EFiled: Dec 10 2021 01:55PM EST
Filing ID 67158951
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 the Superior Court of the State of Delaware C.A. No. N13C-04-300 PEL

APPELLEE'S ANSWERING BRIEF

Dated: December 10, 2021

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NATURE OF THE PROCEEDINGS

This is a products liability case arising out of the implantation of transvaginal pelvic mesh. On April 4, 2006, Appellant Mary Rumbo underwent surgery during which her physician implanted two products manufactured by Appellee American Medical Systems, Inc. ("AMS"), a Monarc Sling and a Perigee Device. Ms. Rumbo woke up in severe pain, and within two weeks her physician told her that the mesh might have to be removed if she did not feel better. By her own admission, this was the first time she attributed her bodily injuries to the AMS pelvic mesh products.

Within six weeks of the surgery, her physician informed Ms. Rumbo that the pelvic mesh was exposed and protruding. Ms. Rumbo underwent two revision surgeries in 2006, both of which failed to relieve Ms. Rumbo's pain. Her physician then told her that she needed someone with more experience with mesh, and in pursuit of that person Ms. Rumbo and Appellant Paul Rumbo, her husband, moved from Alaska to Texas in 2007. In 2009, the Rumbos saw attorney-television advertising concerning pelvic mesh injuries and litigation. The Rumbos discussed the advertising and, according to Mr. Rumbo, knew that they needed to contact a lawyer to assert a claim.

On April 27, 2013, some seven years after the 2006 implant and revision surgeries, and roughly four years after seeing the 2009 attorney advertising on television, the Rumbos filed a Short Form Complaint against AMS in *In re AMS*

Pelvic Mesh Prods. Liab. Litig., pending in the Superior Court. AMS moved for summary judgment on statute of limitations grounds, arguing that the Rumbos' claims accrued in 2006 or, at the latest, by the end of 2009. The Superior Court concluded that the two-year limitations period for personal injuries contained in 10 *Del. C.* § 8119 applied, determined that the claims accrued in 2006 or, in the alternative, in 2009, and held that the claims were time-barred.

This appeal followed. As set forth in the following pages, the Superior Court's decision was proper, this appeal has no merit, and this Court should affirm the entry of summary judgment in favor of AMS.

SUMMARY OF THE ARGUMENT

The Superior Court properly granted summary judgment in favor of AMS on statute of limitations grounds:

1. Denied. That neither Ms. Rumbo nor Dr. Godet were "certain" that the mesh caused her injuries is immaterial. It is undisputed that: (i) Ms. Rumbo began to suffer from the injuries she claims in this lawsuit in the immediate aftermath of her surgery; (ii) she first attributed those injuries to the AMS pelvic mesh within two weeks of her implant surgery; (iii) her physician told her that the mesh might have to be removed if there was no other explanation for her symptoms; (iv) her physician told her within weeks of the surgery that the mesh was exposed; (v) her physician performed two revision surgeries; and (vi) her physician told her that her symptoms could be related to the mesh. All of this occurred in 2006. In short, Ms. Rumbo was on notice that her injuries were possibly connected to the mesh in 2006, and the Superior Court properly ruled that her claims accrued at that time. Moreover, it is undisputed that Mr. Rumbo testified that he and his wife saw and discussed attorney advertising for mesh claims on television in 2009 and Ms. Rumbo testified that she believed she had seen the advertising in 2009. Thus, even if Ms. Rumbo were somehow not on notice in 2006, she was in 2009—as the Superior Court properly found. Accordingly, this Court should affirm the entry of summary judgment in

favor of AMS on statute of limitations grounds because the Rumbos did not file this action until 2013. 10 *Del. C.* § 8119.

2. Denied. If a plaintiff raises the discovery rule in response to a summary judgment motion based on the statute of limitations, Delaware law does not require that summary judgment automatically be denied and the question of when the cause of action accrued be left to the trier of fact. Indeed, it is well-settled in Delaware jurisprudence that a court may grant summary judgment on statute of limitations grounds where—as is the case here—there is no genuine issue as to when a plaintiff "knew or should have known" of a possible connection between her injuries and the allegedly defective product. There is no basis for reversal here.

STATEMENT OF FACTS

A. On April 4, 2006, Ms. Rumbo Undergoes Pelvic Mesh Implant Surgery; She Wakes In "Severe Pain" That Does Not Go Away

On April 4, 2006, Dr. Andre Godet implanted Ms. Rumbo with a Monarc sling and Perigee device. (A0145 (Plaintiff Fact Sheet at ¶ 1)). Ms. Rumbo awoke from her implant surgery with a "severe stabbing pain," which she described as a 10 out of 10. (A0036 (August 8, 2019 Deposition Transcript of Mary Ann Rumbo ("M. Rumbo Dep.") at 36:10-14; 36:22-24)). The pain did not go away. (A0048 (M. Rumbo Dep. at 74:16-22)).

B. Within Two Weeks Of The Surgery, Ms. Rumbo's Physician Informs Her That She Might Have To Undergo Mesh Removal; It Is At This Time That Ms. Rumbo First Attributes Her Injuries To The Pelvic Mesh

On April 14, 2006 (10 days after implant), Ms. Rumbo complained to Dr. Godet of pressure in the area of surgery that had been present since the implant surgery and getting worse. (A0069-70 (October 8, 2019 Deposition Transcript of Andre Godet, M.D. ("Godet Dep.") at 125:21-126:4)). Dr. Godet was aware that intolerance was a risk with implanted mesh (A0072-72 (Dr. Godet Dep. at 132:20-133:6)) and explained to Ms. Rumbo that she either had an infection or an intolerance to the mesh (A0071-72 (Godet Dep. at 131:12-132:10)).

Dr. Godet specifically told Ms. Rumbo that she might have to undergo mesh removal "if the symptoms aren't improving and we can't find another

explanation[.]" (A0072 (Godet Dep. at 132:15-19); A0071 (Godet Dep. at 131:8-11 ("We're—so this is 10 days out at this point or more, maybe two weeks—I indicated that maybe we will have to remove the mesh if you don't start to get better.")).

It was at this time that Ms. Rumbo first attributed her injuries to the implanted AMS pelvic mesh products, as she stated under oath in the Plaintiff Fact Sheet she filled out for this case in May of 2019:

> b. When is the first time you experienced symptoms of any of the bodily injuries you claim in your lawsuit to have resulted from the pelvic mesh product(s)?
>
> Two weeks post implantation
>
> c. When did you first attribute these bodily injuries to the pelvic mesh product(s)?
>
> Immediately

(A0147 (Plaintiff Fact Sheet at § II ¶ 6(b) & (c)); A0164 (Plaintiff Fact Sheet Sworn Declaration)).[1]

C. In May Of 2006, Dr. Godet Examines Ms. Rumbo, Finds Exposed Mesh, And Informs Ms. Rumbo Of The Extrusion

Ms. Rumbo's pain did not go away with medication; Dr. Godet administered a CT scan and an urodynamic study, which found that Ms. Rumbo could not hold

[1] Ms. Rumbo indicated that the following injuries resulted from the implantation of the AMS mesh products: severe pain; muscle dysfunction; severe nerve damage; constant urinary tract infections; vaginal infections; and spasms in bladder/vaginal wall and rectum. (A0147 (Plaintiff Fact Sheet at § II ¶ 6(a))).

any urine. (A00037 (M. Rumbo Dep. at 37:6-16)). During this period of time, Ms. Rumbo had to wear heavy pads—because of leakage—and had to change them every hour or so. (A00037 (M. Rumbo Dep. at 37:17-25)).

Dr. Godet also performed several pelvic examinations after Ms. Rumbo's implant procedure. (A0038 (M. Rumbo Dep. at 39:1-2)). On May 22, 2006, six weeks after implant, Dr. Godet found exposed mesh and informed Ms. Rumbo that there was an extrusion of the mesh in the vaginal area. (A0074 (Godet Dep. at 133:23-134:14); A0038 (M. Rumbo Dep. at 39:1-2)). For her part, Ms. Rumbo testified that it was her understanding at that time that the mesh was "wrapped around her urethra and was exposed down into it." (A0038 (M. Rumbo Dep. at 39:3-9)).[2]

D. In June Of 2006, Ms. Rumbo Undergoes Her First Revision Surgery, Which Is Unsuccessful In Alleviating Her Symptoms; Dr. Godet Concludes It Is Possible Her Symptoms Are "Directly Related" To The Mesh

[2] Ms. Rumbo testified that she could have sex with pain symptoms occurring only rarely before her mesh implant. (A0049-50 (M. Rumbo Dep., at 92:4-93:1)). Ms. Rumbo testified that following her implant, she could not have sex at all. (A0051 (*Id.* at 94:14-15)). When she attempted it, she felt a "knife-searing pain upon entry." (A0051 (*Id.* at 94:9-15)). Mr. Rumbo testified that following the implant, he could feel the mesh during sex, which "felt like bristles on [his] toothbrush." (A0065 (September 13, 2019 Deposition Transcript of Paul Rumbo ("P. Rumbo Dep.") at 36:13-15)).

Dr. Godet first excised Ms. Rumbo's mesh exposure on June 9, 2006, two months after her implant. (A0038 (M. Rumbo Dep. at 39:10-12)). Dr. Godet noted in his June 9, 2006 operative report that "[i]t is possible that [Ms. Rumbo's] irritative urinary symptoms is [sic] directly related to the exposed mesh." (A0214 (June 9, 2006 Operative Records at 2)).

Following the procedure, Ms. Rumbo testified that she experienced the same severe pain as before (A0038 (M. Rumbo Dep. at 39:19-40:9)), which she described as precipitating a conversation with Dr. Godet about removing the mesh in its entirety:

> Q. So did you let Dr. Godet know that you were in the same severe pain?
> A. Yeah, he knew.
> Q. And did he discuss any further treatment with you?
> A. He talked about having to try to take it out.
> Q. So when you say take it out, did he tell you to remove all of it?
> A. He was going to try to remove all of it ….

(A0039 (M. Rumbo Dep. at 40:7-17); *see also* A0077-78 (Godet Dep. at 145:13-17; 146:6-12)).

E. In July Of 2006, Ms. Rumbo Undergoes A Second Revision Surgery, Which Is Also Unsuccessful In Alleviating Her Symptoms; Dr. Godet Tells Ms. Rumbo There Is A Possibility That The Mesh Caused Her Symptoms

On July 19, 2006, Dr. Godet performed another examination. (A0075-76 (Godet Dep. at 143:25-144:2). Dr. Godet explained to Ms. Rumbo that there was

"more mesh exposed, and he saw some erosion in my vaginal wall." (A0040 (M. Rumbo Dep. at 41:2-41:7)). Dr. Godet's notes from that day reflected his impression of "[p]ersistent symptoms of vaginitis with probable early recurrence of mesh erosion or mesh infection." (A0217). His written recommendation reflected his view that Ms. Rumbo "will likely require removal of all palpable and exposed mesh" (*Id.*) and he communicated that recommendation to Ms. Rumbo. (A0077 (Godet Dep at 145:13-145:17)).

Accordingly, Dr. Godet performed a second excision procedure on July 27, 2006. (A0039 (M. Rumbo Dep. at 40:22-41:1); A0080 (Godet Dep. at 152:22-24)). Following the surgery, Ms. Rumbo reported that that the procedure did not relieve her pain and she felt the same way; she still felt like a knife stabbed her. (A0041 (M. Rumbo Dep. at 43:8-13)). Around this time, 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)).

F. Dr. Godet Diagnoses Ms. Rumbo With Interstitial Cystitis And Tells Her It Probably Occurred Because Of The Mesh

Dr. Godet eventually diagnosed Ms. Rumbo with interstitial cystitis, a chronic condition causing bladder pressure, bladder pain and sometimes pelvic pain, and she testified at her 2019 deposition that he told her it "probably … occurred because of the mesh and all of the irritation and all the surgeries [she] had to have." (A0044-45 (M. Rumbo Dep. at 46:19-47:15)).

G. In 2007, The Rumbos Move From Alaska To Texas In Search Of A Physician With More Experience With Mesh

Subsequently, Dr. Godet told her that she needed "someone that had more experience with the mesh to try to get it removed," and in search of that person Ms. Rumbo moved from Alaska to Texarkana, Texas, in 2007. (A0042-43 (M. Rumbo Dep. at 44:14-45:18); A0053 (M. Rumbo Dep. at 122:10-11)). Mr. Rumbo confirmed that she and Mr. Rumbo moved because the "doctors up there couldn't do her any good." (A0064 (P. Rumbo Dep. at 26:6-21)).

H. In 2009, The Rumbos See Television Commercials Advertising The Services Of Attorneys For Pelvic Mesh Injury Claims

In 2009, Ms. Rumbo developed urosepsis and she learned that a CAT scan revealed a mass in her vagina comprised of "mesh and scar tissue all in a kind of round ball." (A0044 (M. Rumbo Dep. at 46:2-11).

In 2009, the Rumbos also saw television commercials from attorneys that described pelvic mesh injuries and advertised the attorneys' services in such cases. (A0052-53 (M. Rumbo Dep. at 121:22-122:15; A0061 (P. Rumbo Dep. at 8:1-3)). For her part, Ms. Rumbo testified that she thought she saw the advertising in 2009. (A0053 (M. Rumbo Dep. at 122:11-15 ("I think I started seeing the commercials in 2009, you know. Pelvic mesh injury, call this number. You may be compensated for your injury or whatever. And, I mean, you know, it was in every channel every 30

seconds.")); A0132 (M. Rumbo Dep. at 120:25-121:4 ("I think it was 2009 is when I first started filling out paperwork, I think. I'm not sure, ma'am, I'm sorry."))).

Mr. Rumbo testified that they saw these commercials in 2009. (A0224 (P. Rumbo Dep. at 8:4-12 ("Q. Okay. Prior—and approximately when was that? A. It's been 2009. Been a long time."))). One advertisement Mr. Rumbo specifically remembered listed mesh-related problems that a woman with a mesh implant might experience and instructed: "[I]f you are having [mesh-related] problems, call this number." (A0061-62 (P. Rumbo Dep. at 8:16-9:4)). Mr. Rumbo testified that his wife had many of the problems described in the advertisement. (A0061-62 (*Id.* at 8:24-9:4)). Mr. Rumbo testified that, after he saw the advertisement and discussed it with his wife, they decided to pursue a claim. (A0062-63 (*Id.* at 9:5-9; 12:1-17)).

I. On April 27, 2013, Seven Years After The Implant Surgery, The Rumbos File This Action; The Superior Court Grants AMS Summary Judgment On Statute Of Limitations Grounds

On April 27, 2013, the Rumbos filed a Short Form Complaint against AMS in *In re AMS Pelvic Mesh Prods. Liab. Litig.*, pending in the Superior Court, claiming injuries allegedly caused by the AMS pelvic mesh implanted in 2006.[3] (A0001). AMS moved for summary judgment on statute of limitations grounds,

[3] Ms. Rumbo passed away during the course of the litigation. (Mem. Op. at 4 note 22). Before then, she had submitted a sworn Plaintiff Fact Sheet (the equivalent of interrogatory answers) and had been deposed. (Mem. Op. at 2 note 4).

arguing that the Rumbos' claims accrued in 2006 or, at the latest, by the end of 2009. (A0004).

Given that the Rumbos were non-resident plaintiffs, the Superior Court (Andrea L. Rocanelli, J.) first considered Delaware's "borrowing statute," 10 *Del. C.* § 8121, and whether Alaska, Delaware, or Texas law controlled the statute of limitations analysis. (Mem. Op. at 5-9). The court determined that Delaware's two-year statute of limitations controlled and agreed with AMS that the Rumbos' claims accrued in 2006 or, in the alternative, in 2009. (Mem. Op. at 10-12). Since the Rumbos did not file suit until April 27, 2013, the court held that their claims were time-barred and dismissed their case.[4] (Mem. Op. at 13).

[4] In the course of its decision, the Superior Court observed that the ultimate outcome would not change regardless of whether the court applied Delaware, Alaska, or Texas law. (Mem. Op. at 8).

ARGUMENT

The Court should affirm.

I. THE SUPERIOR COURT PROPERLY DETERMINED THAT PLAINTIFFS' CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS

A. Question Presented

Did the Superior Court properly determine that the Rumbos were first on notice of a possible connection between Ms. Rumbo's injuries and the AMS pelvic mesh more than two years before they filed this action on April 27, 2013? (A004-A224).

B. Standard Of Review

This Court reviews the Superior Court's grant of summary judgment *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Del. Super. Ct. Civ. R. 56(c). At the motion for summary judgment phase, a court must view the facts "in the light most favorable to the non-moving party." *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

The moving party bears the initial burden of showing that no material issues of fact are present and, once that is met, the burden shifts to the non-moving party

to show that a material issue of fact exists. *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979). "By its very terms, the standard of Rule 56(c) provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Burrell v. AstraZeneca LP*, 2010 Del. Super. LEXIS 393, at *7 (Sept. 20, 2010) (quoted case omitted).

Thus, to survive summary judgment, a plaintiff's claim must be based on more than mere speculation. "The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based." *In re Asbestos Litig. to Crane Co.*, 2012 WL 1408982, at *2 (Del. Super. Apr. 2, 2012) (quoting *In re Asbestos Litig.*, 2007 WL 1651968, at *16 (Del. Super. May 31, 2007)). An inference cannot be based on "surmise, speculation, conjecture, or guess, or on imagination or supposition." *Id.*

C. Merits Of The Argument

The Superior Court properly determined that the Rumbos' claims were time-barred and this Court should affirm.

Under Delaware law,[5] a two-year statute of limitations governs all actions for damages arising out of personal injuries. 10 *Del. C.* § 8119 ("No action for recovery

[5] The Superior Court concluded that Delaware's statute of limitations controlled the analysis after applying Delaware's borrowing statute, 10 *Del. C.* § 8121 ("Where a cause of action arises outside of this State, an action cannot be brought in a court of

of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained[.]"); *Cole v. Del. League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1123 (Del. 1987) ("Section 8119 ... applies to all claims for personal injury, without exception, and 'regardless of the theoretical basis underlying the requested remedy.'") (quoted case omitted); *see also Hutchinson v. Bos. Sci. Corp.*, 2020 WL 5752393, at *3 (D. Del. Sept. 25, 2020) (Applying Section 8119 to personal injury action involving pelvic mesh).

1. The Rumbos Had The Burden Of Showing That Ms. Rumbo Had An Inherently Unknowable Injury And Was Blamelessly Ignorant Up Until Two Years Before Filing Suit

"In addressing when an action is time-barred, a necessary first step in the analysis is determining the time when the action accrued." *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 503 (Del. 1996). This Court first articulated the time of discovery rule in the *Layton v. Allen*, 245 A.2d 794, 798 (Del. 1968). There, the Court held that where there is an "inherently unknowable

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this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action."). (Mem. Op. at 5-9). That determination is not on appeal. Regardless, the court found that the Rumbos' claims would also be time-barred if either Alaska or Texas law applied instead of Delaware law. (Mem. Op. at 8).

injury" suffered by "one blamelessly ignorant of the act or omission and the injury complained of," an injury is sustained under Section 8119 when the "harmful effect first manifests itself and becomes physically ascertainable":

> [W]hen an inherently unknowable injury… has been suffered by one blamelessly ignorant of the act or omission and injury complained of, and the harmful effect thereof develops gradually over a period of time, the injury is "sustained" under § 8118 [now § 8119] when the harmful effect first manifests itself and becomes physically ascertainable…. We hold that the limitations period commenced to run when the plaintiff first experienced pain caused by the unknown foreign object.

Id. at 798.

In application, the statute of limitations begins to run "on the date that 'the alleged negligence first manifests itself and becomes physically ascertainable.'" *Morton v. Sky Nails*, 884 A.2d 480, 482 (Del. 2005) (quoting *Greco v. Uni. of Del.*, 619 A.2d 900, 906 (Del. 1993), *overruled on other grounds by Verrastro v. Bayhospitalists, LLC*, 208 A.3d 720 (Del. 2019)). "While it is true that the time of discovery rule is equitable in nature, our case law establishes that the only two requirements for application of that rule are an 'inherently unknowable' injury and a 'blamelessly ignorant' plaintiff." *Id.*

"Since *Layton*, this Court and the Superior Court have applied the discovery exception to defer the running of the Section 8119 limitations period in circumstances where the plaintiff has been exposed to a toxic substance, but the nature of the injury involves a latency period where the harmful effects of the toxic

exposure are not discoverable for several years." *Brown v. E.I. duPont de Nemours & Co.*, 820 A.2d 362, 367 (Del. 2003). In *Brown*, the Court recognized that "[a] plaintiff may remain blamelessly ignorant of the potential claim even after a latent injury reveals itself through physical ailments" and held that "[t]he limitations period for a toxic tort does not begin immediately upon the onset of physical problems if the symptoms are reasonably attributable to another cause and the plaintiff is not on notice of the tortious cause." *Id.* at 368.

Finally, the "plaintiff bears the burden of showing that the statute was tolled, and relief from the statute extends only until the plaintiff is put on inquiry notice." *Smith v. Whelan*, 566 F. App'x 177, 179 (3d Cir. 2014) (quoting *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007)). Specifically, "[a] plaintiff who seeks to toll the statutory period through reliance on the discovery rule must show that he 'acted reasonably and promptly in seeking a diagnosis and in pursuing the cause of action.'" *Collins v. Pittsburgh Corning Corp. (In re Asbestos Litig.)*, 673 A.2d 159, 162 (Del. 1996) (quoted case omitted).

2. The Rumbos' Claims Accrued In 2006

The Superior Court properly determined that the Rumbos' claims accrued in 2006

a. Ms. Rumbo Had A Known Injury And Was Not Blamelessly Ignorant In 2006, When She Attributed Her Injuries To The Mesh And Underwent A Second Revision Procedure

Given the following undisputed facts, Ms. Rumbo did not have an inherently unknowable injury and was not blamelessly ignorant in 2006:

- 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)).

Ms. Rumbo did not have an inherently unknowable injury, as she experienced pain and other symptoms in the immediate aftermath of her implant surgery. Further, Ms. Rumbo was not blamelessly ignorant in 2006: she herself believed there was a relationship between her symptoms and the AMS pelvic mesh in 2006, her physician told her there was a possible relationship between her symptoms and the mesh in 2006, and she underwent two revision surgeries in 2006.

These facts establish that this case is not like *Layton v. Allen*, where a metallic hemostat was left inside the plaintiff during surgery and the plaintiff did not begin to experience abdominal pain until seven years later. Ms. Rumbo knew mesh had been implanted in her body and experienced pain immediately upon waking up from surgery, which pain continued for years. Nor is this case like *In re Asbestos Litig.*, 673 A.2d 159, 163 (Del. 1996), where the Court applied the discovery exception to defer the limitations period during the time period in which the plaintiff believed he suffered from asbestosis but his physicians told him that his problems were unrelated to asbestos exposure. Here, there is no evidence Dr. Godet told Ms. Rumbo that the symptoms she attributed to mesh were unrelated to it. Finally, this case is not like

Brown, where the physical ailment was visible but the cause of the physical problem was unknown. Indeed, Dr. Godet recognized and communicated the possible relationship and performed two revision surgeries.

In short, the Superior Court properly determined that Ms. Rumbo was on notice in 2006 that the AMS pelvic mesh was the potential cause of the symptoms and bodily injuries she was experiencing. Since she did not bring suit until 2013, the Superior Court properly granted summary judgment in favor of AMS on statute of limitations grounds and this Court should affirm.

b. Decisions In Other Mesh Cases With Similar Facts Support The Trial Court's Determination That The Claims Accrued In 2006

Decisions in other mesh cases with similar facts support the Superior Court's determination here that the Rumbos' claims accrued in 2006. *Hutchinson v. Bos. Sci. Corp.*, *supra*, is on point. There, the plaintiff began experiencing problems with her mesh implant within two weeks of her November 2008 surgery. 2020 WL 5752393, at *3. Her doctor subsequently informed her that there was erosion and she had two revision surgeries in 2009. *Id.* The defendant moved for summary judgment on statute of limitations grounds.

Applying Delaware law, the court concluded that Hutchinson's harm "first manifested itself and became physically ascertainable" when she began experiencing problems with her mesh implant within two weeks of her November 2008 surgery.

Id. The court further concluded that Hutchinson "did not have an inherently unknowable injury, as she experienced pain and other symptoms, and was not blamelessly ignorant in 2009, when she underwent a second revision procedure." *Id.* Since suit was brought more than two years later, the court entered summary judgment based on the statute of limitations. *Id.* The facts in *Hutchinson* parallel the facts of the case now before the Court and support the outcome below.

Further, the outcome below and in *Hutchinson* are hardly outliers. *See*, *e.g.*:

- *Robinson v. Bos. Sci. Corp.*, 647 F. App'x 184, 187 (4th Cir. 2016) (Affirming summary judgment on statute of limitations grounds: "when the revision surgery failed to correct her symptoms, [plaintiff] had 'sufficient information' to put her 'on notice to make further inquiry' about the cause-in-fact of her harm.").
- *Crum v. Am. Med. Sys.*, 2021 U.S. Dist. LEXIS 10799, at *21-22 (S.D. Ind. Jan. 20, 2021) (Granting summary judgment, holding that the plaintiff knew or should have discovered that she suffered an injury that was caused by the product another when she was told the AMS product was eroding into her vagina, she complained of numerous physical problems in the vaginal area that she also complained of in her lawsuit, and she continued to complain of discomfort after revision surgery).
- *Villarreal v. Am. Med. Sys.*, 2020 WL 4390372, at *4 (C.D. Cal. May 6, 2020) ("In pelvic mesh cases specifically, district courts have held that a plaintiff triggers the statute of limitations on the date of a second corrective procedure that occurs shortly after the initial mesh procedure.") (citations omitted).
- *Freire v. Am. Med. Sys.*, 2019 WL 1575187, at *1 (S.D. W. Va. Apr. 11, 2019) (granting summary judgment based on the statute of limitations because plaintiff possessed sufficient information to be put on inquiry notice where she "explained in her Plaintiff Fact Sheet ('PFS') that she immediately attributed the symptoms

she was having after surgery to the [mesh] device" and then underwent revision surgery after being told there was erosion).

- *In re Bos. Sci. Corp.*, 2015 WL 1405493, at *4 (S.D. W. Va. Mar. 26, 2015) ("Here, the record is clear that by April 17, 2008, when Ms. Fleming underwent a procedure to remove exposed mesh, she was aware that the Pinnacle mesh product had been implanted inside of her *and* that she was experiencing adverse health effects.") (italics in original).

In the face of these cases, the Rumbos trumpet that "Other Courts Have Rejected the Same Arguments Presented by" AMS before citing to one lonesome case: *Long v. Ethicon, Inc.*, 2020 WL 4679570 (D. Or. June 29, 2020). (App. Br. at 27-29). At the outset, *Long* is an Oregon case applying Oregon law, and therefore not binding on this Court. But even if *Long* were mandatory authority, the facts there are readily distinguishable.

The *Long* defendant's argument that the plaintiff was on notice of her claims simply because she had an explant is not comparable to AMS's argument here, where there is extensive evidence that Dr. Godet informed Ms. Rumbo in 2006 (i) that she might have to undergo mesh removal if her 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)), and (ii) subsequently that there was a "possibility that the mesh could have caused her irritative symptoms[.]"[6] (A0139 (Godet Dep. at

[6] Further, Dr. Godet diagnosed Ms. Rumbo with interstitial cystitis, and she testified at her 2019 deposition that he told her it "probably … occurred because of the mesh and all of the irritation and all the surgeries [she] had to have." (A0044-45 (M.

151:12-15)). Indeed, within two weeks of her surgery Ms. Rumbo herself attributed the symptoms of the bodily injuries she claimed in this lawsuit to the AMS pelvic mesh. (A0147 (Plaintiff Fact Sheet at § II ¶ 6)).

Accordingly, *Long* adds nothing to this Court's analysis. As shown above, the overwhelming weight of authority supports the Superior Court's decision here, and this Court should affirm the entry of summary judgment on statute of limitations grounds.

c. The Superior Court Properly Relied On The Admissions In Ms. Rumbos' Plaintiff Fact Sheet

The Court should reject the Rumbos' argument that Ms. Rumbo's Plaintiff Fact Sheet is essentially meaningless when it comes to the question of accrual. The Superior Court properly held that it undermined any claim that Ms. Rumbo did not and could not have discovered that her injuries were related to the AMS pelvic mesh in 2006.

Each plaintiff in the AMS Pelvic Mesh Products Liability Litigation is required to complete a Plaintiff Fact Sheet. (A0142). The purpose of the Fact Sheet "is 'to give each defendant the specific information necessary to defend the case

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Rumbo Dep. at 46:19-47:15)). Ultimately, Dr. Godet told Ms. Rumbo that she needed "someone that had more experience with the mesh to try to get it removed," and in search of that person Ms. Rumbo moved from Alaska to Texarkana, Texas, in 2007. (A0042-43 (M. Rumbo Dep. at 44:14-45:18); A0053 (M. Rumbo Dep. at 122:10-11)).

against it . . . [because] without this device, a defendant [is] unable to mount its defense because it [has] no information about the plaintiff or the plaintiff's injuries outside the allegations of the complaint.'" *Armstrong v. Am. Med. Sys. (In re Am. Med. Sys.)*, 2017 U.S. Dist. LEXIS 92094, at *4-5 (S.D. W. Va. June 15, 2017) (quoted case omitted).

Completed Fact Sheets are considered interrogatory answers. (A0142). A plaintiff completes a Fact Sheet "under oath" and must "provide information that is true and correct to the best of [her] knowledge." (*Id.*). Ms. Rumbo was represented by counsel when she filed out her Fact Sheet. (A0143). At her deposition, Ms. Rumbo acknowledged her signature on her Fact Sheet. (A0164; A0033 (M. Rumbo Dep. Tr. at 18:14-16)).

In Paragraph 6 of Section II of Ms. Rumbo's 2019 Fact Sheet, Ms. Rumbo admitted under oath that she attributed her symptoms of bodily injuries to the AMS pelvic mesh products within two weeks of her implant surgery in April of 2006:

> 6. Do you claim that you suffered bodily injuries as a result of the implantation of any of the pelvic mesh products?
>
> *Yes*
>
> If Yes:
>
> 6.a. Describe the bodily injuries, including any emotional or psychological injuries, that you claim resulted from the implantation of the pelvic mesh product(s).
>
> *Erosion into bladder and vaginal wall. Severe pain; severe muscle dysfunction; severe nerve damage.*

Constant urinary tract infections and vaginal infections. Spasms in bladder/vaginal wall and rectum

6.b. When is the first time you experienced symptoms of any bodily injuries you claim in your lawsuit to have resulted from the pelvic mesh product(s)?

Two weeks post implantation

6.c. When did you first attribute these bodily injuries to the pelvic mesh product(s)?

Immediately

6.d. To the best of your knowledge and recollection, please state approximately when you first saw a health care provider for each of those bodily injuries you claim to have experienced relating to the pelvic mesh product(s)?

One week post operation

(A0147 (Plaintiff Fact Sheet at §II ¶ 6)). The Superior Court specifically cited and quoted this language in full in rendering its decision. (Mem. Op. at 11 n. 48).

"On predicate issues … it is not too much to expect of a plaintiff that [she] will be prepared to offer definitive testimony in interrogatories or at deposition regarding the factual bases for [her] claims[.]" *In re Asbestos Litig.*, 2006 Del. Super. LEXIS 483, at *17 (Nov. 28, 2006). Accordingly, "[a]bsent extraordinary circumstances, a plaintiff should be bound by [her] sworn testimony." *Id.*; *see also Shimko v. Honeywell Int'l, Inc.*, 2014 Del. Super. LEXIS 500, at *15 (Sept. 30, 2014).

A plaintiff is required to supplement her answers in a Fact Sheet if she learns that any responses in it are incomplete or incorrect. (A0142). Ms. Rumbo never did

so. Indeed, after having been given the opportunity to review her Fact Sheet, ***Ms. Rumbo testified at deposition that the information she had provided in her Fact Sheet was correct***:

> Q. And is there anything that's incorrect in this Plaintiff Fact Sheet that you provided?
>
> And you can take your time to review it.
>
> A. Not that I'm aware of.

(A0033 (M. Rumbo Dep. Tr. at 18:17-20)).

In short, the Rumbos are bound by Ms. Rumbo's admissions under oath in her Fact Sheet that she first attributed her injuries to the AMS mesh products within the first two weeks after her implant surgery. The Superior Court properly relied on the Fact Sheet when it determined that her claims against AMS accrued in 2006. *See also Freire v. Am. Med. Sys.*, 2019 WL 1575187, at *1 (granting summary judgment based on the statute of limitations because plaintiff "explained in her Plaintiff Fact Sheet ('PFS') that she immediately attributed the symptoms she was having after surgery to the [mesh] device"). There is no basis for reversal here.

d. Delaware Requires Only Notice Of A Possible Connection Between An Injury And A Product For A Claim To Accrue, Not A Definitive Diagnosis

The basic thrust of the Rumbos' argument on appeal is that summary judgment was improper because Dr. Godet was not able to definitively determine

that the AMS pelvic mesh was in fact the cause of Ms. Rumbos' symptoms. (App. Br. at 18-22). The Court should reject this argument.

"[C]ommencement of the running of the statute does not depend on when a diagnosis is made[.]" *Collins v. Wilmington Med. Ctr., Inc.*, 319 A.2d 107, 108 (Del. 1974); *see also Greco v. Univ. of Del.*, 619 A.2d at 904-05 (Physician at failed to connect the oral contraceptives to symptoms and plaintiff later suffered a grand mal seizure and was properly diagnosed with mesenteric vein thrombosis, resulting from continued use of the contraceptive; this Court held that Section 8119 began to run at the time symptoms began rather than the time of formal diagnosis). Thus, Delaware does not require that a plaintiff know or should know that her symptoms are in fact caused by a product before her claim accrues. *Cole v. Del. League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1124 (Del. 1987) ("For the statute of limitations to begin to run, [a] plaintiff is not required to have knowledge of a causal relationship between the initial injury and the defendants' tortious conduct."). Accordingly, that Dr. Godet may not have been able to be certain that the mesh caused Ms. Rumbo's symptoms is not even remotely dispositive on the question of accrual.

Rather, the question is "when the plaintiffs were first on notice of a ***possible*** connection" between the conditions and the product. *Brown*, 820 A.2d at 366 (emphasis added); *see also Barnett v. Bos. Sci. Corp.*, 2021 WL 1923666, at *3 n.11 (Del. Super. May 13, 2021) ("[O]nce a plaintiff has physical symptoms that are

consistent with mesh implant issues the plaintiff is on notice that these problems ***could be related*** to the mesh implant.") (emphasis added). And when that question is asked here, the answer is that Ms. Rumbo was first on notice of a possible connection between her symptoms and the mesh in 2006.

First, Ms. Rumbo admitted as much in her Plaintiff Fact Sheet. (A0147 (Plaintiff Fact Sheet at §II ¶ 6)). Second, within two weeks of surgery, Dr. Godet specifically told Ms. Rumbo that she might have to undergo mesh removal if her 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)). Third, Dr. Godet found exposed mesh six weeks after implant and informed Ms. Rumbo. (A0074 (Godet Dep. at 133:23-134:14); A0038 (M. Rumbo Dep. at 39:1-2)). Fourth, Ms. Rumbo underwent her first revision surgery on June 9, 2006. (A0038 (M. Rumbo Dep. at 39:10-12)). When it did not alleviate her pain (A0038 (M. Rumbo Dep. at 39:19-40:9)), 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)). Fifth, Dr. Godet performed a second excision procedure on July 27, 2006. (A0039 (M. Rumbo Dep. at 40:22-41:1); A0080 (Godet Dep. at 152:22-24)). That surgery 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)).[7]

Nonetheless, the Rumbos go so far as to claim Delaware law requires that, before their claims could accrue, AMS needed to adduce evidence that "conclusively" established that Ms. Rumbo was aware, or should have been aware, "that [her] symptoms were tied to a defect in the product[.]" (App. Br. at 22). Putting aside the fact that this argument turns the burden of proof on its head,[8] this is not Delaware law for the reasons just explained.

Further, this argument was rejected in the *Hutchinson* case. There, the plaintiff argued that she was blamelessly ignorant because no doctor had told her that the cause of her injuries was a defect in the pelvic mesh. The court accepted that claim, but went on to observe that "actual notice is not required for the statute of limitations to run" and that "inquiry notice is sufficient," finding that Hutchinson

[7] The Rumbos fixate on the June 9, 2006, in making their argument that Ms. Rumbo did not know and had no reason to know that her symptoms were caused by the mesh. (App. Br. at 21-22). This argument, of course, ignores everything that went before as well as what occurred later in 2006. As just illustrated, the evidence taken together shows that Ms. Rumbo knew or had reason to know in 2006 that her symptoms were possibly related to the AMS mesh products.

[8] As noted above, the plaintiff bears the burden of showing that the statute was tolled. *See Collins v. Pittsburgh Corning Corp. (In re Asbestos Litig.)*, 673 A.2d at 162; *In re Tyson Foods, Inc.*, 919 A.2d at 585.

"was chargeable with knowing that her injuries may be attributable to mesh after being informed of the erosion in 2008 and having two revision surgeries in 2009":

> While Plaintiff alleges, and the Court takes as true, that no doctor told her that the cause of her injuries was a defect in the pelvic mesh … actual notice is not required for the statute of limitations to begin to run. Inquiry notice is sufficient. *See Brown*, 820 A.2d at 368. After being informed of the erosion in 2008 and having two revision surgeries in 2009, it follows that Plaintiff was chargeable with the knowledge that her injuries may be attributable to the polypropylene mesh. At that point, Plaintiff was "chargeable with knowing that...her rights had been violated." *Id.*

2020 WL 5752393, at *4 (citations omitted).

The sole authority offered for the novel argument that AMS needed to adduce evidence that conclusively established that Ms. Rumbo was aware, or should have been aware, that her symptoms were tied to a defect in the mesh is a Maryland case that does not even apply Delaware law and otherwise dos not support the argument. *See generally In re Smith & Nephew Birmingham HIP Resurfacing (BHR) Hip Implant Prods. Liab. Litig.*, 2018 WL 6067505 (D. Md. Nov. 19, 2018). *Smith & Nephew* involved 55 cases at the motion to dismiss stage and the court was being asked to decide whether the claims were time-barred. As the court itself recognized, the determination of when a claim accrues under a discovery rule is "unsuited to decision at the motion to dismiss stage." *Id.* at *27-28.[9] Here, of course, the Superior

[9] Thus, the court's comment that "revision surgery, alone, only tells a plaintiff that she is suffering from complications as a result of her implant procedure" (*id.* at *34)

Court did not render its decision at the motion to dismiss stage. Rather, the Superior Court decided the issue at the summary judgment stage after extensive discovery had been exchanged. Thus, even if it had been decided under Delaware law, *Smith & Nephew* has no application here and provides no reason for reversing the Superior Court's decision.

In short, as the Superior Court correctly found, the evidence shows that Ms. Rumbo had notice in 2006 that her injuries might be related to the mesh. Since she did not file suit until 2013—some seven years later—the Superior Court properly entered summary judgment in favor of AMS on statute of limitations grounds. This Court should accordingly affirm.

3. The Rumbos Were On Notice In 2009 Of A Possible Connection Between Ms. Rumbo's Injuries And The AMS Pelvic Mesh Products

The Superior Court properly held that "[e]ven if 2006 was not the pivotal date for notice of a claim, the 2009 television commercial put Rumbo on notice." (Mem. Op. at 12). For their part, the Rumbos do not dispute that their claims would be time-barred if they saw the attorney advertising regarding pelvic mesh injuries and

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must be read in that context. Moreover, 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.

lawsuits in 2009. Instead, they contend that there is a genuine issue of fact as to when they saw the advertising. (App. Br. at 25-27). The Court should reject this argument.

Ms. Rumbo testified that she thought that she started seeing the commercials in 2009. (A0053 (M. Rumbo Dep. at 122:11-15 ("I think I started seeing the commercials in 2009, you know. Pelvic mesh injury, call this number. You may be compensated for your injury or whatever. And, I mean, you know, it was in every channel every 30 seconds.")); A0132 (M. Rumbo Dep. at 120:25-121:4 ("I think it was 2009 is when I first started filling out paperwork, I think. I'm not sure, ma'am, I'm sorry."))). Inasmuch as Ms. Rumbo has passed away, this is the only testimony from her on the subject: while she could not be absolutely sure, she twice testified that it was her belief that she saw attorney advertising in 2007.[10]

[10] Appellants' Brief asserts that Ms. Rumbo was tying her recollection of the commercial to the time when she first retained an attorney and then claims that the date she first hired an attorney was in August of 2011. While the Rumbos had the opportunity to submit evidence on the subject, there is no competent evidence in the record that she hired an attorney in August of 2011 or that, even if she did, that this was the first attorney she retained or to whom she spoke. The Court should not consider this argument: "The Court must decline to draw an inference for the non-moving party if the record is devoid of facts upon which the inference reasonably can be based." *In re Asbestos Litig. to Crane Co.*, 2012 WL 1408982 at *2 (Del. Super. Apr. 2, 2012) (quoting *In re Asbestos Litig.*, 2007 WL 1651968 at *16 (Del. Super. May 31, 2007)).

Further, the Superior Court relied on the testimony of Mr. Rumbo in finding that the Rumbos saw the attorney advertising in 2009. Significantly, the Rumbos fail to address—indeed, ignore—Mr. Rumbo's testimony on the subject. Specifically, Mr. Rumbo testified that he and his wife saw the attorney advertising together and he was quite clear that they saw the advertising in 2009:

> Q. Okay. You say you saw it on TV. Was there an ad or something?
>
> A. Yes.
>
> Q. Okay. What did the ad say?
>
> A. It just gave a – explained what mesh was and how it affected people and for you to call thus number if you think you have a claim.
>
> Q. Okay. So you called this number?
>
> A. Yes, my wife did.
>
> Q. Okay. Prior – and approximately ***when was that***?
>
> A. ***It's been 2009. Been a long time***.
>
> Q. Okay. So in 2009 – do you recall what time of year it was in 2009 you saw the ad?
>
> A. No.

(A0061 (P. Rumbo Dep. Tr. at 8:1-15 (emphasis added); *see id.* at 9:2-9; 12:13-21)).

There is nothing equivocal about Mr. Rumbo's testimony. When asked when they saw the advertising, he answered "2009." Coupled with Ms. Rumbo's stated belief that she started seeing attorney advertising for pelvic mesh claims in 2009, the Superior Court did not err in finding that there was no genuine issue of fact that the Rumbos saw attorney advertising for pelvic mesh claims in 2009. And since 2009

is more than two years before this action was filed, the Superior Court properly determined that the action was time-barred. The Court accordingly should affirm on this ground.

II. DELAWARE COURTS ROUTINELY ENTER SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS WHERE PLAINTIFFS HAVE RAISED THE DISCOVERY RULE

A. Question Presented

If a plaintiff raises the discovery rule in response to a summary judgment motion based on the statute of limitations, must summary judgment automatically be denied and the question of when the cause of action accrued be left to the trier of fact?

B. Standard Of Review

This Court reviews the Superior Court's grant of summary judgment *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011).

C. Merits Of The Argument

Delaware law does not require that the question of whether Ms. Rumbo was on notice of a possible connection between her injuries and the AMS pelvic mesh products be submitted to the trier of fact. Indeed, it is well-settled in Delaware jurisprudence that a court may grant summary judgment on statute of limitations grounds where—as is the case here—there is no genuine issue as to when a plaintiff "knew or should have known" of a possible connection between her injuries and the product.

While a 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" in applying the time of discovery rule, *Brown*, 820 A.2d at 368, summary judgment in favor of a 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 [her] 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)).

Thus, "[i]n the case of a motion for summary judgment based on a statute of limitations defense, the Court must grant the motion if the record reveals that no genuine issue of fact exists regarding the date on which the applicable statute of limitations began to run, the date to which the statute of limitations may have been tolled, and the date on which the plaintiff filed her complaint with the court." *Burrell v. Astrazeneca LP*, 2010 WL 3706584, at *2 (Del. Super. Sept. 20, 2010) (citing *McClements v. Kong*, 820 A.2d 377, 381 (Del. Super. 2002)).

Delaware jurisprudence is replete with examples of summary judgment being entered in the face of the assertion of the time of discovery rule. Indeed, this Court itself has affirmed the entry of summary judgment on statute of limitations grounds despite the plaintiff having raised the time of discovery rule. *See*, *e.g.*, *Greco*, 619 A.2d at 906 (affirming grant of summary judgment in personal injury case because the statute began to run when plaintiff reported her symptoms of twitching, numbness, vomiting, nausea and dizziness to her doctor on December 8, 1987, "if

not before," even though the injury was not diagnosed at that time, and rejecting plaintiff's argument that the statute did not begin to run until December 20, 1987, when "a correct diagnosis" was made); *Collins v. Wilmington Med. Ctr., Inc.*, 319 A.2d at 108 (affirming summary judgment because plaintiff was on notice by December 9, 1970, that "something was wrong" based on "the pain she was experiencing and her doctor's inability to provide relief"). *See also Smith v. Whelan*, 566 F. App'x at 179 (affirming summary judgment and rejecting plaintiff's argument that the limitations period was tolled).

Likewise, the lower courts routinely enter summary judgment in the face of the assertion of the time of discovery rule, including cases involving mesh litigation. *See*, *e.g.*, *Hutchinson v. Bos. Sci. Corp.*, 2020 U.S. Dist. LEXIS 176623, at *8-9 (affirming summary judgment in a pelvic mesh case based on the statute of limitations: "[a]fter being informed of the erosion in 2008 and having two revision surgeries in 2009, it follows that Plaintiff was chargeable with the knowledge that her injuries may be attributable to the polypropylene mesh [and that] her rights had been violated"); *Hall v. Casino at Del. Park*, 2021 Del. Super. LEXIS 666, at *4 (Nov. 17, 2021) (rejecting time of discovery argument and entering summary judgment on statute of limitations grounds); *Anderson v. Anderson-Harrison*, 2013 Del. Super. LEXIS 350, at *14 (Aug. 15, 2013) (same); *Burrell v. Astrazeneca LP*, 2010 Del. Super. LEXIS 393, at *28 (Sept. 20, 2010) (same).

In short, 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. Instead, courts in Delaware routinely grant summary judgment motions on statute of limitations grounds, even in the face of arguments that the statute should be tolled based on the time of discovery rule, where—as is the case here—there is no genuine issue of material fact concerning when a plaintiff was on inquiry notice.

As demonstrated in Argument Point I, it is undisputed that Ms. Rumbo began to suffer from the injuries she claims in this lawsuit in the immediate aftermath of her surgery, that she first attributed those injuries to the AMS pelvic mesh within two weeks of her implant surgery, that her physician told her that the mesh might have to be removed if there was no other explanation for her symptoms, that her physician told her within weeks of the surgery that the mesh was exposed, that her physician performed two revision surgeries, and that her physician told her that her symptoms could be related to the mesh—all of this occurred in 2006. On top of that, it is undisputed that Mr. Rumbo testified that they saw attorney advertising for mesh claims in 2009 and Ms. Rumbo testified that she believed she had seen the advertising in 2009. There is no basis for reversal here.

CONCLUSION

The material facts are not in dispute and the law is clear. The Superior Court properly determined that the applicable statute of limitations bars the Rumbos' claims. Ms. Rumbo attributed her injuries to her AMS Products in 2006 and her course of treatment unequivocally demonstrates and confirms her knowledge of her injury and its possible connection to the AMS mesh products. Then, in 2009, television advertisements explicitly informed her that a cause of action existed. Notwithstanding the foregoing, the Rumbos waited until 2013 to file suit. For these reasons, this Court should affirm the Opinion and Judgment of the Superior Court in their entirety.

Respectfully submitted,

Dated: December 10, 2021

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