment. (**Tovar's Brief at VI.D**.). In fact, RZL responded to Tovar's three sets of Interrogatories and Requests for Production prior to the deadline for Tovar to file his Opposition. (**Appx. 1116, 1132, 1144**). The

answers to discovery and the documents produced negate Tovar's claim that further discovery was needed to learn the identities of Tovar's medical providers. (**Tovar's Brief at VI.D. p. 48; Appx. 1090 ¶¶ 18-19; Appx. 1117-22**). The Superior Court, on August 15, 2022, before Tovar opposed RZL's Motion, entered a scheduling order. (**Appx. 8, 888**). However, Tovar did not pursue any discovery beyond the interrogatories and requests for production issued to RZL.

Nor does the affidavit Tovar submitted in response to RZL's Motion satisfy the requirement needed to invoke protection under Superior Court Rule 56(d). Therein Tovar asserts that: "Discovery would be necessary, including depositions, in order to evaluate [RZL's] assertions that they made a reasoned and informed decision when abandoning my claim for future TBI-related care." (**Appx. 1089 ¶ 13**). This broad and conclusory statement, and the paragraphs that follow, fails to "demonstrate precisely how additional discovery will lead to a genuine issue of material fact." *Travelers Indem. Co. of Ill. v. United Food & Commercial Workers Int'l Union,* 770 A.2d 978, 994 (D.C. 2001) (internal citations omitted). Rule 56(d) "impos[es] a requirement that a party seeking further discovery in response to a summary judgment motion submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." *Dowling v. City of Philadelphia,* 855 F.2d 136, 139–40 (3d Cir. 1988) (cited with approval in *Travelers*,

770 A.2d at 994). Tovar's affidavit was insufficient to invoke the protection of Rule 56(d).

Tovar seeks additional discovery as to the identities of the D.C. Bar members RZL consulted regarding the decision to not seek future medical expenses at trial. (**Tovar's Brief at VI.D. p. 47; Appx. 1089-90 ¶ 16**). There is no evidence these Bar members could provide that would demonstrate that the strategy employed was not a reasonable exercise of professional judgment. Assuming a Bar member advised RZL that asserting such a claim would be prudent, that would merely demonstrate that another lawyer would have conducted the trial differently. Even Tovar's first attorney did not identify a lifecare planner (**Appx. 82-105**) and, opposing counsel in the underlying trial Mr. Hesselbacher, believes it would have been a mistake to claim future medical expenses by way of a lifecare planner at trial. (**Appx. 886-87 ¶ 11**). Tovar presented no expert testimony on this issue in response to the Motion for Summary Judgment. *See infra* Section IV.B.4. Nor did Tovar seek to depose Mr. Cornoni or Mr. Regan.

Because the undisputed facts clearly indicate that Mr. Cornoni assessed the relative strengths and weaknesses of Tovar's claims and exercised his best, informed judgment in litigating Plaintiff's claims, any error or mistake in judgment as to this strategy cannot serve as the basis for a legal malpractice action. Accordingly, RZL's

decision to forego a claim for future medical care and expenses constitutes a strategic, tactical decision not actionable under the judgmental immunity doctrine.

ii. The Professional Judgment RZL Exercised was Reasonable

The second element of judgmental immunity defense requires a determination that the attorney's "judgment was reasonable at the time it was made, not whether a different strategy may have resulted in a more favorable judgment." *Biomet*, 967 A.2d at 667 (citing *Mills*, 647 A.2d at 1123] ("[R]etrospective disagreement cannot be the predicate for a finding of legal malpractice.")). Accordingly, there is no need to conduct a trial-within-a-trial to conclude that RZL's judgment was reasonable.

The Complaint failed to allege that the underlying litigation strategy and decision was not reasonable; instead, the Complaint posits that a different strategy may have resulted in a more favorable judgment. Tovar alleges that RZL failed to pursue a claim for his future medical expenses in the underlying trial and had such a claim been made, "Plaintiff, more likely than not, would have been awarded and would have collected the full value of this future care in addition to the award of $500,000 for bodily injuries and $3,297,573 in lost future earnings." (**Appx. 16 ¶ 29**). This alleged outcome is speculative at best. Tovar vaguely suggests that the omission of a claim for future medical care was a "material omission" because "Plaintiff's TBI-related symptomology had gotten worse over time." (**Appx. ¶¶ 27,**

29). This is insufficient to support a finding that RZL's trial strategy was not reasonable.

Both trial counsel have submitted affidavits opining that the strategy employed was the best possible one for Tovar. (**Appx. 262, 884**). In the expressed judgment of both trial lawyers, if Tovar's medical care and expenses were discussed at trial, it would have drawn attention to the multitude of doctors and other healthcare professionals Tovar sought out for unnecessary and redundant treatment and the low value of his medical expenses, without substantially advancing, and most likely harming, his chances for success. (**Appx. 265 ¶ 16; Appx. 886-87 ¶ 11**). If such evidence was raised, the reasons for having seen 40-50 doctors would have come out on cross-examination and would have been used against him by the McKesson Defendants. (***Id***.).

Moreover, RZL was concerned that Tovar would not present well to the jury if faced with an aggressive cross-examination on his medical treatment and costs, based on their history in dealing with Tovar and his strange correspondence to them over the course of four years – *e.g.*, believing the McKesson Defendants hired "warlocks" and demonic entities to perform cadaver rituals in an effort to kill him. (**Appx. 264-71 ¶¶ 13, 16, 17, 27, 33**). RZL's decision to focus on pursuing a claim for bodily injury and future lost wages was a clear strategic judgment and Tovar clearly benefitted from this strategy. Based on the entire record, there can be no

doubt that the strategy employed at trial was a reasonable exercise of professional judgment. (**Appx. 262-72**).

Notably, Mr. Cornoni's Affidavit identified at least 16 factors that he considered in making the reasonable strategic decision not to pursue a life care plan. (Appx. 265-66 ¶ 16). The most significant factors include that: 1) many, if not most, of Tovar's fifty treating health care providers would not support a life care plan; 2) even Tovar's primary physician did not support the finding that he had a TBI; 3) Tovar's brain MRIs were deemed normal by his physicians; 4) a life care plan would have permitted the defense to cross-examine Tovar's treating physicians on past treatment and future care that many would not support; 5) Tovar would have been open to cross-examination on the issues of his doctor-shopping, bizarre comments, and journal notations regarding his numerous doctors, amongst other things. (**Appx. 265-66 ¶ 16**). No discovery was pursued by Tovar on any of these factors.

Upon the filing of RZL's Motion and supporting Affidavit, the burden fell on Tovar to assert actual evidence, not speculation or conclusory averments, showing a genuine issue of material fact. Having received RZL's entire file at the outset of this litigation, to include all available trial transcripts and email correspondence, Tovar was sufficiently equipped to discover any evidence, to support his malpractice claim. Despite being armed with RZL's entire file, Tovar failed to meet this standard. Prior to Tovar's deadline to file his opposition, Judge Scott entered a discovery order but

besides the Interrogatories and Requests issued, Tovar did nothing to pursue the areas of inquiry he now claims are necessary. (**Appx. 8, 888**).

In opposing the Motion, Tovar did not submit any evidence tending to show that the extensive sworn-to-reasons why RZL did not pursue future medicals at trial was unreasonable or not an exercise of professional judgment. (**Appx. 26 ¶¶ 13-17**). Tovar's self-serving, conclusory Affidavit is contradicted by the weight of the record and asserts nothing more than a mere scintilla of evidence insufficient to withstand summary judgment. (**Appx. 1087-92**). For example, Tovar claims that he was unaware that he could make a claim for future medical expenses. (**Appx. 1088 ¶¶ 6-7**). However, Tovar undoubtedly knew he could assert a claim for future medical expenses, stating in his journal on January 26, 2014: "Note: The doctor treating me must provide an opinion regarding what I will need in terms of future medical treatment so that it can be claimed. . . .". (**Appx. 230**) (internal YouTube video link no longer available). Tovar executed, under oath, his Interrogatory Answers that contain claims for permanent injuries and future medical care. (**Appx. 954; Tovar's Brief at 37**). Moreover, as Judge Scott observed, Tovar was very involved in the process of litigating his personal injury claim. (**Appx. 1254-56**).

Tovar agreed with the strategy not to include past medical bills. (**Appx. 293-95**). Thirteen days prior to the start of trial, on June 5, 2018, Tovar raised the issue regarding future care costs to RZL. (**Appx. 1168**) ("Roger called. He would like to

ask you whether we should request a report from his treating physician(s) regarding future care costs."). This request was made on June 5, 2018, at 10:44 a.m. (***Id***.). At 10:50 a.m., Mr. Cornoni's assistant asked Tovar if he had time tomorrow to speak with Paul [Cornoni]. (**Appx. 1169**). Tovar responded at 11:27 a.m., "**I just spoke with Paul (he's at lunch). Questions addressed**." (***Id***.) (emphasis added); see also (**Appx. 267 ¶ 19**).

Tovar's argument that pretrial discovery and filings that contain claims for future medical expenses demonstrates that RZL did not exercise reasonable professional judgment during the trial strains credulity. (**Tovar's Brief at 36-37**). It is not unusual to preserve such arguments pre-trial but to narrow the focus before the jury. RZL used reasonable care in ensuring that the evidence put forth at trial put their client in the best position possible. Indeed, the Complaint, discovery, and pretrial filings included claims for both *past* and future medical expenses. Nevertheless, the record demonstrates Tovar knowingly agreed with RZL's intentional strategic decision not to submit evidence or testimony related to both his past and *future* medical expenses. (**Appx. 293-95, 1168-69**). The argument posited by Tovar neglects the fact that he executed and signed, under oath, the same Interrogatory Answers that included a claim for both past and future medical expenses in the underlying proceeding. (**Appx. 954**). Tovar offers nothing besides his own self-serving conclusory statements that he somehow did not know that

claiming future medical care was an available option. (*compare* **Appx. 1087-88 ¶¶ 4-9** *with* **Appx. 230, 267 ¶ 19, 954, and 1168-69**).

3. The D.C. Superior Court's Summary Judgment Holding was not Dictum

Tovar's Brief argues that the trial court erred in granting the Motion to Dismiss when it considered extra-record exhibits and engaged in fact finding. (**Tovar's Brief at 21-22, 24-32**). Effectively, Tovar argues, the trial court applied the summary judgment standard to the arguments under the motion to dismiss. Tovar then argues that the trial court's ruling on summary judgment was not a holding at all but pure dictum. (***Id.* at 33-34**). Tovar cannot have it both ways.

Dictum refers to a statement by a court's opinion that is "entirely unnecessary for the decision of the case." *Albertie v. Louis & Alexander Corp*., 646 A.2d 1001, 1005 (D.C. 1994) (quoting *Noel v. Olds*, 138 F.2d 581, 586 (D.C.A 1943)). "It is 'a statement not addressed to the question before the court or necessary for its decision.'" *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) (quoting *American Family Mutual Ins. Co. v. Shannon*, 356 N.W.2d 175, 178 (Wis. 1984)). "The basic formula [for distinguishing holding from dictum] is to take account of facts treated by the judge as material and determine whether the contested opinion is based on them." *Id*. (quoting *United Steelworkers of America v. Board of Education*, 209 Cal. Rptr. 16, 221 (Cal. Ct. App. 1984)) (alterations in original). The

rationale against giving weight to dictum further demonstrates that the trial court's statement regarding summary judgment was not dictum:

> the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential to the outcome. A closely related reason is that the passage was not an integral part of the earlier opinion—it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion and, again, may not have been fully considered. Still another reason is that the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it; another, that the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation.

Albertie, 646 A.2d at 1005 (quoting *Crawley*, 837 F.2d at 292-93.

Here, RZL filed a Motion to Dismiss and/or for Summary Judgment, including a Statement of Undisputed Material Facts. (**Appx. 27, 55**). Tovar's Opposition directly addressed RZL's summary judgment arguments and included a Statement of Genuinely Disputed Material Facts, which did not, however, correspond to each of RZL's numbered paragraphs. (**Appx. 1155**). The trial court held, "***based upon the record***," that "there [was] no genuine issue of material fact and [RZL] are entitled to judgment as a matter of law ***given the Court's findings that***: (1) [RZL] cannot be held liable for legal malpractice because the decision not to present a lifecare planner was reasonable, and a protected exercise of legal judgment and not a basis for legal malpractice; (2) [Tovar's] knowledgeable and

voluntary settlement of the underlying matter precludes his claim for legal malpractice; (3) [Tovar] consented to, and participated in, the trial strategy at issue; and (4) The record does not support a finding that [RZL] breached a duty owed to [Tovar], and [Tovar] failed to produce an expert to bolster this claim." (**Appx. 1188**) (emphasis added).

The trial court expressly noted that it took into account the factual record and made specific findings as to the arguments RZL raised in their Motion for Summary Judgment. The four findings of the trial court were questions before the court necessary for the decision on summary judgment grounds. Accordingly, the Superior Court's findings on these issues was not dictum and summary judgment should be affirmed.

4. The Failure to Present Any Expert Testimony in Response to RZL's Request for Summary Judgment was Insufficient to Defeat that Request

When RZL filed the Motion to Dismiss and/or for Summary Judgment, it became incumbent on Tovar to "provide evidence showing that there is a triable issue as to each element" of his claim. *Kaempe v. Myers*, 367 F.3d 958, 966–67 (D.C. Cir. 2004). In an attorney malpractice case, that requires "providing expert testimony establishing the applicable standard of care.'" *Flax v. Schertler*, 935 A.2d 1091, 1107 (D.C. 2007). In determining whether RZL was negligent in failing to assert a certain claim at trial, and whether that omission caused Tovar harm, a jury would

need to understand the elements of the claim, how to calculate damages, the strength of the supporting proof, the interplay of the supporting evidence with the other claims asserted, the foundation of the RZL's rationale for the strategy employed for the claims that were pursued, "and many other factors that an expert who is an expert trial lawyer would understand, but that would not likely have been within the common knowledge of a jury. *Id.* At the time Tovar's Opposition was filed, no additional discovery was needed, **nor sought**, to procure an expert opinion. All the information needed to form an expert opinion on these issues could be found in RZL's file and email correspondence, which was indisputably provided to him on or about August 26, 2022. (**Appx. 1166; Appx. 915 n.11**).

RZL also submitted with their Motion, affidavits from lead counsel for Tovar, Mr. Cornoni, and from the attorney for the McKesson Defendants, Robert Hesselbacher. (**Appx. 262; Appx. 884 ¶ 6**). Tovar chose not to depose Mr. Hesselbacher or Mr. Cornoni, and the opinions and experience of both attorneys went undisputed. (**Appx. 262 ¶¶ 1-9; Appx. 884 ¶¶ 1-5**). Mr. Hesselbacher opined that not pursuing a claim for future medical expenses at trial, "was the best way for Mr. Cornoni to try the case." (**Appx. 886-87 ¶ 11**). In Mr. Hesselbacher's opinion, RZL "did not commit legal malpractice in the trial of or in the settlement of this matter." (***Id.* ¶ 12**). Tovar could not, and did not, survive summary judgment without an expert witness to rebut these conclusions or create a genuine issue as to whether

RZL's professional judgment was reasonable. Nor did he elicit any opinion whatsoever on the issues that would be presented to a jury in a trial-within-a-trial of this case in response to the summary judgment motion.

Accordingly, Tovar failed to create a genuine issue of material fact through the required expert testimony such that summary judgment in RZL's favor was properly granted.

5. Considering the Entire Record it is Evident that Tovar Cannot Establish that RZL's Alleged Failure was the Proximate Cause of any Actual Harm

Although the Rule 12(b)(6) dismissal of Tovar's Complaint on the absence of proximate cause is proper, justification for dismissal is bolstered when the absence of proximate cause and speculative nature of the claim is examined under the summary judgment standard. *See supra* Section V.A.2. In responding to RZL's request for summary judgment, Tovar must show, beyond mere speculation, that RZL's alleged negligence was the proximate cause of a legally cognizable injury. *Chase v. Gilbert*, 499 A.2d 1203, 1212 (D.C. 1985). "If the plaintiff cannot establish that [he] would have "fared better" in the absence of the attorney's negligence, [he] cannot prevail on [his] legal malpractice claim." *Steele v. Salb*, 93 A.3d 1277, 1281 (D.C. 2014). Tovar failed to produce any evidence to support a reasonable inference that a jury would have awarded him millions of dollars for future medical expenses in addition to the nearly $3.8 million already awarded.

It is sheer speculation to conclude that Tovar would have obtained a higher verdict with different evidence or a different witness or different testimony. Although Tovar asserts various generalized categories of evidence that should have been submitted at trial, he did not, produce any evidence to support his claim or what his future medical expenses are/were, or any evidence that would convince the Court that his malpractice theory was based in anything more than conjecture. Not only does the absence of this evidence fail to establish proximate cause, it also fails to demonstrate how Tovar suffered an actual, concrete injury. Moreover, considering the amount of evidence concerning Tovar's incredulous beliefs and statements that would be submitted in a trial-within-a-trial, – *e.g.*, statements regarding "warlocks" and his supernatural experiences as a Shaman – only a fraction of which is contained in the record, it is complete guesswork to assume the verdict would be higher.

Accordingly, the record clearly demonstrates that the speculative nature of Tovar's malpractice suit and absence of actual harm is insufficient to show proximate cause in relation to producing a better result in the ultimate outcome. Thus, this Court should affirm the granting of summary judgment in RZL's favor.

D. The Superior Court's Denial of RZL's Motion to Dismiss on Statute of Limitations Grounds was Error

In the District of Columbia, legal malpractice claims are subject to the three-year statute of limitations per D.C. Code § 12-301. *Knight v. Furlow*, 553 A.2d 1232, 1233 (D.C. 1989). To be timely, a plaintiff's cause of action must be filed within

"three years from the time the right to maintain the cause of action accrues." *Id*. (internal citation omitted). The cause of action normally accrues when the injury occurs, however, where the connection between the injury and the alleged tortious conduct is obscure, the District of Columbia applies the "discovery rule" to determine the accrual date. *Id*. at 1234. Inquiry notice of the relevant facts that support the causes of action "must be assessed under an objective 'reasonable person' standard." *Hendel v. World Plan Exec. Council*, 705 A.2d 656, 661 n.5 (D.C. 1997). That standard applies "regardless of the presence or absence of fraud, or the characterization of that fraud." *Diamond v. Davis*, 680 A.2d 364, 381 (D.C. 1996). Under the discovery rule, a plaintiff's claim accrues, and the limitations period begins to run, when a plaintiff has knowledge of, or by the exercise of reasonable diligence should have knowledge of: (1) some injury, (2) its cause-in-fact, and (3) some evidence of wrongdoing. *Id*. So long as the plaintiff should know of any appreciable harm, a cause of action accrues. *Knight*, 553 A.2d at 1235.

The District of Columbia Superior Court's COVID Orders suspended the statute of limitations for claims that would otherwise expire between March 18, 2020, and March 31, 2021. By statute, the Chief Judge of the Superior Court is cloaked with the authority to "enter such order[s] . . . to delay, toll, or otherwise grant relief from the time deadlines imposed by otherwise applicable laws or rules." D.C. Code § 11-947(a)(2)(A). The Court's Order described the tolling period:

> In the March 30, 2021 Order, the Chief Judge ended tolling of the statute of limitations in civil cases (with exceptions inapplicable to the instant matter). See Chief Judge Order (Mar. 30 2021). Additionally, on January 21, 2021, the then Presiding Judge of the Civil Division issued an Addendum to the General Order Concerning Civil Cases, which provided, in relevant part: "If an event before the start of the tolling period triggered a deadline that falls within the tolling period, the number of days remaining before the original deadline on March 18 are added to the end of the tolling period." Amended Addendum to the General Order Concerning Civil Cases (Jan. 21, 2021). Thus, all statutes of limitations were tolled between March 18, 2020 and March 30, 2021, so long as they fell within the tolling period.

(**Appx. 1181**).

The language of the Chief Judge's tolling orders plainly shows that the statute of limitations periods was only tolled in cases where the statute of limitations would have expired during the period of emergency – March 18, 2020, and March 30, 2021. *See Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) ("The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that [they have] used." (internal quotation marks omitted)). While the trial court accurately described the tolling period, it erred in applying the Covid tolling period to the three possible accrual dates of Tovar's legal malpractice claim: 1) the date of the jury verdict – June 26, 2018; 2) the date of settlement – April 25, 2019; and 3) the date the Praecipe of Satisfaction of Judgment was filed with the Court – May 7, 2019. (**Appx. 1181-83**).

Absent any tolling provision, the three-year statute of limitations for the foregoing accrual dates expired on June 25, 2021, April 24, 2022, and May 6, 2022, respectively. None of these expiration dates fall "within" the tolling period described by the Covid Orders such that Tovar's claim was not subject to tolling. Therefore, the trial court erred in applying the tolling period and in finding that Tovar's Complaint, filed May 9, 2022, was timely.

Accordingly, irrespective of the other legitimate grounds for dismissing Tovar's claim and/or entering summary judgment in favor of RZL, the Complaint is barred by the statute of limitations and must be dismissed on that basis.

VII. CONCLUSION

A careful review of the record, under either a motion to dismiss or summary judgment standard, leads to one conclusion – the Superior Court's dismissal of Tovar's Complaint with prejudice should be affirmed. Alternatively, Tovar's claim was barred by the applicable statute of limitations.

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CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on October 23, 2023, I filed the Response Brief and Opening Cross-Brief of Appellees with the Clerk of the District of Columbia Court of Appeals and served the Brief of Appellees on this same date via the D.C. Court of Appeals e-filing system.

/s/ Paul J. Maloney

Paul J. Maloney

D.C. Ct. App. R. 28 ADDENDUM

District of Columbia Superior Court Rules of Civil Procedure Rule 12

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

(a) Time to Serve a Responsive Pleading.

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

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

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

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

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

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

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

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

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

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

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

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) [Omitted];

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under Rule 19.

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

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but early enough not to delay trial a party may move for judgment on the pleadings.

(d) Results of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

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

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

(1) on its own; or

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

(g) Joining Motions.

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

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

(h) Waiving and Preserving Certain Defenses.

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

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

(B) failing to either:

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

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

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

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

(B) by a motion under Rule 12(c); or (C) at trial.

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

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

District of Columbia Superior Court Rules of Civil Procedure Rule 56

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment.

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

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

(b) Time to File a Motion; Format.

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

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

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

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

(c) Procedures.

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

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

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

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

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

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

(d) When Facts are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

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

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief-- that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

D.C. Code § 12-301. Limitation of time for bringing actions

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

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

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

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

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

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

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

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

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

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

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

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

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

[(b)] This section does not apply to actions for breach or contracts for sale governed by § 28:2-725, nor to actions brought by the District of Columbia government.

D.C. Code § 11-947. Emergency authority to toll or delay proceedings.

(a) *Tolling or Delaying Proceedings.* --

(1) *In general.* -- In the event of a natural disaster or other emergency situation requiring the closure of Superior Court or rendering it impracticable for the United States or District of Columbia Government or a class of litigants to comply with deadlines imposed by any Federal or District of Columbia law or rule that applies in the Superior Court, the chief judge of the Superior Court may exercise emergency authority in accordance with this section.

(2) *Scope of Authority.* --

(A) The chief judge may enter such order or orders as may be appropriate to delay, toll, or otherwise grant relief from the time deadlines imposed by otherwise applicable laws or rules for such period as may be appropriate for any class of cases pending or thereafter filed in the Superior Court.

(B) The authority conferred by this section extends to all laws and rules affecting criminal and juvenile proceedings (including, pre-arrest, post-arrest, pretrial, trial, and post-trial procedures) and civil, family, domestic violence, probate and tax proceedings.

(3) *Unavailability of Chief Judge.* -- If the chief judge of the Superior Court is absent or disabled, the authority conferred by this section may be exercised by the judge designated under section 11-907(a) or by the Joint Committee on Judicial Administration.

(4) *Habeas Corpus Unaffected.* -- Nothing in this section shall be construed to authorize suspension of the writ of habeas corpus.

(b) *Criminal Cases.*. -- In exercising the authority under this section for criminal cases, the chief judge shall consider the ability of the United States or District of Columbia Government to investigate, litigate, and process defendants during and after the emergency situation, as well as the ability of criminal defendants as a class to prepare their defenses.

(c) *Issuance of Orders.* -- The United States Attorney for the District of Columbia or the Attorney General for the District of Columbia or the designee of either may request issuance of an order under this section, or the chief judge may act on his or her own motion.

(d) *Duration of Orders.* -- An order entered under this section may not toll or extend a time deadline for a period of more than 14 days, except that if the chief judge determines that an emergency situation requires additional extensions of the period during which deadlines are tolled or extended, the chief judge may, with the consent

of the Joint Committee on Judicial Administration, enter additional orders under this section in order to further toll or extend such time deadline.

(e) *Notice.* -- Upon issuing an order under this section, the chief judge --

(1) shall make all reasonable efforts to publicize the order, including, when possible, announcing the order on the District of Columbia Courts Web site; and

(2) shall send notice of the order, including the reasons for the issuance of the order, to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives.

(f) *Required Reports.* -- Not later than 180 days after the expiration of the last extension or tolling of a time period made by the order or orders relating to an emergency situation, the chief judge shall submit a brief report to the Committee on Homeland Security and Governmental Affairs of the Senate, the Committee on Oversight and Government Reform of the House of Representatives, and the Joint Committee on Judicial Administration describing the orders, including –

(1) the reasons for issuing the orders;

(2) the duration of the orders;

(3) the effects of the orders on litigants; and

(4) the costs to the court resulting from the orders.

(g) *Exceptions.* -- The notice under subsection (e)(2) and the report under subsection (f) are not required in the case of an order that tolls or extends a time deadline for a period of less than 14 days.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ORDER

(Amended 3/19/20)

By order issued on March 18, 2020, the Joint Committee of Judicial Administration authorized the Chief Judge to issue orders extending the period during which deadlines are suspended, tolled, and extended for all statutory and rules-based time limits in the D.C. Code, and the Superior Court Rules, during the current judicial emergency and consistent with the best interest of the administration of justice.

By Order of the Chief Judge, the District of Columbia Superior Court is adjusting its operations to address concerns regarding the Coronavirus (COVID19). The court will make additional adjustments as circumstances warrant.

To the extent that a case type has not been identified below, all nonpriority matters scheduled before May 15, 2020, will be rescheduled and new dates set; emergency matters will be heard as scheduled by the court and as set forth below.

It is ordered that no attorney or persons should enter the courthouse with symptoms of C0V19.
See https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html

Any party may seek relief from these changes by filing a motion with the appropriate court.

Filings:

All Divisions and the Family Court will be open for filing of pleadings, motions and new cases with limited staff. Electronic filing will continue.

The following procedures are in effect through May 15, 2020:

Suspending, Tolling, and Extending Filing Deadlines:

Unless otherwise ordered by the court, all deadlines and time limits in statutes, court rules, and standing and other orders issued by the court that would otherwise expire before May 15, 2020 including statutes of limitations, are suspended, tolled, and

extended during the period of the current emergency. Such deadlines and time limits may be further suspended, tolled, and extended as circumstances change.

Court Operations:

The court will hear only the following matters:

- Felony presentments and misdemeanor arraignments other than citation arraignments;
- Juvenile initial hearings and petitions for writ of habeas corpus;
- Initial hearings and requests of removal in neglect and abuse matters; and
- Emergency matters only.

The following courtrooms will hear matters:

- C-10: Criminal Arraignments and Presentments
- JM-15: Family Court Emergencies, Neglect Initial Hearings, and Juvenile Initial Hearings
- 115: Criminal Division and Domestic Violence Emergencies - other than TPOs emergencies which will be heard via Web Ex, see below
- 516: Civil and Probate and Tax Division Emergencies (Judge in Chambers)

All other matters are continued, parties need not appear and the court will notify parties of new date.

Additional Matters:

- All jury trials in progress shall proceed as scheduled.
- The court will still rule on motions and matters that can be decided without a hearing in all Divisions.

- Parties may file, and the court will rule on, applications for waivers of filing fees and other costs.

- The court will accept court-ordered payments by individuals; only payments for criminal matters, except bond payments, can be made electronically. In addition, any obligation of any tenant under a protective order to make payments into the court registry is suspended during the period of the emergency. Tenants should make these payments instead directly to landlords, and a landlord's acceptance of a direct payment will not prejudice the landlord's ability to prosecute the action. If a landlord seeks sanctions for violation of a protective order after the public health emergency ends, the court will consider, in addition to other relevant circumstances, exigent circumstances relating to the public health emergency.

- All evictions of tenants and foreclosed homeowners on or before May 15, 2020 are stayed.

- Extradition matters shall proceed as scheduled.

- Indictments returned by the grand jury shall be received as presented; all matters concerning appearance before the grand jury will be considered as presented.

- Pretrial and Probation show cause hearings and motions to review bond or release conditions may proceed and be heard by the Criminal Division Emergency Judge where appropriate.

- Any existing Temporary Protection Order and Civil Protection Order will remain in effect and will be extended through May 15, 2020 or to the next assigned court date.

- Requests for Temporary Protection Orders will be available through the Emergency Temporary Protection Order (ETPO) Process. During this emergency operating Court status, the ETPO process will be accessible at any time of the day for situations involving immediate danger. If you are in immediate danger and call the police (911) or the DC Safe Critical

Response Team (800) 407-5048, you will be routed to the ETPO process to determine if you qualify for an Emergency Temporary Protection Order.

- Emergency Filings in Civil Protection Order cases can be made through www.probono.net/dccourts. You can complete and submit the forms electronically. Once you complete and submit the form, please contact the Clerk's Office to proceed with the filing by phone at (202) 879-0157 or by email at domesticviolencemanagement@dcsc.gov. You can also access the Domestic Violence Division forms on the DC Courts website at http://www.dccourts.gov/services/forms?title=&combine and, after completing the form, email it to domesticviolencemanagement@dcsc.gov. If there is a form that is not available on the website, please email domesticviolencemanagement@dcsc.gov for further assistance.

- The Marriage Bureau will not be issuing marriage licenses at this time. Wedding ceremonies previously scheduled will not go forward. If you wish to reschedule your ceremony, please contact the Marriage Bureau at (202) 879-1212.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ORDER

(Amended 3/30/21)

By Order issued on March 18, 2020, and reaffirmed on May 29, 2020, the Joint Committee of Judicial Administration authorized the Chief Judge to issue orders extending the period during which deadlines are suspended, tolled, and extended for all statutory and rules-based time limits in the D.C. Code, and the Superior Court Rules, during the current judicial emergency and consistent with the best interest of the administration of justice.

By Orders issued March 18, 2020, March 19, 2020, May 14, 2020, June 19, 2020, August 13, 2020, November 5, 2020, and January 13, 2021, the Chief Judge ordered that (except as otherwise specified) all deadlines and time limits in statutes, court rules, and standing and other orders issued by the Court that would otherwise expire, including statutes of limitations, are suspended, tolled, and extended during the period of the current judicial emergency. As indicated in that order, the deadlines and time limits may be further suspended, tolled, and extended as circumstances change. Suspension, tolling, and extension will continue to the extent specified in this Order until at least May 20, 2021. The Court will provide at least 60 days' notice before ending all suspension, tolling, and extension of deadlines.

The Court is expanding the types and number of cases it will hear through May 20, 2021.

To ensure the safety and well-being of Court staff, counsel, parties, and members of the public, all case types will be heard remotely, except for a limited number of Criminal Division and Domestic Violence Division hearings, which will be partially remote.

To the extent that a case type has not been identified below, all nonpriority matters scheduled through May 20, 2021, will be rescheduled and new dates set; emergency matters will be heard as scheduled by the Court and as set forth below. Presiding Judges will issue additional orders, as necessary, setting forth the matters to be heard.

No attorney or persons should enter the courthouse with symptoms of C0VID-19. See https://www.cdc.gov/coronavirus/2019-ncov/about/symptoms.html

Any party may seek relief from these changes by filing a motion with the appropriate division.

All Divisions and the Family Court will be open in a remote status for filing of pleadings, motions, and new cases. Electronic filing will continue. See the Clerk's Offices Remote Operations Notices for detailed information. http://www.dccourts.gov/coronavirus

The Court is now accepting electronic payments in certain circumstances. For more specific information, see https://www.dccourts.gov/services/onlinepayment.

When permitted by law, members of the public may have real-time access to remote hearings. Information about the process for listening to live remote proceedings are posted on the Court's website.
https://www.dccourts.gov/services/remote-hearing-information

The Court will make additional adjustments as circumstances warrant. Most courtrooms can be used for remote operations, and the Court will equip the remaining courtrooms as soon as possible. As additional courtrooms are made available, the Presiding Judges for each Division will announce other matters that may be scheduled and heard.

The Court will operate primarily remotely under the following conditions:

CIVIL DIVISION

Unless otherwise ordered by the Court, no deadlines and time limits in statutes (including statute of limitations), court rules, and standing and other orders issued by the Court are suspended, tolled or extended during the period of emergency, with the following exceptions: (1) statutes of limitations on claims subject to a statutory moratorium during a public health emergency are suspended, tolled and extended until the moratorium ends; and (2) the time limits concerning the validity and issuance of writs of restitution in Rules 16(a)(4) and 16(c) of the Superior Court Rules of Procedure for the Landlord and Tenant Branch that would otherwise expire during the period of emergency are suspended, tolled and extended during the period of emergency.

The Civil Division will operate as follows:

- Both judges and division staff continue to work remotely. Judges will conduct remote hearings five days per week in virtual courtrooms. No parties or attorneys should appear in person unless specifically directed to do so by a judge. •

- Any emergency motion must be electronically filed and emailed to Civilefilings@dcsc.gov.

- The Civil Division may conduct remote non-jury trials with appropriate notice to the parties. The Civil Division plans to resume jury trials starting in May 2021. When the Civil Division schedules in-court jury or non-jury trials, it will either schedule the trial during a hearing with all parties present or issue written notice 30 days before any in-court, non-jury trial and 60 days before any jury trial to provide counsel and parties time to subpoena witnesses and prepare for trial.

- The Civil Division will conduct remote hearings, including evidentiary hearings and bench trials, in any case where it is appropriate.

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

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

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

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

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

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

/s/ Paul J. Maloney
Signature

23-CV-165
Case Number(s)

Paul J. Maloney
Name

October 23, 2023
Date

Paul.Maloney@carrmaloney.com
Email Address