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Case Number 155,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARY RUMBO and PAUL RUMBO, *Plaintiffs Below, Appellants* v. AMERICAN MEDICAL SYSTEMS, INC., *Defendant Below, Appellee*	No. 155, 2021 On Appeal from C.A. No. N13C-04-300 PEL in the Superior Court of the State of Delaware

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities

CASES

SUMMARY OF ARGUMENT

Nothing in the Defendants' Answering Brief obviates for the simple fact that the Superior Court erred in granting Summary Judgment on the statute of limitations in this transvaginal mesh matter.

Indeed, nothing presented by the Defendants obviates from the inconclusive and equivocal testimony of Mary Rumbo and Dr. Alan Godet, which does not establish (as it must) that Ms. Rumbo knew, or should have known, in 2006 that her injuries were attributable to the AMS Monarc and Perigee products.

Further, nothing in the Answering Brief disputes that when Mrs. Rumbo saw a television commercial on the mesh litigation, that became a potentially "triggering" date for the statute of limitations as well. This was also error, because Mrs. Rumbo's testimony clearly indicated that she was simply guessing as to when she saw the commercial that the Court held was the "trigger" date for the statute of limitations.

Finally, the caselaw offered by the Defendants does not indicate that the Superior Court correctly refused to send the question of when the Plaintiff-Appellant Mary Rumbo "knew or should have known" that her injuries were connected to the implantation of the Monarc sling and the Perigee cystocele mesh products to the finder of fact. It is well-settled in Delaware jurisprudence that such a question is the provision of the jury, and the granting of Summary Judgment denied the fact finder

its opportunity to determine when Mrs. Rumbo knew or should have known that her symptoms and injuries were connected to the AMS Monarc and Perigee products.

As will be shown below, there is a question of material fact as to when Mrs. Rumbo became aware of the causation of her injuries, a factual question that makes granting Summary Judgment impossible, as the testimony is not, in any way, conclusive. In sum, the Trial Court's factual findings are frequently unsupported or contradicted by the record.

ARGUMENT

I. THE TESTIMONY AND EVIDENCE OFFERED BY AMS DID NOT CONCLUSIVELY ESTABLISH THAT THIS MATTER IS TIME BARRED

A. None of the alleged "Facts" cited by Defendant Obviate from the Considerable amount of Testimony that shows that it was not Conclusive in 2006 that Mrs. Rumbo "knew or should have known" that the AMS Pelvic Mesh was the Cause of her Injuries.

The Defendants-Appellees offer a handful of points that they argue establish that Mrs. Rumbo was aware of the connection between her injuries and the mesh in 2006, as follows:

- "Ms. Rumbo first attributed the symptoms of the bodily injuries she claimed in this lawsuit to the AMS pelvic mesh within two weeks of her surgery. (A0147 (Plaintiff Fact Sheet at § II ¶ 6))".

- "Within two weeks of surgery, Dr. Godet specifically told Ms. Rumbo that she might have to undergo mesh removal if the symptoms did not improve and there was no other explanation for them. (A0072 (Godet Dep. at 132:15-19); A0071 (Godet Dep. at 131:8-11))."

- "Six weeks after implant, Dr. Godet told Ms. Rumbo that he had found exposed mesh. (A0074 (Godet Dep. at 133:23-134:14); A0038 (M. Rumbo Dep. at 39:1-2))."

- "On June 9, 2006, Ms. Rumbo underwent her first revision surgery. (A0038 (M. Rumbo Dep. at 39:10-12)). It did not alleviate her pain (A0038 (M. Rumbo Dep. at 39:19-40:9)) and she and Dr. Godet discussed surgery to remove all of the mesh. (A0039 (M. Rumbo Dep. at 40:7-17); *see also* A0077-78 (Godet Dep. at 145:13-17; 146:6-12))."

- "On July 19, 2006, Dr. Godet performed another examination, told Ms. Rumbo he saw more exposed mesh and erosion, and recommended removal of all palpable and exposed mesh. (A0040 (M. Rumbo Dep. at 41:2-41:7);(A0075-77 (Godet Dep. at 143:25-144:2, 145:13-145:17)."

- "On July 27, 2006, Dr. Godet performed a second excision procedure. (A0039 (M. Rumbo Dep. at 40:22-41:1); A0080 (Godet Dep. at 152:22-24)). It did not relieve her pain (A0041 (M. Rumbo Dep. at 43:8-13)) and Dr. Godet told Ms. Rumbo that there was a "possibility that the mesh could have caused her irritative symptoms[.]" (A0139 (Godet Dep. at 151:12-15))."

  (See Def's Br. at 18-19).

These arguments essentially parrot the holding of the Superior Court, and the Defendants consider them, essentially, conclusive. However, these points do not definitively establish Mrs. Rumbo's knowledge or that of Dr. Godet. Not only are they generous interpretations of Dr. Godet's testimony, but as noted in Plaintiff's initial brief, Mrs. Rumbo offered considerable testimony that supports the argument that she was not "immediately" aware that either of the AMS pelvic mesh products were the cause of her pain and injuries.

For example, Mrs. Rumbo testified that Dr. Godet immediately conducted a CT Scan after her first mesh implant surgery to try and ascertain the cause of her pain (as well as her incontinence symptoms)(A127 at 37:7-25). Even more critically, Dr. Godet, at that point, offered Mrs. Rumbo both pain medication (A128 at 38:1-8) and estrogen cream, in order to "help the lining of my vagina and keep it moist so I wouldn't be dry." (A128 at 38:9-15). This kind of treatment does not implicate the mesh, but is, instead, generalized and exploratory treatment. Defendants raise no argument against this testimony in their answering brief.

Further, the Defendants incorrectly interpret Dr. Godet's testimony on the points the Defendants raise. For example, Dr. Godet *never* indicated that there was "no other explanation" for Mrs. Rumbo's injuries than the AMS Monarc or Perigree products, as the Defendants argue.[1] During the testimony the Defendants cite to in support of this argument (that is, A0072 (Godet Dep. at 132:15-19) and A0071 (Godet Dep. at 131:8-11)), Dr. Godet indicates that he was not precisely sure what the cause of Mrs. Rumbo's issues were. (A0071 at 131:120-132:10). Further, Dr. Godet goes on to testify that the reason for Mrs. Rumbo's pain symptoms at that time could simply be an infection or "just an intolerance of certain things." (A0072 at 132:7-10)(Q. In your experience? A. [I]n my experience, it's either an infection or just an intolerance of certain things.") This is far from the unequivocal statement that the mesh was absolutely the problem for Mrs. Rumbo, as the Defendants' contend Dr. Godet stated in their answering brief.

The same is true of the Defendants' points on Dr. Godet's physical and surgical findings. When Dr. Godet located exposed mesh on May 22, 2006, he recommended that Mrs. Rumbo approach the mesh exposure conservatively with estrogen cream for several weeks. (A0074 at 134:2-20).

- [1] Within two weeks of surgery, Dr. Godet specifically told Ms. Rumbo that she might have to undergo mesh removal if the symptoms did not improve and there was no other explanation for them. (A0072 (Godet Dep. at 132:15-19); A0071 (Godet Dep. at 131:8-11)).

Then, after the first revision surgery on June 9, 2006, Dr. Godet still did not know what the real cause of Mrs. Rumbo's pain symptoms were. (A0077-0078 at 145:24-146:5)("[A.] . . . except for where there was a bit of discharge. The basis for the - possibly requiring further intervention was this persistent discharge and her complaints. **Hard to really prove to me in this setting, you know, is – is the mesh an ongoing issue here or not**.")(emphasis added).

Regarding the July revision surgeries, Dr. Godet noted that there was no "objective" way to know what the cause of her irritative symptoms were. (A0079, Godet Dep. at 151:16-18)("Q. But there's nothing that you have objectively do – objectively do to know for sure? A. Correct. Correct.")

Finally, Dr. Godet testified that, after conducting a pelvic exam in 2006, even he was not certain what the cause of Mrs. Rumbo's pain and symptoms were, because those symptoms were inconclusive. (*See* A0077-A0078, Godet Dep. at 145:1-146:24)("Q. Did you do a pelvic exam? A. Pelvic exam was done and the vaginal tissue appeared healthy. Whitish discharge without an odor in the midline area. She was tender. The tissue was a little, in my words, granular, but I didn't see any exposed mesh. Q. Uh-huh. A. So she just seemed irritated in that area . . . **without obvious reason, and I guess concern was something lingering or untreated**.")(emphasis added)**.**

Despite the Defendants arguments otherwise, this matter is very much like *Layton v. Allen* and *In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996). Dr. Godet could not even conclusively testify, nearly 15 years after the original implant surgery, as to what he believed the actual cause of Mrs. Rumbo's pain symptoms were, much like the Plaintiff's physicians in *In re Asbestos Litig.*

This testimony is simply too uncertain, too equivocal, for this Court to affirm the holding of the trial court. Though presented with numerous opportunities to say Mrs. Rumbo's pain symptoms were caused by the mesh during his deposition, Dr. Godet avoids going that far and affirms that there was no way to know objectively what the cause of Mrs. Rumbo's injuries were, or that it would be "hard to really prove to me in this setting, you know, is – is the mesh an ongoing issue here or not." (A0078 at 146:3-5).

Mrs. Rumbo's testimony corroborates that of Dr. Godet's in the sense that there was no objective way to know what the cause of Mrs. Rumbo's issues were in the Spring and early Summer of 2006. Mrs. Rumbo did not describe being told anything about the mesh being the cause of her injuries in or around June 9, 2006—the time of her first revision surgery. Instead, she was told on June 9, 2006 that the mesh had eroded through her vaginal wall. (A128, M. Rumbo Dep. at 39: 3-9). She testified that the mesh was "wrapping around her urethra" and "was exposed down into my urethra," but a close reading of the testimony indicates that Mrs. Rumbo

seemingly co-mingled these facts with things that occurred later in time. (*Id*. at 39:5-9)("It was wrapping around my urethra. It was wrapped around. So he [Dr. Godet] had to take me back to the OR, and he said he snipped it off. **Oh, I'm going ahead**.")(emphasis added).

Ultimately, this testimony does not establish that Mrs. Rumbo knew (or should have known) that, on June 9, 2006, a defect in the AMS Monarc or Perigee mesh was the cause of her injuries. What it does indicate is that she was aware that her symptoms[2], such as pain and incontinence, were not resolved by the mesh, that she was suffering from additional complications as a result of her mesh implantation procedure, and that she needed some of the mesh excised in the hopes of relieving those complications. (A00128, M. Rumbo Dep. at 39:13-18)("Q. And before Dr. Godet did the excision surgery [in June 2006], did he talk about any specific risks or benefits to the surgery or just general surgical risks? A. He was hoping that once he clipped off the exposed mesh that things would be better. That's all he said.[]")

In applying the time of discovery rule, the court "must conduct a fact-intensive inquiry to determine whether a plaintiff was blamelessly ignorant of a potential claim or dilatory in pursuing the action." *Brown v. E.I. Du Pont de Nemours & Co.,* 820

[2] The same is true of Mrs. Rumbo's dyspareunia. Mrs. Rumbo began experiencing dyspareunia immediately after the mesh was put in in 2006. (A131, M. Rumbo Dep. at 91:20-16; A168, Deposition of Paul Rumbo at 39:3-5). But having this symptom does not establish that Mrs. Rumbo knew, or should have known, that a defect in the AMS products were the cause.

A.2d 362, 368 (Del. 2003). That never occurred in the motions below. Further, "Summary judgment in favor of the defendant may be granted when the facts, viewed in the light most favorable to the plaintiff, "predominate toward the conclusion that the plaintiff is chargeable with knowledge that his harmful physical condition was attributable" to the defendant's product. *Id.* at 366 (*quoting In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996)). The testimony cited above does not "predominate towards the conclusion that Plaintiff [Mrs. Rumbo] is chargeable with knowledge that his harmful physical condition was attributable" to the defendant's product." The Superior Court's decision must be reversed.

B. The Caselaw cited by Defendants is Inapplicable here.

The Defendants rely on a handful of matters in support of their arguments. *Hutchinson v. Bos. Sci. Corp.*, 2020 U.S. Dist. LEXIS 176623 (Del. Dist. Ct. Sept. 25, 2020) is a matter that reads the application of the discovery rule too narrowly when applied to transvaginal mesh. Indeed, as the Superior Court stated in *Barnett v. Boston Sci. Corp.*, 2021 Del. Super. LEXIS 402, at *6 (Del. Superior Ct. May 13, 2021): "[t]o the extent that this Court has read *Hutchinson* too narrowly it declines to follow it and any rule that the statute of limitations begins to run from the time of the first implant regardless of when the plaintiff first had adverse physical symptoms. The statute of limitations does not begin to accrue until there are signs of a physical injury that are consistent with implant issues." *Id.* at *6, fn. 11. So it

is here as well – the testimony cited above from Dr. Godet does not establish that Mrs. Rumbo's injuries were *consistent* with implant issues.

The remaining cases cited by Defendants are equally inapplicable. *Robinson v. Bos. Sci. Corp.*, 647 F. App'x 184, 187 (4th Cir. 2016) is a fourth circuit decision that applies Utah law and utilizes a "cause in fact" standard that is inapplicable in Delaware. *Id.* at 186. In *Crum v. Am. Med. Sys.*, 2021 U.S. Dist. LEXIS 10799, at *21-22 (S.D. In. Jan. 20, 2021), it was the plaintiff who discovered the mesh had eroded through her vaginal wall, not the physician, as here in the Rumbo matter. *Id.* at *20. Moreover, *Villarreal v. Am. Med. Sys.*, 2020 U.S. Dist. LEXIS 138956, at *4 (C.D. Cal. May 6, 2020) is a decision out of the Central District of California that applies the novel standard that the date of a *second* corrective procedure that occurs "shortly" after the first is the knowledge trigger date. These facts have no application here. In *Freire v. Am. Med. Sys.*, 2019 US. Dist. LEXIS 62592, at *2-3 (S.D. W. Va. Apr. 11, 2019), the Plaintiff was far more conclusive about what she attributed her injuries to in both her testimony and her plaintiff's fact sheet, and that was the Court's reason for granting the statute of limitations arguments. Finally, *In re Bos. Sci. Corp.*, 2015 WL 1405493, at *4 (S.D. W. Va. Mar. 26, 2015) involves Florida law and is inapplicable to the facts of the instant matter.

Ultimately, *Long v. Ethicon, Inc.*, 2020 U.S. Dist. LEXIS 147385 (D. Or. June 29, 2020) remains the precedent most similar to the facts of the matter below despite

the Defendants' obvious attempts to downplay its importance. *Long* is much like this matter in the sense that, like Mrs. Rumbo, the Plaintiff there had (1) multiple surgeries and (2) was unaware of the connection between the mesh and her symptoms until seeing a television advertisement for transvaginal mesh litigation. *Id.* at *13-14.

The *Long* Court rejected virtually the same arguments that Defendant-Appellee made below, holding that "[w]hether Long should have been aware of the substantial possibility that the TVT product was the cause of her ongoing injuries as opposed to other aspects of her surgical history or health conditions, and whether Long was subject to a duty to inquire about facts that may trigger the statute of limitations is itself a genuine issue of material fact." *Id.* at *13-14 (*citing Kildow v. Berg, Inc.*, 796 F. Supp. 2d 1295 (D. Or. 2011)). Defendants can say nothing to obviate from this sensible standard, other than to repeat the same arguments they made to the Court below and attempt to brush over *Long.* [3]

Mrs. Rumbo also testified that until she saw pelvic mesh attorney advertisements on television, she had no idea what the possible root cause of her injuries were. (A132, M. Rumbo Dep. at 121:25-122:4)("A. I do not remember. All I remember is it said something about pelvic mesh, and I'm like "Paul, that's what's

[3] Ironically, the Defendants complain that *Long* is a precedent out of the District of Oregon. At the same time, Defendants themselves offer primarily precedent out of district courts other than Delaware.

wrong with me. Maybe that's what's wrong with me.' Because at the time I didn't really know.") In sum, the precedent with the most similar facts to the matter at bar is *Long*.

C. Reliance on the Plaintiff Fact Sheet was Improper given Dr. Godet and Mrs. Rumbo's testimony Regarding Dr. Godet's knowledge in 2006.

As initially argued, one of the two primary components of the Superior Court's decision is that Mrs. Rumbo, supposedly, indicated that she was aware of the causal connection between her injuries and the Defendant-Appellee's Mesh immediately. (*See* Opinion and Order, Exhibit A at p. 10-11). Specifically, the Superior Court held that:

> [Mary] Rumbo's assertion that [she] did not and could not have discovered that her injuries were related to AMS Pelvic Mesh are undermined by Rumbo's "Fact Sheet" in which Mary Rumbo stated that she knew "Immediately" and/or "One week post operation" that her injuries were caused by the AMS Pelvic Mesh.
>
> (Opinion and Order, Exhibit A at p. 10-11).

The Superior Court is referring to a portion of Mrs. Rumbo's Plaintiff's Fact Sheet at Section II, ¶ 6(c), which indicates:

> *6.c. When did you first attribute these bodily injuries to the pelvic mesh products?*
>
> *[A]. Immediately.*
>
> (*See* A147).

But the Superior Court ignored the significant amount of testimony from Mrs. Rumbo and Dr. Godet that they were unsure about the link between the mesh and Mrs. Rumbo's injuries. As noted above, Dr. Godet indicated that he was not precisely sure what the cause of Mrs. Rumbo's issues were. (A0071 at 131:120-132:10). Further, Dr. Godet goes on to testify that the reason for Mrs. Rumbo's pain symptoms at that time could simply be an infection or "just an intolerance of certain things." (A0072 at 132:7-10)(Q. In your experience? A. [I]n my experience, it's either an infection or just an intolerance of certain things.") Finally, Dr. Godet felt it was "hard to really prove to me in this setting, you know, is – is the mesh an ongoing issue here or not." (A0078 at 146:3-5).

Dr. Godet further refused to conclude that Mrs. Rumbo's injuries in or around June and July 2006 were tied to the mesh. When Dr. Godet located exposed mesh on May 22, 2006, he recommended that Mrs. Rumbo approach the mesh exposure conservatively with estrogen cream for several weeks. (A0074 at 134:2-20). Then, after the first revision surgery on June 9, 2006, Dr. Godet still did not know what the real cause of Mrs. Rumbo's pain symptoms were. (A0077-0078 at 145:24-146:5)("[A.] . . . except for where there was a bit of discharge. The basis for the - possibly requiring further intervention was this persistent discharge and her complaints. **Hard to really prove to me in this setting, you know, is – is the mesh an ongoing issue here or not**.")(emphasis added).

Going to the July revision surgeries, Dr. Godet noted that there was no "objective" way to know what the cause of her irritative symptoms were. (A0079, Godet Dep. at 151:16-18)("Q. But there's nothing that you have objectively do – objectively do to know for sure? A. Correct. Correct.")

Mrs. Rumbo's testimony was in lockstep with this uncertainty. When recalling the discussion before the first mesh revision surgery in or around May or June of 2006, Mrs. Rumbo said that Dr. Godet only indicated he *hoped* removal of the mesh would be curative. (A00128, M. Rumbo Dep. at 39:13-18)("Q. And before Dr. Godet did the excision surgery, did he talk about any specific risks or benefits to the surgery or just general surgical risks? A. He was hoping that once he clipped off the exposed mesh that things would be better. That's all he said.[]") And of course, Mrs. Rumbo also testified that until she saw pelvic mesh attorney advertisements on television, she had no idea what the possible root cause of her injuries were. (A00132, M. Rumbo Dep. at 121:25-122:4)("A. I do not remember. All I remember is it said something about pelvic mesh, and I'm like "Paul, that's what's wrong with me. Maybe that's what's wrong with me.' Because at the time I didn't really know.")

The Defendants argument regarding *See Smith & Nephew Birmingham Hip Resurfacing Hip Implant Products Liability Litigation MDL No. 2775,* 2018 U.S. Dist. LEXIS 198316, at *34 (D. Md. Nov. 19, 2018) is simply incorrect. That matter

indicates that "[r]evision surgery, alone, only tells a plaintiff that she is suffering from complications as a result of [their] implant procedure, but it is silent as to the cause of that complication. Without more information, a reasonably conscientious patient could not deduce whether the cause of her injury is her doctor's malpractice, something unique to her own medical history, an unfortunate but accepted ill-effect of the . . . device, or a true product defect."

The Defendants, seemingly, go on to agree with this obvious standard from *Smith & Nephew*. (See Def.'s Br. at 30, fn. 9)(noting that "[m]oreover, AMS is not arguing—nor did the Superior Court rule—that Ms. Rumbo's June 2006 revision surgery, alone, automatically served as the accrual date for her claims. Here, the evidence includes Ms. Rumbos' admissions in her Plaintiff Fact Sheet, the fact that she underwent a second revision surgery in July of 2006, and the fact that Dr. Godet indicated to her that her symptoms could be related to the mesh.")

However, when all of these "components" of testimony and evidence are combined, it is difficult to see how these facts presented a view that was clear enough for the Court to dismiss this matter on the statute of limitations. That is why the Superior Court erred in its ruling—though it was presented with all this material and testimony, the Superior Court ignored it. (A350)(indicating that all of this testimony is undermined by Mrs. Rumbo's two Plaintiff Fact Sheet responses). It is well-settled that the standard for granting summary judgment is high. Summary Judgment

should only be granted where the moving party establishes the absence of any genuine issue of material fact. *See Moore v. Sizemore*, Del. Supr., 405 A.2d 679, 680-81 (1979). All of this creates an issue of fact for the jury. The Superior Court's decision must be reversed.

D. As with the 2006 Time Period, the Testimony Regarding Mrs. Rumbo's Viewing of the Television Advertisements Creates a Question of Fact.

Regarding the timing of Mrs. Rumbo's viewing of the television advertisements, the Defendants-Appellees simply parrot the Superior Court's holding that even if Mrs. Rumbo had not known in 2006 that her injuries were caused by her AMS mesh, her testimony regarding a television advertisement that she supposedly saw in 2009 regarding transvaginal mesh lawsuits established a date that she knew, or should have known, that the mesh caused her injuries. (*See* Opinion and Order, Exhibit A, pp. 12)("Even if 2006 was not the pivotal date for notice of a potential claim, the 2009 television commercial put Rumbo on notice.")

But as with several other comments made in the varying depositions mentioned above, Mrs. Rumbo did not *conclusively* testify as to the exact date she saw an advertisement for vaginal mesh lawsuits. Though she *guessed* that 2009 was a possible date, she testified that she did not recall when, exactly, she saw these commercials. (A00132, M. Rumbo Dep. at 120:25-121:4)("Q. Do you remember approximately when you saw the advertisement? A. I think it was 2009 is when I

first started filling out paperwork, ***I think. I'm not sure, ma'am. I'm sorry.***") (emphasis added).

However, the Superior Court ignored Mrs. Rumbo's uncertainty as to when she saw these commercials, and instead argues that the next exchange of testimony conclusively establishes that Mrs. Rumbo knew, in 2009, that she potentially had a lawsuit. But a reading of the testimony indicates that Mrs. Rumbo was not certain when she saw the advertisement, or when she contacted a lawyer, and that she was simply guessing about it being in 2009. But as noted above, AMS entirely ignored the clear testimony that Mrs. Rumbo was not sure when she first saw that commercial and took no further steps to try and determine the date Mrs. Rumbo inquired, and ultimately retained, an attorney.

Finally, Defendants-Appellees' argument that there is "nothing in the record" regarding the actual timeline Mrs. Rumbo retained an attorney is meaningless. The Defendants-Appellees have never wanted to know the actual date that Mrs. Rumbo retained an attorney (which is 2011) because it hurts their narrative. Nor did the Superior Court assess this information either. In sum, the Superior Court erred in holding that the Rumbos were on notice in 2009 when the testimony as to when Mrs. Rumbo saw the transvaginal mesh commercials on television is unclear.

II. DELAWARE CONSIDERS THE DISCOVERY RULE A QUESTION OF FACT FOR THE JURY AND THE FAILURE TO PASS THIS QUESTION TO THE FINDER OF FACT WAS ERROR

A. The Failure to Pass this Matter to the Jury was Error.

As to Point II, Defendants seem to misinterpret the argument at hand. The primary thrust of Defendants' response here is that "Delaware does not have a rule that, if a plaintiff raises the discovery rule in response to a summary judgment motion based on the statute of limitations, summary judgment must automatically be denied and the question of when the cause of action accrued be left to the trier of fact." (Def's Br. at 38).

But is not the argument that Plaintiff raised below. What was argued—and what is well-settled in Delaware jurisprudence—is that the application of the discovery rule requires a fact intensive inquiry that must be submitted to the jury.

The caselaw in support of this rule is legion. *See Estate of Sanchez Valdez v. Burlington Northern Santa Fe. Ry.,* 2020 Del. Super. 2991 (Sup. Ct. New Castle Cty. Dec. 15, 2020)("where, as here, there is a genuine dispute regarding a material fact, summary judgment is not appropriate. Furthermore, applying the discovery rule requires a fact intensive inquiry that must be submitted to the jury. Therefore, if BNSF wishes to present this factual dispute at trial, then the jury will be asked to apply the discovery rule to determine the date on which Valdez knew or should have known that his cancer was caused by exposure to toxic substances during his

employment by BNSF as a machinist"); *see also Silverstein v. Fischer,* 2016 Del. Super. LEXIS 234, at *17 (Sup. Ct. New Castle Cty. 2016)("[w]hether that renders the injury "inherently unknowable" to the Silversteins is an unresolved question of fact for the jury. Similarly, if the injury is "inherently unknowable," whether the Silversteins are "blamelessly ignorant" is also a question for the jury. Therefore, the Court cannot rule that, as a matter of law, the "discovery rule" does not toll the statute of limitations"); *Crest Condo. Ass'n v. Royal Plus, Inc.,* 2017 Del. Super. LEXIS 642, at *14(Del. Sup. Sussex Cty. 2017)(" There are factual questions in dispute, namely whether the doctrines of inherently unknowable injuries and fraudulent concealment tolled the statute of limitations. Plaintiffs have submitted adequate evidence to show that the facts of this case may support the finding that one or both of these doctrines apply. Therefore, these are questions of fact that must be left to the jury"); *Ocimum Biosolutions Ltd. v. AstraZeneca UK Ltd.*, 2019 Del. Super. LEXIS 640, at *19 (Del. Sup. Ct. 2019)("Whether a statute of limitations was tolled generally is a question of fact")

Courts in Delaware have applied the discovery rule to claims such as the instant matter, where a blameless Plaintiff was unaware of the cause of her injuries. *See Bendix Corp. v. Stagg*, 486 A.2d 1150, 1153 (Del. 1984)("here, the Superior Court properly denied Bendix's motion for summary judgment as it is still controverted when his asbestosis manifested itself and became ascertainable").

The issue complained of here is that the Superior Court, when faced with testimony that did not conclusively establish the "trigger" date for the statute of limitations, should have passed this question on to the jury, as so many matters in Delaware have before. Not that this precedent is a "bright-line" rule, as the Defendants argue.

Given all arguments above, this matter was simply not ripe for summary judgment, as there was nothing that conclusively established what Mrs. Rumbo knew in 2006, or anything that conclusively established when Mrs. Rumbo saw the television advertisement that she indicated connected the issue of her injuries. These issues are in dispute, and that dispute must be resolved by the jury. Notably, AMS will still be allowed to raise their statute of limitations arguments at trial, even if this appeal is successful. Plaintiff-Appellant Paul Rumbo, however, would be denied his day in Court if the Superior Court is affirmed. The motion should have been denied under Delaware law, which is what the Superior Court held was applicable. This Court should reverse and remand for all the reasons detailed in Plaintiff-Appellants' opening brief and above.

CONCLUSION

WHEREFORE, Plaintiff respectfully request that this Honorable Court reverse or vacate the Judgment of the Superior Court and reinstate and remand this matter for all pre-trial and trial proceedings.

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