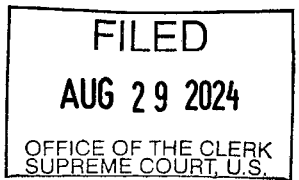


24-5945



NO.: _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JODI ROUVIERE.,

Petitioner,

-vs-

HOWMEDICA OSTEONICS CORPORATION, DBA STRYKER ORTHOPAEDICS,
DEPUY ORTHOPAEDICS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jodi Rouviere".

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Appearing Pro se

QUESTIONS PRESENTED

ISSUE I: WHETHER THE TRIAL COURT EFFECTIVELY REMOVED THE FACTUAL INQUIRY INTO PETITIONER “EXERCISE OF REASONABLE DILIGENCE” UNDER NEW YORK CLS CPLR 214-c (2) FROM THE JURY IN FAVOR OF AN OBJECTIVE STANDARD WHICH DISPENSES WITH ANY NEED TO ASCERTAIN PETITIONER’S KNOWLEDGE AS TO THE ETIOLOGY OF AN INJURY?

ISSUE II: WHETHER THE TRIAL COURT’S REMOVAL FROM THE JURY THE MATERIAL FACT QUESTION OF WHEN PETITIONER KNEW OR REASONABLY SHOULD HAVE KNOWN THE LATENT INJURY OF METALOSIS SUSTAINED BY PETITIONER, AND DECIDING SAID MATERIAL FACT QUESTION DURING SUMMARY JUDGMENT PROCEEDING VIOLATED PETITIONER’S SEVENTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION?

ISSUE III: THE SECOND CIRCUIT FAILED TO FOLLOW FED. R. EVID. 702 AND WHERE THE PANEL’S FAILURE TO ADHERE TO THE STANDARD OF “DISPUTES OF MATERIAL FACT” IN THE REVIEW AND GRANTING OF A SUMMARY JUDGMENT MOTION UNDER CPLR 214C(2) DEPRIVED PETITIONER OF A JURY’S CONSIDERATION THEREBY CONFLICTING WITH THE SUPREME COURT’S RULINGS IN ANDERSON V. LIBERTY LOBBY, INC. AND RELATED CASES

LIST OF PARTIES

1. JODI ROUVIERE, Petitioner.
2. HOWMEDICA OSTEONICS CORPORATION, DBA
STRYKER ORTHOPAEDICS, Respondent.
3. DEPUY ORTHOPAEDICS, INC., Respondent.

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687, 709 (1999).) 26

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Second Circuit entered on May 31, 2024 denying Petitioner Jodi Rouviere's Petition for Rehearing and Suggestion for Rehearing *en banc* is appended hereto as Appendix "A". The unpublished opinion of the United States Court of Appeals for the Second Circuit entered on April 5, 2024, affirming the judgment of the United States District Court below court granting summary judgment in favor of Respondents Howmedica Osteonics Corporation, DBA Stryker Orthopaedics and DePuy Orthopaedics, Inc. and against Petitioner Jodi Rouviere ("Rouviere" or "Petitioner"), is appended hereto as Appendix "B". The district court's original judgment was entered on January 4, 2023 is appended hereto as Appendix "C". The district court's order granting summary judgment in favor of DePuy is appended hereto as Appendix "D". The district court's order granting summary judgment in favor of Stryker is appended hereto as Appendix "E".

JURISDICTION

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Second Circuit dated April 5, 2024 which is appended hereto as Appendix B and reported at *Rouviere v. Howmedica Osteonics Corp.*, 2024 U.S. App. LEXIS 8201 (2d Cir. Apr. 2024) (unpublished) is invoked under 28 U.S.C. 1254(1). The Second Circuit's order dated May 31, 2024 denying Petitioner Jodi Rouviere's

Petition for Rehearing and Suggestion for Rehearing *en banc* is appended hereto as Appendix “A”. Petitioner also seeks review of the district court’s judgments dated January 4, 2023 and September 17, 2021 which are reported at *Rouviere v. Howmedica Osteonics Corp.*, 645 F. Supp. 3d 157 (S.D. N.Y. 2022) and *Rouviere v. Depuy Orthopaedics, Inc.*, 560 F. Supp. 3d 774 (S.D.N.Y. 2021) which are appended hereto as Appendix D and E respectfully, which were reviewed by the Second Circuit in its above decision dated April 5, 2024.

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

Seventh Amendment to the U.S. Const.: In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

Fed. R. Civ. P. 56 provides in part:

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

CPLR 214-c(4) provides in part:

The plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise

satisfied the requirements of subdivisions

STATEMENT OF CASE

This case involves a 43-year-old mother with pre-existing medical conditions including chronic headaches, Ehlers-Danlos Syndrome (EDS) and joint dislocations.

In August 2012, the Petitioner, Rouviere, underwent hip replacement surgery using the Respondents' hip implant devices. Despite the surgery, she continued to experience severe pain. In 2013, Rouviere underwent an unsuccessful cervical fusion surgery, which resulted in cerebrospinal fluid ("CSF") leaks, persistent neurological symptoms, and permanent disability. On November 11, 2016, Rouviere had open exploratory surgery to address severe hip pain and dislocation in which the surgeon discovered that impingement between Stryker's metal acetabular components and DePuy's metal femoral stem generated excessive metal wear debris observed as grayish-brown hip tissue which he diagnosed as "metallosis". Between 2016 and 2017, Rouviere underwent three additional surgeries, culminating in complete removal of hip implants. As a result of losing a functioning hip joint, Rouviere was rendered permanently handicapped and unable to walk. *ECF 231-2, Exh:48, p.44,194,212-214,225,230.1*

In May 2018, Rouviere filed a federal civil complaint in the district court below, asserting product-liability claims against DePuy and Stryker under theories

1 ECF is abbreviation for the docket entry in the district court below.

of failure to warn, negligence, strict liability, and breach of express and implied warranties. *ECF 1*. She later amended the complaint. *ECF 26*.

Stryker moved for summary judgment, citing Petitioner's claims were time-barred under New York's three-year statute of limitations for personal injury. Rouviere opposed this, asserting that the causes of action did not accrue until 2016, when metallosis was discovered during surgery. Alternatively, she argued that the claims were timely due to Stryker's deceptive practices, which concealed the risks associated with her implant and left her and her surgeons unaware of the safety and efficacy issues, thereby preventing proper follow-up care.

The district court held "[i]n years leading up to May 2015, Rouviere began experiencing exactly those symptoms she now seeks damages for and attributes to implantation of [Stryker]'s devices." *Appendix C at p.20.2* Consequently, the court ruled claims against Stryker were time-barred and granted summary judgment in Stryker's favor under New York's CPLR 214-c (2). *Id. at p.32*.

2 The lower court stated, "It is important to note that the onset of any symptoms is not sufficient to trigger the Statute of Limitations under C.P.L.R. 214-c (2). Instead, the symptoms must put plaintiff on notice of the "primary condition on which the claim is based." (*Matter of New York Cnty. DES Litig.*, 678 N.E.2d at 475; see *Grill v. Philip Morris USA, Inc.*, 653 F. Supp. 2d 481, 487 (S.D.N.Y. 2009)). However, the court triggered Rouviere's SOL based on 2013-2015 symptoms not related to her main injury of metallosis of her hip tissue but related to and diagnosed as a permanent and severe cervical spinal disorder resulting in spinal disability.

There were no signs of metallosis before open surgery in November 2016 and none of the experts in the case opined on metallosis before 2016. They focused on the condition of Rouviere's hip tissue after the discovery of metallosis during surgery and on the secondary injuries also caused by metal wear debris. The evidence established that the impingement, its mechanical symptoms, and the related metal wear debris were consequences of Stryker's defective MDM/Trident design, not symptoms of Rouviere's metallosis. The lower court agreed Rouviere's claims were not of the failure of the device but of the latent injury of metallosis that its excessive metal wear debris imposed which led to the injury of metallosis and to the device's premature failure. Appendix Metallosis is *caused* by excessive metal wear debris. Under New York's CPLR 214-c (2), the cause of injury does not trigger the Statute of Limitations. *ECF 239-1 p.12, ECF 231-2 p.53:5- 54:5*. The exact timing of when the metal debris exposure led to the manifestation of Rouviere's metallosis remains unclear and unsupported by the evidence before its discovery in November 2016.

The Petitioner contends that the issue of when she discovered metallosis is a material fact that should have been determined by a jury, not the district court in a pretrial proceeding. However, the district court effectively usurped this jury function by deciding the material fact, eliminating evidence, and rewriting Plaintiff's medical history and testimony to suggest she knew she was suffering

from metallosis in her hip tissue years before its discovery based on symptoms that were not related to the asymptomatic condition of metallosis, but to her cervical spinal injury, surgery and chronic disability. The Petitioner argues that this decision violated her Seventh Amendment rights and requests that the judgments rendered by the lower courts be vacated.

Regarding Respondent DePuy, the Petitioner asserts that she provided evidence that DePuy's products were defective, despite the magistrate judge's exclusion of certain expert opinions. Nonetheless, the district court granted summary judgment in favor of DePuy, concluding that Rouviere failed to present expert testimony regarding DePuy's defects. Rouviere contends that this was an abuse of discretion and that the court's exclusion of significant portions of her expert's report was both erroneous and fundamentally unfair.

The district court also found that, although DePuy failed to provide adequate warnings, this failure would not have altered the surgeon's use of DePuy's devices and then wrongly focused solely on the chemistry of DePuy's stem, rather than the main issue of metal-on-metal impingement between the Defendants' components that led to metallosis ignoring crucial evidence that Plaintiff and her surgeon would have avoided such risks. Following the magistrate judge's decision to limit the testimony of Rouviere's replacement expert, ignore crucial evidence and focus on the wrong issue, the district court granted DePuy's motion for summary judgment. ECF

318. Rouviere respectfully submits that the district court abused its discretion and erred as a matter of law in granting summary judgment in favor of the Appellees. The magistrate judge's decision to strike portions of her expert's report, implicating DePuy and its wrongdoing, constituted an abuse of discretion or was clearly erroneous, undermining the fairness of the proceedings.³

I. PROCEDURAL HISTORY.

In May 2018, Petitioner filed a complaint against Stryker and DePuy, for products liability and breach of warranty. In October, 2018, Petitioner amended the complaint. Stryker filed a motion for summary judgment based on Statute of Limitations. DePuy filed a motion for summary judgment asserting that the Petitioner presented no evidence to establish proximate causation.

On December 5, 2022, the district court granted Stryker's motion for summary judgment, finding that the Petitioner's personal injury claims were time-barred under New York's three-year limitations period pursuant to N.Y. C.P.L.R. 214-c(2) because she knew of the condition on which her claim was based and that virtually all of plaintiff's alleged symptoms emerged more than three years prior to her commencement of the action on May 31, 2018. *Rouviere v. Howmedica Osteonics*

³ Additionally, the lower court disregarded Plaintiff and her surgeon's testimony based on the wrong issue, the chemistry of the stem, rather than the metal-on-metal impingement of it that shed its dangerous metal pieces into Rouviere's hip tissue and led to severe consequences including metallosis and the device's failure.

Corp., 645 F. Supp. 3d 157 (S.D.N.Y. 2022). The district court also granted DePuy's motion for summary judgment, holding that the Petitioner had failed to offer any evidence establishing DePuy's liability. *Rouviere v. Depuy Orthopaedics, Inc.*, 560 F. Supp. 3d 774 (S.D.N.Y. 2021). The Second Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of both Stryker and DePuy in an unpublished decision. *Rouviere v. Howmedica Osteonics Corp.*, 2024 U.S. App. LEXIS 8201 (2d Cir. 2024). On May 31, 2024, the Second Circuit denied the Petitioner's petition for rehearing and her suggestion for rehearing en banc.

II. STATEMENT OF FACTS.

Petitioner suffered from medical conditions including chronic headaches, Ehlers-Danlos syndrome (EDS), and joint dislocations following a hip injury in 2009 resulting in extreme pain requiring her to often wear a hip brace and sometimes use a wheelchair. Her medical records noted extreme global hypermobility and dislocations including bilateral hips, knees, wrists, shoulder, neck and back. In August 2012, Petitioner underwent hip replacement surgery and was implanted with a device that combined components made by two companies," DePuy and Howmedica (Stryker). 645 F. Supp. 3d at 160.

DePuy and Stryker concealed knowledge and failed to disclose to Rouviere and her surgeons that Stryker's defective metal-on-metal impingement dual-mobility design introduced more severe risks than metal-on-metal bearings.

Unbeknownst to Rouviere and her surgeons, the hip implants caused metal impingement and subsequent excessive metal debris resulting in metallosis. Metallosis is a latently imposed condition known to be asymptomatic. It is only detectable in open surgery and not by diagnostic testing.⁴

In February 2013, Rouviere suffered a five-level cervical dislocation and underwent an unsuccessful emergency cervical fusion surgery which led to a severe cervical and spinal condition, an unstable spine, severe and permanent neurological symptoms, debilitating cerebrospinal “CSF” leaks, and an overall significant decline in her health. Rouviere sought consultations with neurosurgeons and neurologists beginning in February 2013 and frequently throughout 2014.

In 2014, Rouviere was also examined by her hip surgeon who reassured her through diagnostic testing that the devices were operating correctly with no issues, failures or injuries. The same year, a neurosurgeon diagnosed Rouviere with severe-cervical medullary syndrome and recommended two additional cranial/spinal fusion/stabilization surgeries which she declined. Currently, in 2024, Petitioner continues to experience neurological/cognitive symptoms including headaches, nausea, dizziness, vertigo, tremors, neck pain due to her permanent spinal

⁴ DePuy’s femoral Summit stem (titanium) and BioloX (ceramic) head, along with Stryker’s acetabular devices, were implanted into Petitioner. Despite knowing failures from metal-on-metal impingement with Stryker’s Trident shell/metal liner, DePuy still did nothing to prevent its pairing with their stem. ECF 233-6 p.118; ECF 316-1; ECF 231-1.

disability which limits her neck's ability to hold up her head.

In 2015, Petitioner's hip surgeon determined after diagnostic testing that the devices were functioning correctly and showed no signs of metallosis. In August 2016, Petitioner suffered her first prosthesis dislocation and underwent closed surgery. Then on November 11, 2016, she had open exploratory surgery to address new severe and ongoing hip pain and instability. Her surgeon found that the titanium DePuy stem impinged with the cobalt-chromium Stryker MDM liner and Trident shell causing excessive metal debris and grayish-brown hip tissue which he confirmed was metallosis leading to a partial implant revision.

In February and in May 2017, Petitioner underwent two additional revisions, removing/replacing components. In May 2017, the surgeon removed the final piece of the Respondents' components, Stryker's Trident shell and attempted a final implant surgery. In October 2017, girdlestone surgery was performed when all hip components were removed leaving Petitioner without a hip joint and unable to walk.

In May 2018, Rouviere filed a complaint in the district court below against Respondents, presenting claims of negligence, strict products liability, failure to warn, breach of express warranty, and breach of implied warranty. ECF 26.

DePuy moved for summary judgment against Petitioner, citing lack of evidence establishing DePuy's liability. After the district court struck portions of the

opinion of Petitioner's engineering expert supporting Petitioner's causes of action against DePuy, the district court below agreed "without Dr. Jarrell's DePuy-related opinions—the Rouvieres have adduced no expert testimony that DePuy's products were defectively designed." 560 F. Supp. 3d at 795. "Summary judgment is therefore granted for DePuy on the Rouvieres' negligence and strict-products-liability claims (counts one and two) to the extent they are based on a defective-design theory." Id. The district court ignored the main issue of the metal impingement between the Defendants' devices and instead determined that "Rouvieres have proffered no facts that would allow a jury to make that inference without resort to speculation" that DePuy's failure to warn of the chemistry of the titanium stem would have caused Rouviere's surgeon to implant other devices. Id. at 800.

Howmedica also moved for summary judgment, claiming all of Petitioner's claims presented were time-barred as a matter of law. The district court chose to make the factual finding that Petitioner knew of the metallosis in her hip tissue prior to May 2015:: (***denotes portions of the district court order wherein he contradicts himself*)

In the years leading up to May 2015, Rouviere began to experience exactly those symptoms that she now seeks damages for and attributes to the implantation of Defendant's device. In September 2012, Rouviere went to the emergency room because she was experiencing extreme dizziness and vertigo as well as nausea and vomiting. Joint 56.1 Statement ¶ 7. Even if those symptoms at the time could be deemed to be too "inconsequential" or "isolated" to be the "primary condition" on which Plaintiffs' claim is based, Rouviere testified at her deposition that by 2013 she felt like she saw "the

most decline starting to happen" and experienced "[m]ore pain, more instability, less function" in her hip. Dkt. No. 335-1 at ECF p. 13. Rouviere further testified that in 2013 she was "receiving a lot of effects" such as her "heart would start beating harder," it was "taking a lot for [her] to do the normal things [she] was doing," "[e]xertion was exhausting for [her]," and "[her] body was tiring." *Id.* at ECF pp. 13-14. In 2013, Rouviere visited a neurologist due to symptoms including "heaviness in arms and legs, feeling like itching in her face and head, urinary urgency and hesitation," and "feel[ing] like she has slowed down in general" and questioned whether she had a disease such as multiple sclerosis. *Id.* at ECF p. 15. In 2014, at a physical therapy appointment, Rouviere reported feeling "shooting pain through her body" and that "she is getting worse" with "severe daily headaches" and extreme fatigue, Dkt. No. 335-14; at a neurosurgery appointment in that same year, Rouviere presented with "vertigo, dizziness, lightheadedness, tremors, headache and neck pain, blurred vision at times on the left, visual flashes, vision halos, tinnitus, speech difficulties, hoarseness, choking, weakness of the arms and legs, nausea, imbalance, poor coordination, dysphagia, and dysautonomia manifest by palpitations," Dkt. No. 346-7 at ECF p. 12. And, at the time of her visit to Dr. Alvarado in May of 2015, Rouviere again reported "poundings in [her] body" and head, blurred and double vision, "malaise," and an "[o]verall feeling of sickness." *Id.* at ECF p. 18. These symptoms map onto the injuries Plaintiffs' experts state that Rouviere experienced from Defendant's conduct, including "chronic fatigue, nausea, headaches, weakness, dizziness/vertigo, cognitive impairment, hip and other joint and muscle pain, tachycardia, dry eyes/blurred vision, and other immunological and neurological symptoms." Joint 56.1 Statement ¶ 24.

Medical records also document that the impacts of these symptoms on Rouviere's life were immense in the years prior to the three-year period before Plaintiffs filed the complaint in this case. As one medical record from 2014 documents: "Notwithstanding the fact that she has been raising four children, she has been otherwise totally disabled. There was a cascade of injuries starting six years ago when she injured her hip Presently, with no activity and some pain medicine, her pain level is 6/10. With activity the pain is 9/10." Dkt. No. 346-7 at ECF p. 12. In 2014, Rouviere reported on a medical form that "living is a physical challenge," that she worked from her "bed," and that she suffered numerous symptoms including numbness of right leg, shaking episodes, tremors, headaches, blurred vision at times, double vision at times, ringing in ears, chronic pain, heart palpitations, poor coordination and speech difficulty. Dkt. No. 346-7

at ECF pp. 36-37.

****Thus, from this evidence, it is apparent that Rouviere knew of the condition on which her claim was based and that "virtually all of plaintiff's alleged symptoms emerged more than three years prior to her commencement of the action" on May 31, 2018. Those symptoms, prior to March 31, 2015, were also sufficiently continuous and sufficiently severe that they were not "so isolated or inconsequential that a reasonably diligent person would not attribute them to an injury or disease." The conditions significantly affected Rouviere's physical activity and quality of life over an extended period of time. Rouviere stated in 2014 that, due to her symptoms, living was a "physical challenge," and she repeatedly went to various doctors during this period in order to seek treatment for her symptoms and to have them diagnosed. Dkt. No. 346-7 at ECF pp. 36-37; *see generally* Dkt. No. 346-7. Courts have held that symptoms of this degree trigger the running of the statute of limitations under C.P.L.R. 214-c(2) as a matter of law. They have also held that repeated complaints to doctors about symptoms are sufficient to trigger the running[.]**

****It is true that there is evidence Rouviere did not begin to suspect that her symptoms were related to the implant malfunction until May 2015 and that her doctors did not determine that the devices at issue were the cause of those symptoms until November 2016 (when she underwent her partial revision surgery). Those facts make it understandable that she did not file suit prior to November 2016 (though it is more difficult to understand why she waited until May 2018). But the fact that the statute of limitations would start to run before Rouviere was aware that the ailments she was experiencing were due to the implanted devices or even before she might have known that those ailments had a nonbiologic cause is what *Matter of New York County DES Litigation* requires. As the New York Court of Appeals again held shortly after *Matter of New York County DES Litigation*, it is irrelevant that the plaintiff has no reason to believe that her injury has a nonnatural cause—it is sufficient that the Plaintiff have simply discovered the injury underlying his claim: "[a]ll that is necessary to start the limitations period is that plaintiff be aware of the primary condition for which damages are sought." *Whitney*, 683 N.E.2d at 769. A would-be plaintiff must, within the three-year period, receive a correct diagnosis of her other than inconsequential, generalized, or isolated ailments lest she lose her claim even before she knew she had it. ****Rouviere was aware prior to May 2015 of the injuries which she now claims were caused by Defendant's allegedly tortious acts. That she was left in the dark as to its****

true cause does not save her claims.

Plaintiffs nonetheless argue that this case is ill-suited for resolution at summary judgment as Rouviere has had a long and complex history of medical conditions and injuries, even prior to the 2012 hip surgery at issue, and "[t]he complexity of her physical condition makes it impossible to state that as a matter of law any one injury was resultant from the malfunction or defect of the device." Dkt. No. 341 at 25. Plaintiffs state that the ailments that Rouviere complained of "back in 2012-2015 are subject to interpretation since the defendant's own experts attribute these ailments in various body parts to a connective tissue disorder, generally genetic in nature." *Id.* Plaintiffs then appear to argue that the injury may not have presented itself "until the revision surgery done in 2016." *Id.*

The facts upon which Defendant bases this motion, however, are not genuinely in dispute. The legal conclusions she would have the Court draw do not follow. *See Braunscheidel*, 2013 U.S. Dist. LEXIS 45376, 2013 WL 1337013, at *5 (rejecting argument that the statute of limitations defense raised a fact issue precluding summary judgment) To the extent that Plaintiffs would now have the Court accept that the symptoms she experienced prior to May 2015 do not constitute part of the primary condition on which their claim is based, "[t]hat is not how" Plaintiffs plead their case. **** That metallosis is the latent injury and CPLR 214 c2 applies and not mechanical failure- not personal injury law that allows symptoms to trigger the SOL.** Throughout this litigation, including in the amended complaint and Plaintiffs' briefing, interrogatory responses, as well as expert reports, Plaintiffs have proffered a theory of the case that the symptoms Rouviere suffered shortly after the 2012 surgery were attributable to the implementation of the devices. *See, e.g.*, Dkt. No. 26 ¶ 209; Dkt. No. 335-3 at 6 (Rouviere Interrogatory Response: "The device cause injury upon implementation, physiological instability, toxicity, and toxic result over time."); Dkt. No. 335-10. Plaintiffs also allege in the amended complaint that Rouviere suffered "elevated metal levels and instability" *prior* to the revision surgery and "[b]y the beginning of 2013, she experienced pain and loss of range of motion." Dkt. No. 26 ¶¶ 6, 11. These are key injuries that Rouviere claims were caused by implantation of Defendant's device. *****he said mechanical symptoms not relevant and metallosis is the claim, not mechanical failure of the device-*** Joint 56.1 Statement ¶ 23 ("Among the injuries claimed by Ms. Rouviere in this action include physiological instability, pain . . . toxicity."). Plaintiffs cannot now state—solely for purposes of getting around the applicable statute of limitations—that it is

unprovable whether any of these symptoms were, in fact, attributable to the devices and the only injury Plaintiff can be shown to have suffered was the revision surgery itself. ***as per cpl'r 214 c2- this should be symptoms attributable to metallosis not the devices*

Moreover, even if Rouviere subjectively believed that her ailments "were merely a continuation of h[er] pre-existing" conditions, "this is not a factor in the accrual of the statute of limitations." The record here, however, establishes that the ailments Rouviere suffered from were "new and different" and they "consistently impacted" her life. 2013 U.S. Dist. LEXIS 45376, [WL] at *4-5. Rouviere testified during her deposition that up until the August 2012 surgery she largely suffered from pain in her right hip as well as joint and ligament complaints, which were connected to her hip injury from her 2009 accident as well as her Ehlers-Danlos syndrome; however, after, the August 2012 surgery, Rouviere started to experience a host of new side effects throughout 2013 and 2014, including that her heart would start beating faster, "exertion was exhausting," her body was "tiring," and she was experiencing dizziness. Dkt. No. 316-6 at 84-89, 135-36, 145. Plaintiffs also submit expert opinions opining that these 2013 and 2014 symptoms were caused not by Rouviere's underlying medical conditions but by "excessive metal debris from the impacted hip components." Dkt. No. 335-8; *see also, e.g.*, Dkt. No. 335-9. In other words, this is not a case where the type of symptoms Rouviere suffered due to her underlying medical issues prior to her surgery were the identical symptoms that she suffered post-surgery and thus she would not have known she was injured. To the contrary, Rouviere testified that the nature of her ailments changed markedly after the surgery making it unmistakable that she would have known she was injured.

645 F. Supp. 3d 174-175 (internal citations and quotations omitted).

The Second Circuit "affirm[ed] the district court's summary judgment decisions for both Stryker and DePuy on Statute of Limitations grounds. The record reveals no genuine dispute of material fact that the relevant symptoms began before May 2015. Rouviere's 2018 complaint is therefore time barred." *Rouviere v. Howmedica Osteonics Corp.*, 2024 U.S. App. LEXIS 8201

*2 (2d Cir. Apr. 2024) (unpublished); *see also Appendix A, pp. __.*

The instant petition followed.

The Second Circuit “affirm[ed] the district court's summary judgment decisions for both Stryker and DePuy on Statute of Limitations grounds. The record reveals no genuine dispute of material fact that the relevant symptoms began before May 2015. Rouviere's 2018 complaint is therefore time barred.” *Rouviere v. Howmedica Osteonics Corp.*, 2024 U.S. App. LEXIS 8201 *2 (2d Cir. Apr. 2024) (unpublished); see also *Appendix A*, pp. __.

The instant petition followed.

THE REASONS FOR GRANTING THE PETITION

Petitioner, Mrs. Rouviere, submits the district court erred in deciding the material fact question of when she knew of when the hip implant's metal debris caused the latent injury of metallosis in her hip tissue for the purpose of Statute of Limitations is reserved for the jury at trial; that is, whether Petitioner's claims of injury caused by Respondents' medical devices were time-barred should have been decided at trial by the jury, not the trial judge during a pretrial proceeding.

ISSUE I: THE TRIAL COURT EFFECTIVELY REMOVED THE FACTUAL INQUIRY INTO PETITIONER “EXERCISE OF REASONABLE DILIGENCE” UNDER NEW YORK CLS CPLR 214-c (2) FROM THE JURY IN FAVOR OF AN OBJECTIVE STANDARD WHICH DISPENSES WITH ANY NEED TO ASCERTAIN PETITIONER'S KNOWLEDGE AS TO THE ETIOLOGY OF AN INJURY

The district court below effectively removed the factual inquiry into Petitioner's “exercise of reasonable diligence” under CPLR 214-c (2) from the jury in

favor of an objective standard which dispenses with any need to ascertain a plaintiff's knowledge as to the etiology of an injury.

Beginning in 2009, Petitioner endured a plethora of medical illnesses which resulted in extreme pain throughout her body and in neurological and cognitive symptoms including dizziness, vertigo, tremors, convulsions, speech, sight, and hearing difficulties. Although she had hip implant surgery in 2012, these episodes of pain, discomfort, dizziness and vertigo were related to her other medical conditions. The district court below decided, against medical, technological, and scientific evidence that any and all of Petitioner's 2013-2014 symptoms related to her severe cervical and spinal conditions were related to metallosis, wear debris deposited into her hip tissue, and that Petitioner knew she had metallosis by them years before it was diagnosed in open surgery. Hence, the district court held the Statute of Limitations commenced at the latest in 2014.

Having three years to bring Petitioner's claims in the instant case against Respondents, the district court deemed Plaintiff's causes of action time-barred under CPLR 214-c (2) since Petitioner filed the complaint below in May 2018. Petitioner submits the district court ignored evidence of the material fact as to when Petitioner discovered her injury and knew of her claim against Respondents, a fact question that should have been decided by the jury at trial. The district court effectively removed the factual inquiry into a plaintiff's "exercise of reasonable

diligence” under CPLR 214-c (2) from the jury in favor of an objective standard which dispenses with any need to ascertain a plaintiff's knowledge as to the etiology of an injury.

The NY appellate courts observed that the primary motivation behind the Legislature's enactment of CPLR 214-c was the concern that persons who are unaware that they have been injured by exposure to a particular substance would be unable to pursue their claims by the time they discovered the nature of their injury. See, *Rothstein v Tennessee Gas Pipeline Co.*, supra, 87 NY2d, at 96; *Jensen v General Elec. Co.*, 82 NY2d 77, 82-85; *Enright v Lilly & Co.*, 77 NY2d 377, 383). Thus, it was not the abnormal physical condition per se (for example, a T-shaped uterus) which prompted legislative action, but the lack of awareness on the part of injured persons that a particular substance could cause deleterious physical effects which led the Legislature to act.

The NY appellate court previously noted the sentiment of a member of the New York State Senate that CPLR 214-c was required to “provide relief to injured New Yorkers whose claims would otherwise be dismissed for untimeliness simply because they were unaware of the latent injuries until after the limitation period had expired.” *Jensen v General Elec. Co.*, supra, 82 NY2d, at 84, quoting from *Mem of Senator R. B. Stafford*, reprinted in 1986 NY Legis Ann, at 287. However, the existence of such “latent injuries” cannot be determined in a vacuum. They must be

linked to a particular substance. The Legislature addressed its concern that injured parties would be unable to discover this link between a substance and the physical manifestation of injury within three years of exposure to the substance by enacting CPLR 214-c. The district court's decision to parse out these inextricably intertwined concepts by divorcing the "resulting infirmity" from "impact or exposure" cannot withstand scrutiny. An infirmity "results" only if a substance exerts harmful effects.

Moreover, the district court's and Second Circuit's opinion in this case now burdens plaintiffs with the obligation to commence a lawsuit before any potential defendants have been identified. Without the benefit of hindsight which links a particular substance to a "primary condition" plaintiffs must now deal with an expiring statute of limitations when the only knowledge in their possession is the existence of an abnormal physical condition.

In an apparent repudiation of the Legislature's concern that injured parties would lose access to courts because they lack knowledge that a certain substance causes a certain somatic effect, the district court and Second Circuit holds today that, as a matter of law, knowledge of a metallosis injury to hip tissue from metal wear debris can be imputed to a plaintiff if that plaintiff suffers from any "medical condition". That this condition may not be related, may not have manifested, or a plaintiff may not have discovered it could give rise to a claim apparently holds no relevance for the district court or Second Circuit in this case. The district court and

Second Circuit similarly disregards the diligence exercised by plaintiffs in attempting to discover the causes of their medical problems and Plaintiff's medical evidence that those symptoms were related to and diagnosed as other pre-existing, severe, and chronic medical conditions.

In taking this stance, the district court with approval of the Second Circuit transforms a fact-intensive inquiry into the nature of a plaintiff's knowledge as to the deleterious effects of a substance, and the reasonableness of a plaintiff's diligence in acquiring such knowledge, into an objective standard based on the manifestation of physical symptoms against the technical, scientific and medical evidence that metallosis has no symptoms until it is visually discovered in surgery. The difficulty of determining the reasonableness of the diligence exercised by the plaintiff here is illustrated by the fact that she consulted several medical practitioners who ran many diagnostic exams and confirmed her hip implant was functioning well. She showed no signs of metallosis and was assured by her surgeons that she did not need to be concerned with metallosis with her polyethylene-on-ceramic dual-mobility hip implant. In 2013, plaintiff was suffering all kinds of pain and discomfort and began experiencing extreme neurological and cognitive deficits related to her neck injury and surgery. Her hip tissue's metal wear infiltration that led to metallosis was never considered a causal factor of her extreme neurological and cognitive difficulties diagnosed by a neurosurgeon as a

severe and permanent debilitating cervical spinal condition.

The scientific and technical information confirms metallosis is asymptomatic (*footnote FDA/article by appellate court*) and undetectable until such time as the surgeon observes the tissue surrounding the hip which is saturated with metal shavings. Moreover, the lower courts here assume, as a matter of law, that a layperson would know that metal debris from a hip implant that is not a metal-on-metal hip implant, could cause some undefined “primary condition” of metallosis even though they would experience no symptoms and the diagnostic testing would not indicate it.

Here, Petitioner claimed below that she did not know she was suffering from metallosis until her 2016 hip surgery. Instead of permitting a jury to decide, as an issue of fact, what symptoms related to the main injury and when plaintiff discovered it such knowledge was simply assumed. The imputation as a matter of law to laypersons, or at all, is unwarranted given the lack of any scientific and technical knowledge and medical evidence.

By declining to conduct any inquiry into whether reasonable diligence would have revealed that a particular substance caused plaintiff's physical abnormalities, the lower courts here permitted “fortuitous circumstances” to reign supreme. While the level of technical, medical and scientific knowledge is relevant in determining whether a plaintiff has exercised reasonable diligence in discovering a “primary

condition,” it was all ignored by the district court. Additionally, a jury should determine whether this fact alone or in tandem with others should commence the running of the Statute of Limitations.

CPLR 214-c is a remedial measure and that, as such, it should be liberally construed to effectuate its purposes. By narrowly construing “discovery of the injury,” the lower courts removed the fact-intensive issue of when a layperson should know of specialized scientific and medical concepts from the jury and concluded that courts may determine which physical conditions plaintiffs should be assumed to know and when they acquired this knowledge as a matter of law. The lower courts here have foreclosed Petitioner from bringing her claims because she lacked awareness that exposure to a particular substance could lead to somatic injuries within a certain time frame.

Simply put, the jury in this case should have been the trier of fact on the question of when Petitioner knew or reasonably should have known through the exercise of due diligence of the metallosis condition in her hip, not the district court at a pretrial proceeding.

“‘[W]hether a plaintiff has exercised reasonable diligence is generally a factual question reserved for the jury’ unless ‘the facts are so clear that reasonable minds cannot differ as to whether the plaintiffs exercised reasonable diligence.’”

Butterline v. Bank of N.Y. Mellon Trust Co., Nat’l Ass’n, 841 Fed. Appx. 461 (3d Cir.

2020) (quoting *Mest v. Cabot Corp.*, 449 F.3d 502, 512 (3d Cir. 2006)); see also, *N.C. Corff P'Ship, LTD v. OXY USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 294 (Okla. Civ. App. 1996) (stating that whether a plaintiff should have been aware of injury to his land was a question of fact for the jury); *Auld-Susott v. Galindo*, 2021 U.S. App. LEXIS 20399 (9th Cir. July 9, 2021) ("Whether a plaintiff exercised reasonable diligence is a question of fact."); *Janvey v. Romero*, 817 F.3d 184, 189 (5th Cir. 2016) ("When a plaintiff discovered or could reasonably have discovered a transfer is generally a question of fact for the fact-finder."); *Faircloth v. Fin. Asset Secs. Corp. Mego Mortg. Homeowner Loan Trust*, 87 Fed. Appx. 314, 319 (4th Cir. 2004) ("The question of when a plaintiff "should have discovered" the fraud is typically a question of fact, but this question may be determined as a matter of law where the plaintiff clearly had both the capacity and opportunity to discover the fraud."); *Americare Sys. v. Pinckney*, 635 Fed. Appx. 305, 310 (6th Cir. 2016) ("[T]he question as to whether the plaintiff exercised reasonable care and diligence in discovering the injury or wrong is usually a question of fact.") (internal quotation and citation omitted).

ISSUE II: THE TRIAL COURT'S REMOVAL FROM THE JURY THE MATERIAL FACT QUESTION OF WHEN PETITIONER KNEW OR REASONABLY SHOULD HAVE KNOWN THE LATENT INJURY OF METALOSIS SUSTAINED BY PETITIONER, AND DECIDING SAID MATERIAL FACT QUESTION DURING SUMMARY JUDGMENT PROCEEDING VIOLATED PETITIONER'S SEVENTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION

The Seventh Amendment guarantees a jury trial in civil cases seeking monetary damages in federal court and limits the circumstances under which courts may overturn a jury's findings of fact. The Seventh Amendment provides as follows: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959).⁵

In the case sub judice, the jury should have decided when Petitioner should have discovered with the exercise of due diligence when she had the condition of metallosis – an asymptomatic condition only discoverable in open surgery. Given her chronic pre-existing medical conditions and illnesses, and the 2013 cervical injury and surgery it was impossible for Petitioner to have been alerted that the

⁵ Recognizing the importance of a jury deciding the material facts dispositive of a party's claim against another party, this Court held: "This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, to the text of the note can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U.S. at 510-511.

buildup of metal shavings had occurred in the tissue surrounding her hip. Of course, a jury would make that factual determination if she knew or should have known with the exercise of due diligence that she had metallosis. The district court below took that fact question away from the jury before a trial on the merits and cherry-picked cognitive and neurological symptoms related to her cervical spine injury and surgery in 2013-2014 as a point in time when the Statute of Limitations had commenced.

Based on the precedent established by this Court and followed by virtually every federal circuit court cited above, the district court erred by deciding the factual question of when Petitioner knew she sustained the injury of metallosis by the Respondents' hip implant devices.

ISSUE III: THE SECOND CIRCUIT FAILED TO FOLLOW FED. R. EVID. 702 AND WHERE THE PANEL'S FAILURE TO ADHERE TO THE STANDARD OF "DISPUTES OF MATERIAL FACT" IN THE REVIEW AND GRANTING OF A SUMMARY JUDGMENT MOTION UNDER CPLR 214C(2) DEPRIVED PETITIONER OF A JURY'S CONSIDERATION THEREBY CONFLICTING WITH THE SUPREME COURT'S RULINGS IN ANDERSON V. LIBERTY LOBBY, INC. AND RELATED CASES.

The court's attribution of the plaintiff's symptoms of her other medical conditions was without any supporting medical, scientific, or technical evidence, violating *Federal Rule of Evidence 702* and *FCAP 57* erroneously granting summary judgment under *CPLR 214-c(2)*. This rule requires expert testimony when specialized knowledge is necessary to assist the trier of fact.

The district court ignored this standard, despite the factual record and medical evidence showing that metallosis is asymptomatic.

Summary judgment is appropriate only when there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. The court overstepped its role by creating facts not in the record, improperly attributing symptoms to metallosis without scientific correlation.

The panel's decision sharply conflicts with this Court's rulings in *Matter of New York County DES Litigation*, and.... it exacerbates already irreconcilable conflicts in various circuit and district courts on the proper standard to be applied on motions for summary judgment in latency cases. This Petition is not simply asserting "erroneous factual findings or the misapplication of a properly stated rule of law." (See *Tolan v Cotton*, 572 U.S. 650 (Alito, J., concurring)); Rather, the panel has stated in this case, as have other circuits and district courts in previous cases, an incorrect rule of law for summary judgment motions. Moreover, the error in misusing the parameters of *FRCP Rules 56 and 50* is of such constitutional magnitude that it implicates any litigant's Seventh Amendment right to a jury trial in civil cases. *Tolan v Cotton*, 572 U.S. 650

M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. Pa. J. Const. L. 195, 204-05, n.59 (Oct. 2009), citing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999).)

Rule 50, used for jury trial motions and trial motions to the bench for directed verdict, wisely requires "two-level protection" to ensure that a seated jury is allowed to perform its fact-

finding role. *Rule 56*, used for summary judgment motions, guards the Seventh Amendment right by a strict requirement for the absence of any “genuine disputes of material fact.” Yet, when *Rule 50*’s “reasonable jury” language is improperly smuggled into a decision at the pretext stage of a *Rule 56* motion, courts not only abandon the nonmovant’s “two-level protection” that a correctly-timed *Rule 50* trial motion would provide, but they also abandon *Rule*’s *56*’s required absence of any “genuine dispute of material fact.”

The district court ruled under *CPLR 214c(2)* metallosis was the main condition and so symptoms of metallosis are the rule’s only consideration. Plaintiff presented evidence she suffered from pre-existing, otherwise diagnosed medical disorders and secondarily imposed conditions after metallosis’ discovery in 2016. These conditions and their symptoms are not associated with metallosis which is asymptomatic and undetectable until diagnosed in open surgery. Considering there are no symptoms attributed to metallosis, it is clear the courts overreached in ruling that all of Plaintiff’s symptoms were associated to it.

The statute of limitations under *CPLR 214-c(2)* is triggered by the knowledge of the medical or scientific community, not the plaintiff. As established in *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2d Cir. 2002), this statute was designed to provide relief to plaintiffs who were unaware of their injuries due to latent conditions. The plaintiff’s medical records did not indicate metallosis until it was discovered during surgery in 2016, a fact overlooked by the district court. The court’s premature application of the statute of limitations contradicts cases like *Pompa v. Burroughs Wellcome Co.*, 259 A.D.2d 18 (3d Dep’t 1999), which hold that causation can be ascertained by sufficient scientific information rather than absolute certainty.

The Court of Appeals affirmed the district court's ruling and relied on a 2021 NIH article, "The Mechanism of Metallosis After Total Hip Arthroplasty," which concluded, "There are no specific clinical signs or symptoms that indicate metallosis." It referenced the FDA's 2019 publication, *Biologic Response to Metal Implants*, which similarly found no reliable diagnostic tools or tests to diagnose metallosis, further undermining the district court's decision to grant summary judgment based on unrelated symptoms. [NIH-The Mechanism of Metallosis After Total Hip Arthroplasty, p. 4, FDA-Biologic Response to Metal Implants, p. 31, 56, 73, 74, 78, 84, 87]

The district court deviated from accepted norms and relevant U.S. Supreme Court case law, which emphasizes the weight of public health authorities' views and the necessity of a credible scientific basis for such deviations (*Bragdon v. Abbott*). The Supreme Court mandates that courts assess the objective reasonableness of health professionals' views without deferring to individual judgments: "In assessing the reasonableness of petitioner's actions, the views of public health authorities, such as the U.S. Public Health Service, CDC, and the NIH, are of special weight and authority." *Bragdon v. Abbott*, 524 U.S. 624

The district court applied *CPLR 214-c(2)*, after ruling that metallosis was the claimed injury. Under *Rule 56(f)*, summary judgment should be denied when the nonmoving party lacks essential information for their opposition. Despite evidence that metallosis can be asymptomatic, the court attributed all post-implant symptoms to metallosis, triggering the statute of limitations without specific evidence linking those symptoms. Instead, the court filled in the gaps by providing its own definition of metallosis, contrary to the medical, scientific, and technical

evidence provided by the NIH and the FDA. This failure to meet the evidentiary burden under *Rule 56* was improper, as highlighted in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The admissibility of scientific evidence and expert testimony in summary judgment requires a clear, analytical basis grounded in objective fact. In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), (*slip op.*, at 7, 9),

The district court's reference to unsworn complaint allegations to support his finding of fact was misplaced and error in finding there were no issues of material fact denying a jury trial. "Although the complaint alleges in general terms that the team doctors and trainers knew of the "serious side effects directly correlated to excessive exposure to cortisone injection" and that the health risks involved were "purposefully withheld" from plaintiffs, the complaint, in this case, cannot be considered as evidence at the summary judgment stage because it is unverified. See *Schroeder v. McDonald*, 55 F.3d 454, 460 & nn. 10-11 (9th Cir. 1995); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423-24 (9th Cir. 1985). *Moran v. Selig*, 447 F.3d 748, 759-60 (9th Cir. 2006)

Toxic tort cases, particularly those involving long latency periods, require careful consideration of when an injury is "discovered." In *Wetherill v. Eli Lilly & Co.*, the court cautioned against imputing scientific knowledge to laypersons prematurely. This principle is crucial in the present case, where the district court improperly assumed such knowledge, undermining the remedial purpose of *CPLR 214-c*.

The district court's grant of summary judgment was flawed due to its misapplication of *CPLR 214-c(2)* and misinterpretation of the scientific evidence.

CONCLUSION

WHEREFORE, the Petitioner, JODI ROUVIERE. requests this Court to grant the instant petition, vacate the judgment of the Second Circuit Court of Appeals and remand the case with instructions consistent with the opinion of this court based on the foregoing facts and law; and enter an order granting petition, vacating the judgment of the Second Circuit Court of Appeals and remanding the case with instructions consistent with the opinion of this Court. Petitioner other relief this Court deems proper and just under the unique facts and circumstances of the instant case.

August 29, 2024
Miami, Florida

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jodi Rouviere", written in a cursive style.

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