

Circuit Court for Prince George's County  
Case No. CAL21-10237

UNREPORTED\*

IN THE APPELLATE COURT

OF MARYLAND

No. 710

September Term, 2024

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DORETEA BURTON

v.

NYLES BURTON

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Wells, C.J.,  
Arthur,  
Getty, Joseph M.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Arthur, J.

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Filed: April 17, 2026

\* This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Doretea Burton alleged that she contracted genital herpes from her ex-husband, Nyles Burton, M.D., because he engaged in sexual activity with her during their marriage without disclosing that he had contracted the disease. On the basis of that allegation, Ms. Burton asserted an array of tort claims in the Circuit Court for Prince George’s County.

Dr. Burton moved for summary judgment on several grounds, including the ground that, as a matter of law, Ms. Burton had assumed the risk of her injuries and had consented to engaging in sexual activity with someone who, she knew, had herpes. The circuit court granted the motion. Ms. Burton appealed.

Because the record is replete with genuine disputes of material fact about whether Ms. Burton knowingly assumed the risk of her injuries or consented to Dr. Burton’s alleged misconduct, we reverse.

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. The Complaint**

Ms. Burton commenced this case by filing a complaint and demand for jury trial on August 30, 2021. She amended the complaint on March 24, 2023.

Ms. Burton’s amended complaint alleged that she and Dr. Burton were married in 1995 and that they have six children, who were born between 1995 and 2013. She alleged that Dr. Burton had sex with prostitutes between 2000 and 2004 and that, as a result, he contracted the Herpes Simplex Virus 2 (HSV-2), which is also known as genital herpes. Dr. Burton allegedly experienced an outbreak of genital herpes in late 2004 or early 2005; thus, by that time, he allegedly knew that he had an infection.

According to the amended complaint, Dr. Burton did not inform Ms. Burton that he had contracted genital herpes in 2004 or 2005, when he allegedly learned that he had been infected. Instead, he allegedly concealed the infection from her. Ms. Burton alleged that Dr. Burton continued to engage in sexual activity with her and that usually he did not wear a condom. She alleged, “upon information and belief,” that Dr. Burton transmitted HSV-2 to her in 2005.

Ms. Burton alleged that, had she known that Dr. Burton was infected with genital herpes, she would not have engaged in unprotected sex with him throughout the marriage. In addition, she alleged that she would have informed her obstetricians of her exposure, so that they could take proper precautions to protect their children from contracting HSV-2 during childbirth.

Ms. Burton alleged that she did not manifest symptoms that she believed or knew to be symptoms of herpes. She alleged further that she did not know or have reason to know that she was infected with HSV-2 until July 2018, when, she alleged, Dr. Burton admitted to having sex with prostitutes. She claimed not to have known that she had HSV-2 until she received the results of a blood test in May 2021.

On the basis of these and other related allegations, Ms. Burton asserted claims for intentional infliction of emotional distress, battery, negligence, fraud, and negligent misrepresentation.

## **B. The Divorce Trial**

Ms. Burton’s complaint referred to the parties’ divorce proceedings, which began in 2019 and ended March 17, 2020, about 17 months before she filed the complaint in this case. The divorce proceedings touched on the issue of Dr. Burton’s infection on several occasions.

In October 2019, Ms. Burton filed answers to interrogatories in the divorce proceedings. In her answers, Ms. Burton asserted that, on September 14, 2018, the day when Dr. Burton left the marital home, he “admitted to having contracted herpes from visiting prostitutes on two occasions and that he hid it from [Ms. Burton] for years.” In response to a subsequent interrogatory about whether Dr. Burton had committed adultery, Ms. Burton asserted: “he said that he contracted the Herpes virus from one of the prostitutes and hid it from [her] for years.” She added that she “had some questions in [her] mind about the timing of it all,” because she did “not have Herpes,” and it seemed that “after all that time [she] would have caught it if the infection was that old.”

In requests for admissions in the divorce proceedings, Ms. Burton asked Dr. Burton to admit that he had contracted a sexually transmitted disease (STD) during the marriage. She also asked Dr. Burton to admit that he had engaged in sexual intercourse with her after learning that he had contracted an STD but before telling her that he had an

STD. Dr. Burton responded to both requests by invoking his Fifth Amendment right against self-incrimination.<sup>1</sup>

During the parties' divorce trial in January 2020, Ms. Burton testified on direct examination that she and Dr. Burton had discussed STDs. She testified that the first conversation "probably" occurred in 2007, after the birth of their fourth child, when they were living in Washington State. According to Ms. Burton: "[H]e told me at one point, he thought he had herpes and I was alarmed." "But," she added, "he said that it was actually bumps." She agreed that Dr. Burton "indicated" to her at that time that "he didn't have herpes."

Ms. Burton testified that she also discussed herpes with Dr. Burton in "maybe 2017." She claimed that in that conversation he told her "that he was pretty sure that he had herpes[.]" She "told him that he should go get it checked out[]" and "asked him where he thought he got it[.]" According to Ms. Burton, he said that he contracted the virus from "[s]omeone named Janet[.]" when he was in college, decades earlier. In the portions of the divorce trial testimony that are contained in the record extract, Ms. Burton does not appear to have reiterated the statement in her answers to interrogatories, when she stated that on September 14, 2018, Dr. Burton told her that he had contracted the infection from a prostitute.

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<sup>1</sup> The record extract contains only a few pages of Dr. Burton's testimony during the divorce trial. In her answers to interrogatories in this case, however, Ms. Burton asserted that Dr. Burton invoked his Fifth Amendment right against self-incrimination to refuse to answer questions about whether he committed adultery and whether he had sex with her while knowing that he had an STD.

On cross-examination in the divorce trial, Ms. Burton testified, as she had in her answers to interrogatories, that she did not have herpes.

On re-direct examination, Ms. Burton testified that in 2019, after Dr. Burton had moved out of the marital home, she found a “bottle of herpes medication[.]” “hidden above his cabinet in his office[.]”

The record extract contains only a few pages of Dr. Burton’s testimony at the divorce trial. The extract does, however, contain the court’s memorandum opinion. In discussing the parties’ physical condition for purposes of deciding issues of child custody, the opinion recounts Dr. Burton’s testimony that he self-diagnosed his herpes infection.<sup>2</sup>

### **C. The Current Case: Discovery**

As noted above, Ms. Burton claims to have first learned that she had herpes only when she tested positive for HSV-2 in May 2021. She filed her complaint in this case three months later.

#### **1. Ms. Burton’s Answers to Interrogatories**

In her answers to interrogatories in this case, Ms. Burton asserted that in 2015 Dr. Burton admitted that he was having an extramarital affair with a pharmacy technician with whom he worked. According to Ms. Burton, Dr. Burton told her that he and the technician had “exchanged negative STD tests before engaging in sex.” Despite Dr.

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<sup>2</sup> In addition, in her answers to interrogatories in the present case, Ms. Burton asserted that during the divorce trial Dr. Burton “admitted . . . to a ‘self-diagnosis’ of herpes.”

Burton’s alleged assurances that his paramour had no STDs, Ms. Burton claimed to have insisted that he get an STD test. Ms. Burton took a test as well. According to Ms. Burton, her tests were negative, and Dr. Burton told her that “he was clear.”

Ms. Burton’s answers to interrogatories state that in “July or August of 2018[.]” Dr. Burton “confessed that he had sex with prostitutes in the past and that he thought he may have contracted herpes.” Ms. Burton had recounted a similar conversation in her answers to interrogatories in the divorce case, but there she said that the conversation occurred on September 14, 2018, the day when Dr. Burton left the marital home. Here, by contrast, she recalled that the conversation occurred “prior to their separation in September 2018[.]”<sup>3</sup>

The answers to interrogatories disclosed at least three additional conversations, of indeterminate date, when Ms. Burton said that she and Dr. Burton discussed whether he might have herpes or another STD.

There were several times throughout their marriage that the Defendant expressed concern to the Plaintiff that he thought he may have had “something.” He did not identify details about the “something” but told the Plaintiff he had bumps on his penis. During another conversation, the Defendant wondered if he had herpes. The Plaintiff asked him how he could have herpes if they were married, and since he was only having sex with her. The Defendant said he did not know but that he had a pimple on his penis. During this same conversation, the Plaintiff asked the Defendant how it was possible that she didn’t catch whatever he had or thought he

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<sup>3</sup> It is unclear whether the answers in this case recount a second, earlier conversation in which Dr. Burton confessed to having sex with prostitutes and said that he might have contracted herpes, or whether the answers are intended to correct Ms. Burton’s earlier testimony and to say that the single conversation about prostitutes and herpes occurred in July or August 2018, and not on the day in September 2018 when Dr. Burton left the marital home.

had. The Defendant told the Plaintiff that he avoided having sex with her whenever he saw a bump on his penis. Several months later, the Defendant showed the bump on his penis to the Plaintiff. The Plaintiff told him that he should go to the doctor to get it checked out. The Defendant told her he would go to the doctor. Several days later, the Defendant told the plaintiff that he went to the doctor, that the doctor did not see anything, and that the doctor told him that there were no lab tests to confirm herpes.

## **2. Dr. Burton’s Answers to Interrogatories**

In Dr. Burton’s answers to interrogatories, he stated that he first suspected that he had contracted HSV-2 in “2004 or 2005,” when he became symptomatic while he was completing his residency in Pittsburgh. He said that he was “confused” about whether he had the infection because “the pictures on the internet didn’t look exactly like what [he] was experiencing.” He had another outbreak, “most likely in 2006[,]” while living and working in Washington State. “This time,” he said, he “was sure [that] [he] had HSV[.]” He wrote himself a prescription for Valtrex, an antiviral drug that decreases the length and severity of outbreaks of herpes and other similar viral infections. He stated that his primary care physician now prescribes the medication for him.

In Dr. Burton’s answers to interrogatories, he disputed several aspects of Ms. Burton’s version of events. He said that he told Ms. Burton that he had herpes while they were living in Washington State, “most likely in 2006.” Between 2006 and the parties’ separation in 2018, he said, they “consistently had conversations about [his] HSV diagnosis.” According to Dr. Burton, he told his wife that “the best way to prevent her from contracting HSV from [him] was to use condoms and for [him] to take the Valtrex

prophylactically.” He insisted that his wife “preferred not to use” condoms. “She understood the risks and accepted them[,]” he asserted.

### **3. Ms. Burton’s Deposition**

Ms. Burton’s deposition covered many of the topics that she had discussed in earlier testimony. For example, she testified that at some point—it is not clear when—Dr. Burton “wondered about . . . a little bump,” which, he said, “was from masturbation.” She asked him to go to his doctor, Dr. Patel. Dr. Burton reported that “Dr. Patel said he didn’t see anything[.]” and that “there was no tests [sic] for herpes.”

Ms. Burton testified that on August 1, 2015, she became aware that Dr. Burton had committed adultery. Once she learned of his extramarital affair, she said, she insisted that he be tested. She was tested too. She testified that, after the tests came back, Dr. Burton told her that “he was clean.” Although she later came to suspect that her test did not test for herpes, she said that she had no reason to think that she had herpes at that time. She added that she believed that she had previously been tested for herpes when she gave birth to her children.

Ms. Burton also testified that, for a brief period after Dr. Burton informed her of his extramarital affair with the technician in 2015, she and Dr. Burton used condoms when they had sex. She testified that they went back to having unprotected sex after he informed her that their STD tests were negative.

Ms. Burton testified that she and Dr. Burton last had sex in July 2018. During that month, she said, Dr. Burton told her that he “slept with two prostitutes” and that he “kn[e]w” that he had contracted herpes as a result.

Ms. Burton testified that she first learned that she had herpes in May or June of 2021. Perhaps as a result of an error in transcription, her stated reasons for seeking a test at that time are not entirely coherent. According to the deposition transcript, she said that she sought a test: “Because it came to my attention that even though my ex-husband testified that he was not diagnosed, but that he thought it that I should probably but sure that I don’t have it.” [Sic.]

Finally, Ms. Burton disclosed that, “more than a couple times a year[.]” during the marriage, she would experience what she described as a “lesion” or “rug burn,” apparently in the pubic region. She treated the condition with Desitin, a treatment for diaper rash.

#### **4. Dr. Burton’s Deposition**

At his deposition, Dr. Burton reiterated that he diagnosed himself with herpes in 2005. He said that he told Ms. Burton that he had herpes in 2006. He also said that he told Ms. Burton that he was taking medication for herpes.

Dr. Burton admitted that he had never advised Ms. Burton to be tested for herpes or other STDs.<sup>4</sup> When asked why, he said that he did not know.

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<sup>4</sup> The question posed to Dr. Burton actually encompassed his communications with any sexual partners, other than communications that he may have had with his second and current wife while they have been married. Under section 9-105(b) of the

Dr. Burton admitted that he had sex with two prostitutes between 2000 and 2004. [He agreed that he told Ms. Burton about his experiences with the prostitutes, but implied that the conversation occurred earlier than she said. He acknowledged, however, that he did not disclose the experiences with the prostitutes until “later” in the marriage, by which he meant “after 2015 when she found out about the affair[.]” with the pharmacy technician.

Dr. Burton agreed that, when Ms. Burton learned of the affair, she wanted him to be tested for STDs. He testified that he went to Dr. Patel for testing. He said that Dr. Patel did an “STD panel[,]” but he claimed not to know whether the test tested for herpes. He reported that the results of the test were negative. The negative test, however, did not affect his belief that he had herpes. He knew that he had herpes, and the test simply confirmed that he had no other STDs.

Dr. Burton testified that he told Ms. Burton that the results were negative. He said that he did not recall talking to her about herpes at that point.

Dr. Burton and Ms. Burton saw a marriage counselor after Ms. Burton learned of his affair. He did not inform the counselor that he had herpes.

Dr. Burton insisted that Ms. Burton knew that he had herpes and was willing to continue to have sex with him, in part, he said, because she knew that he would do

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Courts and Judicial Proceedings Article of the Maryland Code (1974, 2020 Repl. Vol.), Dr. Burton ordinarily would not be competent to disclose any “confidential communication” with his wife “during their marriage.”

everything in his power to keep from transmitting the disease to her when he was infectious.

Dr. Burton testified that, when his children were born, he understood that a child could contract herpes while passing through the birth canal. Nonetheless, Dr. Burton could not recall suggesting to Ms. Burton that she “tell her OB-GYN that she may have been exposed to herpes.” Nor could he recall whether he had ever informed Ms. Burton’s OB-GYN that he had herpes and that his wife may have been exposed to herpes. He claimed to have “no idea” whether delivery by cesarean section would reduce or eliminate the risk of herpes transmission during childbirth, but he “assume[d]” that the risk would be reduced.

When the family lived in Washington State, Dr. Burton kept his herpes medication at his office at work. After the family moved to Maryland, he said that he could not recall where he kept the medication but said that he “probably” kept it in his gym bag so that he “would always have access to it[.]” He explained that he “do[es] a lot of call at the hospital.”

#### **D. Ms. Burton’s Motion in Limine**

After the close of discovery, Ms. Burton moved in limine to prohibit Dr. Burton from testifying about certain subjects at trial. In support of her motion, Ms. Burton argued that in the divorce proceedings Dr. Burton had asserted his Fifth Amendment right against self-incrimination to refuse to answer questions about whether he had committed adultery, whether he had contracted an STD during the marriage, and whether he had

engaged in sexual intercourse with Ms. Burton after learning that he had an STD but before disclosing his infection to her. Ms. Burton argued that the court should prohibit Dr. Burton from testifying that he informed her that he had herpes in approximately 2007.

The court denied the motion.

### **E. Dr. Burton’s Motion for Summary Judgment**

After the parties had completed discovery, Dr. Burton moved for summary judgment.

Dr. Burton argued, first, that Ms. Burton could not have contracted herpes from him. He cited her testimony that she last had sex with him in July 2018. He also cited her testimony in the divorce proceedings in 2019 and 2020, that she did not have herpes at that time. He concluded, therefore, that she must have contracted herpes at some point after her testimony in the divorce proceedings, which was after she last had sex with him.

Second, Dr. Burton argued that the three-year statute of limitations (Maryland Code (1974, 2020 Repl. Vol.) section 5-101 of the Courts and Judicial Proceedings Article) barred Ms. Burton’s claims. He cited her testimony that he told her in “probably” 2007 that he thought that he had herpes. He also cited her testimony, at the divorce trial, that “in 2017” he told her that ““he was pretty sure that he had herpes and was going to speak with his physician.””<sup>5</sup> He cited the answers to interrogatories in this case, where Ms. Burton stated that, on several occasions during the marriage, he expressed concern about whether he had “something,” which he associated with bumps

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<sup>5</sup> More precisely, she testified that this conversation occurred in “maybe 2017.”

on his penis. In addition, he cited her answer that on another occasion he “wondered if he had herpes” and “told her that he had a pimple on his penis.” He also cited the answer in which she stated that Dr. Burton told her that “he avoided having sex with her whenever he saw a bump on his penis[]” and that several months later he showed her a bump on his penis. He suggested that she waited until May 2021 to be tested for herpes because she was “trying to avoid the clear implication of the discovery rule.” He concluded that Ms. Burton had notice of her claims more than three years before she filed this suit in August 2021 and, thus, that limitations barred her claims.

Lastly, Dr. Burton argued that, as a matter of law, Ms. Burton assumed the risk that she would contract herpes from him. Citing much of the same evidence that he cited in his limitations argument, Dr. Burton asserted that Ms. Burton had been “put on notice numerous times” that he “may have genital herpes.” Quoting *Poole v. Coakley & Williams Construction, Inc.*, 423 Md. 91, 124 (2011), he argued that, “[u]nder these circumstances there is clear imputed knowledge of the risk by Ms. Burton” because, he said, “the risk of danger is so obvious that any person of normal intelligence will be taken to comprehend it.”

In her opposition to the motion for summary judgment, Ms. Burton introduced several new factual contentions.

First, she cited the report of John J. Cascone, M.D., her designated expert in the field of infectious diseases. Dr. Cascone opined that Ms. Burton contracted herpes from Dr. Burton in 2005, when she experienced an episode of vaginal pain that the doctor

identified as an outbreak caused by HSV-2. Dr. Cascone also opined that “[m]ost” people who are infected with HSV-2 “are unaware of their infection.” He relied on statistics showing that more than 87 percent of people who have genital herpes and who are between the ages of 14 and 49 do not realize that they have contracted the disease. On the basis of Dr. Cascone’s report, Ms. Burton argued that she did not know that she had herpes until she received a positive test in May 2021.

Second, Ms. Burton addressed the conversation in “maybe 2017,” in which Dr. Burton told her that he had herpes. Ms. Burton now asserted that that conversation actually occurred in the summer of 2018. She supported her assertion with an affidavit in which she stated that she previously had “mis-remembered the year[.]”

Third, Ms. Burton addressed her testimony at the divorce trial about a conversation about STDs that “probably” occurred in 2007. There, she had said: “And he told me at one point, he thought he had herpes and I was alarmed.” Although the conversation appears to concern whether Dr. Burton (“he”) thought that he had herpes, Ms. Burton insisted that it did not. Instead, she said, it concerned Dr. Burton’s friend, for whom Dr. Burton had prescribed Valtrex, the medication for treating outbreaks of herpes. Ms. Burton supported her assertion in her affidavit.

Dr. Cascone’s first opinion—that Ms. Burton had contracted herpes from Dr. Burton in 2005 but was unaware that she had the disease—appears to have created a genuine dispute of material fact on Dr. Burton’s lead contention. Dr. Burton had contended that Ms. Burton could not have contracted the disease from him, because she

claimed not to have herpes until as late as 2020 and tested positive only in 2021. Dr. Cascone’s opinion, if accepted, would establish that Ms. Burton contracted the disease from Dr. Burton years earlier, but did not realize that she had it.<sup>6</sup>

Ms. Burton treated Dr. Burton’s limitations argument as the main contention. In response, Ms. Burton pointed out that she asked Dr. Burton to get a test for STDs when she learned of his affair in August 2015. She argued that asking Dr. Burton to get a test for STDs was inconsistent with the notion that she already knew that he had an STD before August 2015. She also argued that she was told that she too tested negative, which is inconsistent with the notion that she knew that he had contracted an STD. She added that she did not tell any of her obstetricians that she had herpes, which, she insisted, she would have done had she known that she had the disease.

Additionally, Ms. Burton pointed out that Dr. Burton concealed his herpes medication from her, keeping it at work or in his gym bag. She also pointed out that Dr. Burton had failed to inform any of the obstetricians that he had herpes during any of her several pregnancies that occurred after he learned that he had the disease. Dr. Burton’s conduct, she argued, was inconsistent with the notion that he had disclosed his infection to her.

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<sup>6</sup> Dr. Burton moved to exclude Dr. Cascone’s opinions under *Rochkind v. Stevenson*, 471 Md. 1 (2020). The circuit court appears not to have ruled on that motion. We express no opinion about the merits of the motion or about the consequences, if any, that might ensue were the court to grant the motion.

Viewing these facts in the light most favorable to her, Ms. Burton argued that a jury could reasonably find that she had no basis to suspect that she had contracted herpes from Dr. Burton until July 2018, when, she said, he told her that he had contracted herpes as a result of his encounters with prostitutes. Although Ms. Burton did not file her complaint in this case until August 30, 2021, more than three years after the conversation in July 2018, she asserted that she had an additional 141 days to file because of the administrative orders that tolled the statute of limitations during the COVID-19 pandemic. As she had filed suit within three years and 141 days of July 2018, she concluded that limitations did not bar her claims.

On the final issue of assumption of risk, Ms. Burton correctly argued, first, that assumption of risk is not a defense to her claim for battery. *See Janelsins v. Button*, 102 Md. App. 30, 39 (1994).

As to her four other claims, Ms. Burton argued that, according to her expert, Dr. Cascone, she contracted herpes from Dr. Burton in 2005. Under any view of the evidence, she said, she was not (in her words) “on notice” that Dr. Burton had herpes until 2007, at the earliest. Thus, she concluded that she could not have assumed the risk of contracting herpes when her expert says she actually contracted it in 2005.

Furthermore, Ms. Burton argued that the jury could reasonably infer that she did not know that Dr. Burton had herpes until July 2018, when the parties ceased to engage in sexual activity. She noted again that, when she learned of Dr. Burton’s affair in August 2015, she demanded that he be tested for STDs, which, she said, she would not have done

had she already known that he had an STD. She also noted that Dr. Burton informed her, falsely or misleadingly, that his test was negative even though he admittedly knew at the time that he had herpes. She reiterated that she too had sought a test and was told that it was negative. She repeated her assertion that, had she known that she had herpes, she would have informed her obstetricians during her pregnancies. Finally, she mentioned that Dr. Burton concealed his herpes medication from her, which he would not need to have done if she already knew that he had herpes.

The circuit court heard argument on Dr. Burton’s motion for summary judgment on January 23, 2024. At the end of the hearing, the court concluded that Ms. Burton had, as a matter of law, assumed the risk of contracting herpes from Dr. Burton.

In support of its conclusion, the court cited Ms. Burton’s testimony that, on several occasions during the marriage, Dr. Burton “expressed concern that he may have something,” that she saw “bumps on the penis,” that Dr. Burton “wondered if he had herpes,” and that “whenever he had bumps, he would avoid any contact with her.” Citing the pattern jury instruction on assumption of the risk, the court reasoned that Ms. Burton “must have known and understood the danger[]” of having sex with Dr. Burton.

As evidence of Ms. Burton’s knowledge and understanding of the danger, the court observed that the parties ceased having unprotected sex for some time after Dr. Burton disclosed the affair in 2015, but that Ms. Burton eventually “chose” to resume having unprotected sex with him even though he had said that he “may have ‘something’” that “may be herpes” and even though he sometimes had “bumps on the

penis.” The court vacillated about whether Ms. Burton had “actual” knowledge of the risk or whether that knowledge should be “imputed” to her because it would have been obvious to any person of normal intelligence. The court ended by stating that Ms. Burton voluntarily exposed herself to the danger of contracting herpes because she continued to have sex with Dr. Burton even though she “acknowledged” that “he told her” that “he may have herpes.”

As a result of its conclusion that Ms. Burton had assumed the risk of contracting herpes from Dr. Burton, the court granted the motion for summary judgment on all counts in Ms. Burton’s amended complaint, except the count alleging battery. The court reasoned that assumption of the risk is not a defense to battery, but that consent is.<sup>7</sup>

Dr. Burton responded by moving for summary judgment on the battery claim on the ground that Ms. Burton had consented to the alleged battery. The court granted that motion.

Ms. Burton noted a timely appeal.

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<sup>7</sup> In fact, assumption of the risk is not a defense to any intentional torts. *See Janelsins v. Button*, 102 Md. at 41-42. Thus, although Ms. Burton does not make this argument, it is unclear how the court could have employed assumption of the risk as a ground for summary judgment on the intentional tort claims of fraud and intentional infliction of emotional distress. Perhaps the court could have reasoned that if Ms. Burton knew that her husband had herpes, he could not have deceived or misled her about his condition. Similarly, the court could have reasoned that if Ms. Burton knew that Dr. Burton had herpes, he could not have engaged in the extreme and outrageous conduct of having sex with her without disclosing his infection.

### QUESTIONS PRESENTED

Ms. Burton presents three questions, which, for simplicity and clarity, we have condensed into two:

1. Did the circuit court err in concluding that, as a matter of law, Ms. Burton assumed the risk of her injuries?
2. Did the circuit court err in denying Ms. Burton’s motion in limine to preclude Dr. Burton from testifying about subjects as to which he had invoked his Fifth Amendment right against self-incrimination during the divorce proceedings?<sup>8</sup>

For the reasons stated herein, we conclude that the court erred in granting summary judgment in Dr. Burton’s favor on the ground that Ms. Burton assumed the risk of her injuries as a matter of law. The question of whether the court erred in denying the motion in limine is not properly before us, but we shall address that issue to provide guidance on remand. We conclude that the court did not err in declining to prohibit Dr.

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<sup>8</sup> Ms. Burton formulated the questions as follows:

1. Did the Circuit Court err as a matter of law by finding that Ms. Burton assumed risks and consented to tortious conduct years after the tortious conduct happened?
2. Did the Circuit Court err by resolving genuinely disputed material facts in favor of Dr. Burton, the party moving for summary judgment?
3. Did the Circuit Court err by allowing the Dr. Burton [sic] to testify in his own defense in this civil tort case even though Dr. Burton on topics on which he had previously invoked his 5th Amendment right against self-incrimination when questioned during the parties’ domestic trial [sic]?

Burton from testifying in this case on the topics about which he declined to testify in another, different case.

## DISCUSSION

### A. Summary Judgment: The Standard of Review

When a party moves for summary judgment, “[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” Md. Rule 2-501(f).

The issue of whether a trial court properly granted summary judgment is a question of law. *Butler v. S & S P’ship*, 435 Md. 635, 665 (2013). In an appeal from the grant of summary judgment, this Court conducts a *de novo* review to determine whether the circuit court’s conclusions were legally correct. *Bennett v. Ashcraft & Gerel, LLP*, 259 Md. App. 403, 447 (2023).

“When reviewing a grant of summary judgment, we determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” *Blackburn Ltd. P’ship v. Paul*, 438 Md. 100, 107 (2014) (internal citations and quotation marks omitted). “This Court considers the record in the light most favorable to the nonmoving party and construe[s] any reasonable inferences that may be drawn from the facts against the moving party.” *Id.* at 107-08.

“The party opposing a motion for summary judgment must produce admissible evidence to show that a genuine dispute of material fact . . . does exist.” *Rite Aid Corp. v.*

*Hagley*, 374 Md. 665, 684 (2003). “For the purposes of summary judgment, a material fact is ‘a fact the resolution of which will somehow affect the outcome of the case.’”

*Romeka v. RadAmerica II, LLC*, 485 Md. 307, 330 (2023) (quoting *USA Cartage Leasing, LLC v. Baer*, 202 Md. App. 138, 174 (2011), *aff’d*, 429 Md. 199 (2012)).

### **B. Assumption of Risk**

Assumption of the risk is an affirmative defense on which the defendant bears the burden of proof. *See, e.g., Imbraguglio v. Great Atlantic & Pacific Tea Co., Inc.*, 358 Md. 194, 212 (2000). “If established by the evidence, assumption of the risk functions as a complete bar to recovery[.]” *See, e.g., Poole v. Coakley & Williams Constr., Inc.*, 423 Md. 91, 110 (2011).

In Maryland, a defendant must prove three elements to establish the defense of assumption of the risk: “(1) the plaintiff had knowledge of the risk of the danger; (2) the plaintiff appreciated that risk; and (3) the plaintiff voluntarily confronted the risk of danger.” *See, e.g., Thomas v. Panco Mgmt. of Maryland, LLC*, 423 Md. 387, 395 (2011) (citing *ADM P’ship v. Martin*, 348 Md. 84, 90-91 (1997)).

“The issue of assumption of the risk rests upon the plaintiff’s subjective knowledge.” *Poole v. Coakley & Williams Constr., Inc.*, 423 Md. at 115. “Because the focus is on what the plaintiff actually knew, understood[,] and appreciated[,] the issue is ordinarily left to the jury to resolve.” *Id.* A court should not grant summary judgment to a defendant on the ground of assumption of the risk unless “the undisputed evidence and all permissible inferences therefrom *clearly* establish that the risk of danger was *fully*

known to and *understood* by the plaintiff.” *Id.* (quoting *Schroyer v. McNeal*, 323 Md. 275, 283 (1991)) (emphasis in original). “[F]or a plaintiff to have assumed the risk of [the] injuries as a matter of law, we require that a plaintiff ‘must’ have known that the risk was ‘actually present,’ not that [the plaintiff] ‘would,’ ‘should,’ or ‘could’ have known that the risk ‘might well be present.’” *Id.* at 123 (quoting *Kasten Constr. Co v. Evans*, 260 Md. 536, 544-45 (1971)).

Nonetheless, “‘when it is clear that a person of normal intelligence in the position of [the] plaintiff *must* have understood the danger, the issue is for the court.’” *Id.* at 116 (quoting *Schroyer v. McNeal*, 323 Md. at 283-84) (emphasis in original). The types of dangers that a plaintiff must understand are the “‘certain risks which anyone of adult age must be taken to appreciate,’” including “‘the danger of slipping on ice’” or “‘of falling through unguarded openings [or] lifting heavy objects[.]’” *Id.* (quoting *W. Page Keeton et al., Prosser & Keeton on the Law of Torts* § 68, at 488 (5th ed. 1984)).

### C. Consent

Assumption of the risk is not a defense to an action for battery. *Janelains v. Button*, 102 Md. App. at 39. Nonetheless, “[t]he general rule—that a person cannot recover damages where he has consented to the wrong—applies in civil battery actions.” *Id.* at 37. “Therefore, a plaintiff’s consent may be a complete defense in a battery action.” *Id.*

“Consent occurs when a plaintiff ‘manifests a willingness that the defendant engage in conduct and the defendant acts in response to such a manifestation.’” *Id.*

(quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, *supra*, § 18, at 113). “Consent may be inferred from words, actions, or inactions if reasonably understood by another to indicate consent, even if not expressly communicated to the actor.” *Id.* “But consent ‘must be knowingly and intelligently given, and not the result of fraud or incompetency[.]’” *Id.* at 37-38 (quoting 6A C.J.S. *Assault and Battery* § 16 (1975)).

“According to the Restatement, the distinctions between the doctrines of assumption of risk and consent are only semantic.” *Id.* at 40. The distinction is “‘one without a difference, of terminology only, and the rules applied are the same in either case.’” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 496A cmt. b (A.L.I. 1965)).

“[T]he defenses of consent and assumption of risk involve two common elements—cognizance of a danger and volition in encountering it.” *Id.* at 41.

“Therefore, the two doctrines substantively amount to flip sides of a single conceptual principle.” *Id.* “To the extent the two theories are distinguishable, it appears that assumption of risk is applied more frequently in negligence actions while consent is more typically applied in intentional tort actions.” *Id.*

#### **D. The Court Erred in Granting Summary Judgment**

Ms. Burton’s expert, Dr. Cascone, has opined that she contracted HSV-2 from Dr. Burton in 2005. Dr. Burton, however, does not claim to have informed Ms. Burton that he had herpes until 2006. Moreover, according to one interpretation of Ms. Burton’s

testimony, Dr. Burton did not tell her of the possibility that he might have herpes until “probably” 2007.

To state the obvious, Ms. Burton could not have knowingly and voluntarily assumed the risk of contracting herpes from Dr. Burton in 2005 if he did not tell her that he had herpes until 2006 or 2007. Similarly, Ms. Burton could not have consented to having sex with Dr. Burton while he was infected with herpes in 2005 if she did not know that he had herpes until 2006 or 2007. Therefore, if the jury credited Dr. Cascone’s testimony that Ms. Burton contracted HSV-2 from Dr. Burton in 2005, it could reject the defenses of consent and assumption of risk.

Dr. Burton counters that he could not have “tortiously” infected Ms. Burton with HSV-2 in 2005 unless he already knew that he had the disease. In his answers to interrogatories, however, Dr. Burton stated that he first suspected that he had contracted HSV-2 in “2004 or 2005,” when he became symptomatic while completing his residency in Pittsburgh. In addition, in his deposition, Dr. Burton testified that he diagnosed himself with herpes in 2005. So, the question becomes, could a reasonable jury find that Ms. Burton contracted the infection from her husband sometime in 2005, after that point in “2004 or 2005” when he first suspected that he had contracted HSV-2?

According to a study cited by Dr. Cascone, the median number of sex acts before the transmission of HSV-2 was 40. Consequently, Ms. Burton may not have contracted the infection until after Dr. Burton had formed his initial hypothesis that he may have HSV-2. In those circumstances, a jury could reasonably find that Dr. Burton either knew

or should have known that he had contracted HSV-2 before he transmitted it to Ms. Burton in 2005, but that he said nothing about the infection or possible infection until at least a year later. If the jury made those findings, it could not find that Ms. Burton assumed the risk of her injuries.<sup>9</sup>

In granting summary judgment in Dr. Burton’s favor on the issues of consent and assumption of risk, the circuit court did not mention Dr. Cascone’s testimony. Instead, the court relied on Ms. Burton’s statements that Dr. Burton once said that “he may have something,” that she saw “bumps on the penis,” that Dr. Burton “wondered if he had herpes,” and that “whenever he had bumps, he would avoid any contact with her.” In addition, the court relied on Ms. Burton’s testimony that she resumed having unprotected sex with Dr. Burton at some point after she learned of his affair.

Ms. Burton’s statements are irrelevant to the issues of consent and assumption of risk if the jury finds, as it may, that she contracted HSV-2 from Dr. Burton in 2005 and that he knew or should have known that he had HSV-2 at that time but did not disclose the infection until at least a year or more later. Ms. Burton could not have assumed the risk of contracting a disease that she had already contracted unwittingly. Nor could she have consented to becoming infected with HSV-2 if she was already infected with the virus.

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<sup>9</sup> If the jury found that Dr. Burton neither knew nor should have known that he had HSV-2 when he transmitted it to Ms. Burton, the jury would not find that she had assumed the risk of her injuries or consented to his tortious conduct. Instead, the jury would find that Dr. Burton had engaged in no tortious conduct.

But even if Ms. Burton did not contract HSV-2 from Dr. Burton in 2005, the statements on which the court relied do not justify the conclusion that, as a matter of law, she knowingly and voluntarily assumed the risk of her injuries or consented to the risk of contracting HSV-2 from her husband. When viewed in the light most favorable to Ms. Burton, numerous facts, unmentioned by the court in its decision, undermine the conclusion that Ms. Burton knew that Dr. Burton had HSV-2.

For example, the court did not mention that, after Dr. Burton raised the issue of herpes in circa 2007, he also “indicated” to Ms. Burton that “he didn’t have herpes.” The court did not mention that Dr. Burton had explained away the bumps on his penis by attributing them to masturbation. The court did not mention that Ms. Burton claimed to have told Dr. Burton to see a doctor about the bumps on his penis and that Dr. Burton allegedly informed her that the doctor “didn’t see anything.” The court did not mention that Dr. Burton had allegedly concealed his infection from Ms. Burton—something that he would not need to do if she already knew about it—by hiding his medication from her, by failing to inform her obstetricians about the infection during her pregnancies, and by telling her that his STD test in 2015 was “clean.” The court did not mention Dr. Burton’s alleged admission that he “hid” his infection from Ms. Burton “for years.” The court did not mention that Ms. Burton, a mother of six, did not tell her obstetricians that she had been exposed to herpes even though she says that she certainly would have told them of the exposure had she known of it. The court did not mention that Ms. Burton had demanded that Dr. Burton be tested for STDs after she learned of his affair in 2015—a

demand that is more than slightly inconsistent with the notion that she already knew that he had herpes by 2015. Finally, the court did not mention that, after the disclosure of the affair, Ms. Burton resumed having unprotected sex with Dr. Burton only after he told her, falsely or misleadingly, that his STD test was “clean.”<sup>10</sup>

In short, viewing the facts and all reasonable inferences in the light most favorable to Ms. Burton, a reasonable jury could find that Ms. Burton did not fully know, appreciate, and understand the risk that she would contract HSV-2 by having sex with Dr. Burton until July 2018. Furthermore, because the distinction between assumption of risk and consent is only semantic, a reasonable jury could find that Ms. Burton did not knowingly and intentionally consent to having sex with a man who was infected with HSV-2.

“[A]ssumption of risk is a matter of whether the plaintiff knew of the risk, not whether the plaintiff should have known of it.” *Poole v. Coakley & Williams Constr.*,

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<sup>10</sup> In the divorce proceedings, Dr. Burton invoked his Fifth Amendment right against self-incrimination in response to a request that he admit that he had engaged in sexual intercourse with Ms. Burton after learning that he had contracted an STD but before telling her that he had an STD. A civil jury could draw an adverse inference from Dr. Burton’s invocation of his Fifth Amendment right. *See, e.g., Whitaker v. Prince George’s County*, 307 Md. 368, 386 (1986); *Robinson v. Robinson*, 328 Md. 507, 516 (1992); *Long v. Long*, 141 Md. App. 341, 349 (2001). Dr. Burton’s “refusal, taken alone, does not relieve” Ms. Burton of the “burden of proof on the issue which was the subject of the question.” *Robinson v. Robinson*, 328 Md. at 516 n.2; *accord Long v. Long*, 141 Md. App. at 348. But “the adverse inference drawn from [his] silence ‘may be coupled and considered with proper and relevant evidence tending to prove’” that he engaged in sexual intercourse with Ms. Burton after learning that he had contracted an STD but before telling her that he had an STD. *Long v. Long*, 141 Md. App. at 347-48 (quoting *Whitaker v. Prince George’s County*, 307 Md. at 386).

*Inc.*, 423 Md. at 123 (quoting *Martin v. Hedding*, 373 N.W.2d 486, 490 (Iowa 1985)). Ms. Burton arguably “‘should,’ or ‘could’ have known that the risk ‘might well be present[,]’” but the evidence falls short of establishing that she “‘must’ have known that the risk was ‘actually present[.]’” *Id.* (quoting *Kasten Constr. Co v. Evans*, 260 Md. at 544-45). The court, therefore, erred in granting summary judgment in Dr. Burton’s favor on the issue of assumption of risk.<sup>11</sup>

Although Ms. Burton herself may not have fully known and appreciated the risk that she would contract HSV-2 from her husband until sometime in 2018, Dr. Burton argues that this knowledge should be imputed to her as a matter of law. He argues that “[a]ny person of normal intelligence in Ms. Burton’s position would understand the danger of contracting genital herpes or some other sexually transmitted disease by having frequent, unprotected sex with Dr. Burton.” His argument echoes the principle that “[w]hen it is clear” that “‘a person of normal intelligence in the position of the plaintiff *must* have understood the danger, the issue is for the court.’” *Poole v. Coakley & Williams Constr., Inc.*, 423 Md. at 123 (quoting *Schroyer v. McNeal*, 323 Md. at 283).

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<sup>11</sup> In his brief, Dr. Burton argues that his alleged disclosures to his wife “would have put any person of ordinary prudence in Ms. Burton’s position on *notice* that engaging in sexual relations with [him] exposed her to the risk of contracting genital herpes or another sexually transmitted disease.” (Emphasis added.) Elsewhere in his brief, however, Dr. Burton recognizes that “notice” does not suffice to establish assumption of the risk as a matter of law. Citing *Poole v. Coakley & Williams Construction, Inc.*, 423 Md. at 123, he acknowledges that, “for the court to find as a matter of law that the plaintiff assumed the risk, the plaintiff must have *known* that the risk was actually present.” (Emphasis added.)

The risks that “‘anyone of adult age must be taken to appreciate’ include such things as ‘the danger of slipping on ice, of falling through unguarded openings[,] of lifting heavy objects . . . and doubtless many others.’” *Poole v. Coakley & Williams Const., Inc.*, 423 Md. at 116 (quoting *Prosser and Keeton on the Law of Torts, supra*, § 68, at 488). For example, a powerlifter must have understood that a heavy lift bar might fall on him during a powerlifting competition. *Poole v. Coakley & Williams Const., Inc.*, 423 Md. at 117 (citing *American Powerlifting Ass’n v. Cotillo*, 401 Md. 658, 663 (2007)). A 55-year-old man must have understood the risk that he might injure himself if he attempted to drag a large, heavy hose from a fuel oil truck across a hundred feet of snow-covered ground. *See Poole v. Coakley & Williams Const., Inc.*, 423 Md. at 117 (citing *Gibson v. Beaver*, 245 Md. 418, 421-22 (1967)). And people who traversed pathways covered by visible snow or ice must have known that they might slip and fall. *Poole v. Coakley & Williams Const., Inc.*, 423 Md. at 117-18 (citing *Morgan State Univ. v. Walker*, 397 Md. 509, 519 (2007); *ADM P’ship v. Martin*, 348 Md. 84, 88-89 (1997); *Schroyer v. McNeal*, 323 Md. at 288-89). These are risks that, as a matter of law, any adult of normal intelligence would undoubtedly have understood.

In our judgment, however, it is less than clear that a person of normal intelligence in Ms. Burton’s position must have understood the danger of contracting HSV-2 from Dr. Burton at any time before July 2018. Ms. Burton certainly could not have understood the danger of contracting HSV-2 from Dr. Burton if she contracted it in 2005, before he ever mentioned the possibility that he might have genital herpes or some other STD.

And even if Ms. Burton did not contract HSV-2 until sometime after Dr. Burton first raised the issue of whether he might have herpes, the equivocal nature of the evidence in this case obviates any conclusion that a person of ordinary intelligence in her position must have understood the danger of contracting HSV-2 from him. Although Dr. Burton told Ms. Burton that he might have “something” and would not have sex with her when he had a bump on his penis, he also “indicated” to her that he “did not have herpes.” He attributed the bumps on his penis to masturbation. When Ms. Burton asked him to see a doctor, he told her that the doctor “didn’t see anything.” When she demanded that he be tested for STDs after she learned of his extramarital affair, he told her that he was clean. Finally, he “hid” his infection from her “for years,” concealing his medications and withholding material information about her exposure to HSV-2 from her and her obstetricians. In short, this is not a case where any reasonable person in Ms. Burton’s position must have understood the risk of contracting HSV-2 by having unprotected sex with Dr. Burton.

In summary, the circuit court erred in concluding that, as a matter of law, Ms. Burton assumed the risk of contracting HSV-2 from Dr. Burton. A reasonable jury could find that Ms. Burton did not fully understand and appreciate the risk of contracting HSV-2 from Dr. Burton, and an adult of normal intelligence in Ms. Burton’s position would not necessarily have understood that risk.

### **E. Statute of Limitations**

Dr. Burton argues that, notwithstanding our decision on the assumption of the risk, this Court should affirm the grant of summary judgment because, he says, Ms. Burton’s complaint is barred by the three-year statute of limitations in civil cases. Maryland Code (1974, 2020 Repl. Vol.) § 5-101 of the Courts and Judicial Proceedings Article. We cannot evaluate whether limitations would provide an alternative ground to uphold the court’s decision, because the circuit court based the grant of summary judgment solely on grounds of assumption of risk.

Ordinarily, a Maryland appellate court may affirm the grant of summary judgment only on the grounds on which the circuit court relied. *See, e.g., Gambrill v. Board of Educ. of Dorchester County*, 481 Md. 274, 297 (2022); *accord Rovin v. State*, 488 Md. 144, 173 (2024). The appellate court may not affirm the grant of summary judgment on a different ground unless “the trial court would have no discretion as to the particular issue.” *Wireless One, Inc. v. Mayor & City Council of Baltimore*, 465 Md. 588, 614 n.6 (2019)) (quoting *Young Elec. Contractors, Inc. v. Dustin Constr., Inc.*, 459 Md. 356, 383 (2018) (further citation omitted); *accord Rovin v. State*, 488 Md. at 173.

The circuit court had discretion to deny summary judgment on grounds of limitations. *See Dashiell v. Meeks*, 396 Md. 149, 164-65 (2006). Consequently, we cannot affirm the judgment on that ground.<sup>12</sup>

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<sup>12</sup> Ms. Burton argues that we cannot consider the issue of limitations because Dr. Burton failed to file a cross-appeal. She is incorrect. As the judgment below was wholly in Dr. Burton’s favor, he was prohibited from filing a cross-appeal. *See, e.g., Paolino v.*

On remand, Dr. Burton may reassert his contention that limitations bars Ms. Burton’s claims. We express no opinion on that subject, except to say that much of the disputed evidence pertaining to whether Ms. Burton knew and appreciated the risk of contracting HSV-2 from Dr. Burton will bear on whether Ms. Burton “in fact knew or reasonably should have known of the wrong” (*Poffenberger v. Risser*, 290 Md. 631, 636 (1981)) within the period of limitations, as extended by the administrative orders entered during the COVID-19 pandemic. “[W]hether or not the plaintiff’s failure to discover [her] cause of action was due to failure on [her] part to use due diligence, or to the fact that defendant so concealed the wrong that plaintiff was unable to discover it by the exercise of due diligence, is ordinarily a question of fact for the jury.” *O’Hara v. Kovens*, 305 Md. 280, 294-95 (1986) (internal quotations omitted); *accord Frederick Road Ltd. P’ship v. Brown & Sturm*, 360 Md. 76, 96 (2000).<sup>13</sup>

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*McCormick & Co.*, 314 Md. 575, 579 (1989). In general, a party who has prevailed in the circuit court, as Dr. Burton did, may “argue as a ground for affirmance the matter that was resolved against it at trial.” *Id.* (quoting *Offutt v. Montgomery Cty. Bd. of Educ.*, 285 Md. 557, 564 n.4 (1979)). Ordinarily, however, that principle does not apply when a party has prevailed on summary judgment.

<sup>13</sup> Citing the so-called “sham affidavit rule,” Maryland Rule 2-501(e), Dr. Burton moved the circuit court to strike the affidavit in which Ms. Burton: arguably recharacterized her account of the conversation in “probably” 2007, when “he” said that “he thought he had herpes”; and said that Dr. Burton first informed her that he had herpes in 2018, not in “maybe 2017,” as she had previously said. The circuit court denied Dr. Burton’s motion, thereby undermining his contention that Ms. Burton had notice of her claims more than three years before she filed suit in 2021. Dr. Burton contends that the circuit court erred in refusing to strike the affidavit. We decline to decide that issue for two reasons. First, it is entwined with the issue of limitations, which we are constrained not to decide. Second, Dr. Burton’s brief cites no case law concerning the sham affidavit rule or its application and contains no substantive argument about why the circuit court

### F. Ms. Burton’s Motion in Limine

Ms. Burton challenges the circuit court’s denial of her motion to preclude Dr. Burton from testifying in this case. Before addressing the merits of Ms. Burton’s argument, we must address Dr. Burton’s argument that the issue is not properly before us.

Dr. Burton argues that, “because this matter did not proceed to trial, Dr. Burton did not offer his own testimony to which Ms. Burton might have objected.” Dr. Burton also argues that we should not review Ms. Burton’s Fifth Amendment argument because Dr. Burton’s statements “formed no basis whatsoever in [the circuit court’s] decision to enter [s]ummary [j]udgment in favor of Dr. Burton and against Ms. Burton.”

Dr. Burton’s arguments have considerable force. Nonetheless, we elect to decide the issue in order to guide the trial court on remand. *Cf.* Md. Rule 8-131(a). On the merits, we reject Ms. Burton’s argument that the circuit court erred by denying her motion to prevent Dr. Burton from testifying.

The Fifth Amendment to the United States Constitution states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]” Although the amendment refers only to criminal proceedings, the privilege “has long been held to be properly asserted by parties or witnesses in civil proceedings.” *Kramer v. Levitt*, 79 Md. App. 575, 582 (1989).

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ruled incorrectly. The extent of Dr. Burton’s argument is that he “disagrees” with the trial court’s denial of his motion to strike the affidavit. “[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.” *Thompson v. State*, 229 Md. App. 385, 400 (2016) (quoting *Wallace v. State*, 142 Md. App. 673, 684 n.5 (2002)).

In arguing that the circuit court should prevent Dr. Burton from testifying in this case because of his invocation of the Fifth Amendment in the parties' divorce case, Ms. Burton relies exclusively on *Kramer v. Levitt*, 79 Md. App. 575 (1989). In that case, this Court held that, “when a defendant in a civil action pleads [the defendant’s] privilege against self-incrimination in response to discovery requests, [the defendant] is prohibited from testifying at trial on matters pertaining to these requests.” *Id.* at 588. Ms. Burton urges us to “adopt” what she calls “the next logical step in this [Fifth] Amendment jurisprudence by holding that a party [who] invokes the [Fifth] Amendment privilege against self-incrimination in a civil case cannot contradict that invocation in a related civil case when questioned about the same subject matter.” We decline to do so.

The *Kramer* Court emphasized that its holding was based largely on discovery concerns: “[I]f a party is free to shield himself with the privilege [of the Fifth Amendment] during discovery, while having the full benefit of his testimony at trial, the whole process of discovery could be seriously hampered.” *Id.* at 587 (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2018 Supp. at 63 (1970, 1988 Supp.)). In this case, however, there is no danger that Dr. Burton will unfairly surprise Ms. Burton with his testimony at trial, as he has answered interrogatories in this case and submitted to a deposition.

Furthermore, on the two issues on which he invoked the Fifth Amendment in the divorce trial, Dr. Burton’s testimony is now clear. He invoked the Fifth Amendment when asked if he “contracted a sexually transmitted disease or infection during [his]

marriage.” Both Ms. Burton and Dr. Burton now agree that he did. Dr. Burton also invoked the Fifth Amendment when asked if he “engaged in sexual intercourse with [Ms. Burton] after learning that [he] had contracted the sexually transmitted disease before telling her that [he] had it[.]” Ms. Burton now knows Dr. Burton’s answer to that question as well: he claims that he informed her that he had herpes in 2006 and that he and Ms. Burton discussed his herpes diagnosis throughout their marriage. If the circuit court forbade Dr. Burton from testifying about these topics at the trial in this case, it would ignore the purpose of the rule established in *Kramer*, which is to prevent a party from concealing important information until trial by invoking the Fifth Amendment during discovery.

Ms. Burton also argues that the circuit court should have prevented Dr. Burton from testifying based on principles of judicial estoppel. A party can establish judicial estoppel when: “(1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation[;] (2) the previous inconsistent position was accepted by a court[;] and (3) the party who is maintaining the inconsistent position must have intentionally misled the court in order to gain an unfair advantage.” *See, e.g., Kamp v. Department of Human Servs.*, 410 Md. 645, 673 (2009) (internal quotations omitted).

This case involves none of the requirements for judicial estoppel. Although a factfinder can draw an adverse inference from the invocation of the Fifth Amendment right against self-incrimination,<sup>14</sup> witnesses do not take a “factual position” when they

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<sup>14</sup> *See, e.g., Long v. Long*, 141 Md. App. at 349.

invoke the right in order not to answer a question. Because Dr. Burton did not “take[]” a “factual position” when he declined to answer the questions in the divorce trial, the divorce court could not have “accept[ed]” his “factual position.” Finally, the record contains nothing to suggest that, in asserting the right against self-incrimination, Dr. Burton “intentionally misled the court in order to gain an unfair advantage.”

In summary, Dr. Burton may testify at a trial in this case notwithstanding that he exercised his constitutional right not to answer two questions in a different case.

**JUDGMENT OF THE CIRCUIT COURT FOR  
PRINCE GEORGE’S COUNTY VACATED.  
CASE REMANDED TO THAT COURT FOR  
FURTHER PROCEEDINGS CONSISTENT  
WITH THIS OPINION. COSTS TO BE PAID BY  
APPELLEE.**