IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CV-445

LAUREN D. BOUTAUGH, *et al.*

Appellants,

v.

DISTRICT OF COLUMBIA

Appellee.

Appeal from the Superior Court of the District of Columbia

BRIEF OF APPELLANTS LAUREN D. BOUTAUGH, *et al.*

Patrick G. Senftle, #412191
psenftle@presslerpc.com
Marc L. Wilhite, #468535
mwilhite@presslerpc.com
Matthew J. Focht*, #480906
mfocht@presslerpc.com
1432 K Street, N.W., 12th Floor
Washington, D.C. 20005
(202) 822-8384 (telephone)
(202) 331-7587 (facsimile)

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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

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

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

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

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

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

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

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

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

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

MFocht #480906
Signature

Matthew J. Focht
Name

mfocht@presslerpc.com
Email Address

No. 23-CV-445
Case Number(s)

12/7/2023
Date

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CERTIFICATE REQUIRED BY RULE 28(a)(2)(A) OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

Pursuant to Rule 28(a)(2)(A) of the District of Columbia Court of Appeals, the undersigned counsel of record for the Appellants hereby certifies that the following listed parties appeared below:

Plaintiffs:

Lauren D. Boutaugh, Individually, and in her capacity as Personal Representative of the Estate of SMB, a deceased minor, and Joshua M. Boutaugh

Defendant:

District of Columbia

These representations have been made so that the judges of this court may, *inter alia,* evaluate potential disqualification and/or recusal.

Respectfully Submitted,

PRESSLER SENFTLE & WILHITE, P.C.

By: /s/ Matthew J. Focht
Patrick G. Senftle, #412191
psenftle@presslerpc.com
Marc L. Wilhite, #468535
mwilhite@presslerpc.com
Matthew J. Focht, #480906
mfocht@presslerpc.com
1432 K Street, N.W., 12th Floor
Washington, D.C. 20005
(202) 822-8384 (telephone)
(202) 331-7587 (facsimile)

Attorneys for Appellants Lauren D. Boutaugh, Individually and As Personal Representative of the Estate of SMB, a deceased minor, and Joshua M. Boutaugh

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I. STATEMENT ASSERTING JURISDICTION

Pursuant to Rule 28(a)(5) of the District of Columbia Court of Appeals, Appellants hereby respectfully state that the instant appeal is from the Superior Court of the District of Columbia's May 12, 2023 Order granting Appellee's "Motion to Dismiss." Said Order disposed of all parties' claims, thereby establishing the basis for this court's jurisdiction.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District of Columbia "Public Duty Doctrine" applies under the circumstances presented herein;
2. Whether the trial court erred in finding as a matter of law that the District of Columbia did not owe SMB, an unborn child, a duty of care to protect her from exposure to COVID-19 while her mother was working in-person in a District of Columbia office as a sworn Metropolitan Police Department officer; and
3. Whether an exception to the "Public Duty Doctrine" applies to the claims raised herein in light of a special relationship between SMB and the District of Columbia.

III. STATEMENT OF THE CASE

On December 23, 2022, Appellants filed the Complaint below asserting survival and wrongful death claims against the District of Columbia arising out of the death of their daughter, SMB, from COVID-19 on or about December 31, 2020. In particular, Appellants claim that had the District of Columbia taken appropriate actions to protect pregnant sworn members of the Metropolitan Police Department, such as SMB's mother, Appellant Lauren D. Boutaugh, from exposure to COVID-19, SMB would now be a healthy toddler on the verge of her third birthday.

On April 13, 2023, the District of Columbia filed a motion to dismiss the action below arguing that it owed no duty of care toward a pregnant sworn officer of the Metropolitan Police Department, as well as to her unborn child, under the District of Columbia's "Public Duty Doctrine." An opposition to said motion was filed by the Appellants on April 27, 2023 with a reply filed on May 4, 2023. The District's motion ultimately was granted by the Superior Court of the District of Columbia (Yvonne Williams, J.) on or about May 12, 2023. In response, this appeal was timely noted on May 23, 2023.

IV. STATEMENT OF FACTS

At all times relevant hereto, Appellants Lauren D. Boutaugh and Joshua Boutaugh were employed as officers of the Washington, D.C. Metropolitan Police Department (MPD). On June 19, 2020, Mr. and Mrs. Boutaugh found out that Mrs. Boutaugh was pregnant with the couple's second child. Mrs. Boutaugh made the required notifications to MPD and was placed on limited duty at the 5D Administrative Office. *See* "Protecting Pregnant Workers Fairness Act," D.C. Code §32-1231.01 *et seq.* (requiring District of Columbia employers to make reasonable accommodations related to pregnancy and child birth); "Protecting Pregnant Workers Fairness Act – Fact Sheet for Employers and Employees," attached hereto at Appendix p. 65.

As a result of the COVID-19 pandemic, which happened during Mrs. Boutaugh's pregnancy, all civilian (non-sworn) female employees assigned to perform administrative work at the Fifth District (5D) Headquarters were required to depart their MPD worksite and "telework" from home. *See* Metropolitan Police Department Executive Order EO-20-10 "Coronavirus 2019 Emergency Telework Program (March 13, 2020), attached hereto at Appendix p. 67. On the other hand, sworn MPD members, including pregnant officers such as Mrs. Boutaugh, were not permitted to telework – despite performing essentially the same tasks as their civilian co-workers. *Id.* This was despite being classified as high risk employees by the

District of Columbia Office of Risk Management. *See* District of Columbia Office of Risk Management "Public Sector Workers' Compensation Claims Arising out of the 2019 Novel Coronavirus (COVID-19)," PSWCP 2020-01 (June 15, 2020), attached hereto as Appendix p. 73.

Despite MPD's Order, at least one other pregnant MPD officer assigned to the 5D administrative office requested permission to telework due to her pregnancy and concerns for the health and safety of her baby. However, MPD required Mrs. Boutaugh's co-worker to continue to work in-person. In light of this experience, Mrs. Boutaugh knew that any request for telework on the basis of her pregnancy would be denied.

Mrs. Boutaugh remained safe from COVID-19 exposure from the start of Mrs. Boutaugh's pregnancy through the end of 2020, when she was infected with COVID-19 due to the negligence of the Metropolitan Police Department and the District of Columbia. During this time, Mrs. Boutaugh remained required to appear for work in-person at 5D Headquarters, where policies and procedures put in place during the pandemic to prevent COVID-19 infection, including those concerning mask-wearing, contact tracing, social distancing, health assessments, self-quarantining, and limitations on access to the 5D administrative office, were being routinely being broken or ignored. Said failures put pregnant sworn officers working

in the administrative office, such as Mrs. Boutaugh, at undue risk of COVID-19 infection.

Fortunately, Mrs. Boutaugh was able to avoid COVID exposure until two officers in Mr. Boutaugh's 5D crime suppression unit tested positive for COVID-19 on or about December 16, 2020. Mr. Boutaugh was a close contact of the officers testing positive but was not immediately advised of their COVID status through the MPD contact tracing program. Rather, Mr. Boutaugh was not aware of his COVID exposure until he was personally notified by a coworker on December 18, 2020 of the coworker's own positive COVID test. Had Mr. Boutaugh been timely informed through the MPD contact tracing program that he had been a close contact of two officers testing positive for COVID, he would have immediately isolated himself away from Mrs. Boutaugh, outside the family home, in order to protect her, and their baby, from exposure to the COVID virus.

By December 19, 2020, Mr. Boutaugh had developed COVID symptoms. The family began masking at all times and Mr. Boutaugh isolated himself on a separate floor of the family home in Dunkirk, Maryland. On December 20, 2020, Mr. Boutaugh took a test for COVID and flu at his local urgent care. The results returned indicated that Mr. Boutaugh was negative for flu, but positive for COVID.

Also on December 20, 2020, Mrs. Boutaugh began developing COVID symptoms. By December 22, 2020, Mrs. Boutaugh had tested positive for COVID and was running a fever as high as 103 degrees Fahrenheit.

On December 26, 2020, still suffering from acute COVID symptoms, Mrs. Boutaugh presented at Calvert Memorial Hospital in Prince Frederick, Maryland where she was evaluated and provided with medication and an IV. She was discharged that night and advised to continue resting and to try to stay hydrated.

On December 30, 2020, Mrs. Boutaugh no longer felt the baby moving and again presented to Calvert Memorial Hospital. The nurses could not find SMB's heartbeat on their fetal Doppler units and an ultrasound confirmed that SMB had no cardiac activity consistent with life. Mrs. Boutaugh was then advised that she would need to deliver SMB's stillborn body.

On or about January 2, 2021, an autopsy of SMB was performed by Dr. Jody E. Hooper of the Department of Pathology at the Johns Hopkins Hospital in Baltimore, Maryland. Said autopsy revealed that SMB died on or about December 30, 2021 as an apparent result of "vascular malperfusion of the placenta due to maternal COVID-19 infection with coagulopathy." The fetus also appeared to have COVID-19 infection, more likely than not from transplacental transmission. Notwithstanding the conditions found by Dr. Hooper on autopsy, SMB was an otherwise healthy and viable fetus.

On or about April 13, 2021, the Medical Services Division of MPD issued a written ruling deeming Mrs. Boutaugh's COVID-19 infection, and the resulting loss of SMB, to have been suffered in the course of the Performance of Duty as a MPD officer (POD). In particular, Mrs. Boutaugh presumptively contracted COVID-19 from the workplace in that she worked in a job "with a very high or high potential for exposure to known or suspected sources of COVID-19" and her COVID-19 condition was "confirmed within at least 14 days of performing service at their workplace." *See* Appendix at 73; Memorandum from Matthew Miranda, Director MPD Medical Services Division to Lauren Wood Regarding "Classification of PD 42 Illness/Injury Report," attached hereto at Appendix p. 77.

V. ARGUMENT

A. Summary of Argument

The District of Columbia was not entitled to dismissal of Plaintiffs' Complaint as a matter of law. To be certain, Appellants alleged beyond a speculative level all required elements of a legally viable claim against the District arising out of SMB's death. Moreover, the public duty doctrine does not apply to the facts presented herein and the District of Columbia thus owed SMB a legal duty to take action to prevent her from developing COVID-19 *in utero*. Even if the public duty doctrine were found to be applicable to this action, an exception to the doctrine applies in that the District of Columbia assumed a special relationship with SMB because there was

a direct or continuing contact between SMB and the District of Columbia and there was a justifiable reliance by the Appellants on the actions taken by the District of Columbia. Statutory and regulatory authority also indicates the existence of a special relationship. The instant matter should be remanded to the trial court for further proceedings on each of these grounds.

B. Standard of Review

Appellate review of a trial court's dismissal of a complaint is undertaken by way of a *de novo* analysis of the record below. *See District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 639 (D.C. 2005). Dismissal under Super. Ct. Civ. R. 12(b)(6) is appropriate only if "the complaint fails to allege the elements of a legally viable claim" above a speculative level. *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007); *see also Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). In deciding a motion to dismiss, the Court must accept as true all allegations in the Complaint and view them in a light most favorable to the plaintiff. *See, e.g., Owens v. Tiber Island Condo. Ass'n*, 373 A.2d 890 (D.C. 1977). Any ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader. *Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985); *see also Sinclair v. Kleindienst*, 711 F.2d 291, 293 (D.C. Cir. 1983); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 877 (D.C. Cir 1981); *Shear v. NRA*, 606 F.2d 1251, 1253 (D.C. Cir 1979). Dismissal is impermissible unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *See, e.g., Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995).

C. Application of the Public Duty Doctrine

For purposes of claims sounding in negligence plaintiffs ordinarily must demonstrate "(1) that the defendant owed a duty to the plaintiff, (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011). To be certain, "[w]hen the District or its agents take action that 'directly' harms an individual, the law of negligence applies to it as it would to any other tortfeasor." *Hoodbhoy v. District of Columbia*, 282 A.3d 1092, 1096 (D.C. 2022) (*citing District of Columbia v. Evans*, 644 A.2d 1008, 1017 n. 8 (D.C. 1994)).

Notwithstanding these general concepts of negligence, when "a plaintiff alleges the District negligently failed to protect [them] from harm, the first element of a negligence claim – duty – is governed by the public duty doctrine, under which the government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen." *Hoodbhoy*, 282 A.3d at 1097 (internal citation omitted). In this regard, a plaintiff "must allege and prove that the District owed a special duty to the injured party, greater than or different from any duty which it owed to the general public." *Klahr v. District of Columbia*, 576 A.2d 718, 719 (D.C. 1990).

Historically, the public duty doctrine was applied to situations in which the District was alleged to have "failed to take affirmative steps to rescue or protect a plaintiff from an injury or a peril caused by someone or something other than the District itself." *Powell v. District of Columbia*, 602 A.2d 1123, 1134 (D.C. 1992) (Schwelb, J., concurring); *see also id.* at 1135-36 ("[s]o far as I am aware, however, the public duty doctrine has never before been applied to a situation such as this one, in which it was solely the District's own lack of due care that actively and directly caused the plaintiff harm. If a negligently operated District police car were to strike and injure [plaintiff], the District would be required to compensate her for her injuries"). Over time, application of the public duty doctrine exploded such that the District cannot be held liable for failing to protect the public at large from **any** potential "source of harm" which is "totally external to the District" unless the plaintiff demonstrates the existence of a "special relationship" imposing a duty on the District beyond the duty owed to the general public at large. *Allen v. District of Columbia*, 100 A.3d 63, 78 (D.C. 2014), *vacated and pet. for reh'g en banc granted*, 2015 D.C. App. Lexis 58 (D.C. Oct. 29, 2015); *Hoodbhoy*, 282 A.2d at 1097.

"Under the public duty doctrine, the District has no duty to provide public services to any particular citizen unless there is a 'special relationship' between the emergency personnel – police officers, firefighters, and EMTs – and an individual." *Woods v. District of Columbia*, 63 A.3d 551, 559 (D.C. 2013) (Oberly, J.,

concurring) (quoting *Allison Gas Turbine Div. of Gen. Motors Corp. v. District of Columbia*, 642 A.2d 841, 843 (D.C. 1994)). "Whether a special relationship exists turns on the distinction between duty to protect the public-at-large and duty to protect the injured party, not on the existence or nature of that duty in the abstract. In other words, no matter how obvious or great the general danger—or how blameworthy the District's omissions with regard to that danger—the public duty doctrine bars liability in a failure to protect case absent a showing that the District assumed a special duty to the injured party." *Hoodbhoy*, 292 A.3d at 1100. Therefore, a special relationship exists where there is (1) a direct or continuing contact between the injured party and a governmental agency or official, and (2) a justifiable reliance on the part of the injured party. *Miller v. District of Columbia*, 841 A.2d 1244, 1246 (D.C. 2004). "Absent a special relationship between the District and an individual, no specific legal duty exists, and...a claim of simple negligence will fail as a matter of law." *Woods*, 63 A.3d at 553 (citation omitted) (ellipsis in original).

D. D.C. Code §5-401.02 Constrains, But Does Not Eliminate, New Exceptions to the Public Duty Doctrine.

Developments in public duty doctrine jurisprudence further clarify the analysis to be performed by the Court in this case. The "Public Duty Doctrine" has a history of being criticized by this Court in well-reasoned concurring and dissenting opinions. *Powell*, 602 A.2d at 1134 (Schwelb, J., concurring) ("[s]ome courts have reasonably concluded, albeit without my metaphor, that even as heretofore applied

[the] doctrine is an albatross around the neck of justice"); *Allen*, 100 A.3d at 75-76 (Easterly, J., dissenting) ("This is not a public duty doctrine case – at least not as the public duty doctrine has ever been conceived by this court…The application of the public duty doctrine to these facts – to uphold a grant of summary judgment no less – demonstrates that this doctrine is analytically bankrupt…I dissent from the majority opinion's extension of the public duty doctrine to the facts presented, and I renew the call to this court to reconsider the doctrine it created and has allowed to run amok").

In response to the grant of *en banc* review in the *Allen* case, and in apparent anticipation of the potential for judicial abrogation, the D.C. Council codified the public duty doctrine into law in 2016. *See* D.C. Code §5-401.02. Reasons included budgetary instability and the "public policy nature of the issue arguing for legislative – not judicial – judgment." *Allen*, 100 A.3d at 63. "In [its] legislation, the Council ratifie[d] the interpretation and application of the public duty doctrine by the District of Columbia Court of Appeals up through the decision of September 25, 2014 in [*Allen*], thereby insulating the existing doctrine from our then-pending reconsideration." *Hoodbhoy*, 282 A.3d at 1098 (internal quotation omitted). However,

> [t]he effect of §5-401.02 is (1) to resuscitate *Allen*, which we had vacated pending *en banc* review, as binding authority, and (2) to constrain this court from overruling public duty doctrine precedents up to and including that opinion, such that we may

> not adopt new "exceptions" to the public duty doctrine that are incompatible with those previous rulings. **Section 5-401.02 does not otherwise preclude us from further clarifying the contours of the doctrine in the same way we ordinarily refine common-law rules. Nor would §5-401.02 prevent us from endorsing a new exception to the public duty doctrine, so long as that exception can be squared with our previous holdings.** *Id.* (emphasis added).

As such, the Court should use an analytical template in this case similar to the one deployed in *Allen*. First, the Court should examine whether this is a case where the public duty applies, and if it is a public duty case, the Court should consider whether an exception to the public duty doctrine is available to the Appellants.

H. The Public Duty Doctrine Does Not Apply In this Case Because the District of Columbia's COVID-19 Response for its Own Police Officers Is Not a Force External to the District.

In granting the District's Motion to Dismiss, the court below stated that "the central question is whether SMB contracting COVID-19 through Ms. Boutaugh was the result of an external threat or of MPD's making. COVID-19 was an external threat." Appendix at 98. The Superior Court went on to find that it "cannot find that the District took the sort of direct action that would make this a standard negligence case rather than one subject to the public duty doctrine." *Id.*

While there can be absolutely no question that the COVID-19 pandemic was a global catastrophe, there is a clear distinction to be had in this case between the existence of COVID-19 (an external threat) and the execution of the District of

Columbia's *response* to the pandemic. Said response to the pandemic in its own facilities was a direct action entirely within the District's control, thereby taking this case outside the protections of the public duty doctrine.

To be certain, the decision below incorrectly conflates the line of cases alleging a failure to act in an emergency situation, where application of the public duty doctrine is warranted, with cases such as this matter, where the District of Columbia owes an independent tort duty to the plaintiff akin to the duty to adequately maintain the safety of property under the District's control. *See, e.g., Long v. District of Columbia*, 820 F.2d 409 (D.C. Cir. 1986); *District of Columbia v. Freeman*, 477 A.2d 713 (D.C. 1984); *District of Columbia v. Woodbury*, 136 U.S. 450 (1890) (cases indicating that the District has a tort duty to maintain public works assets--such as streets, sidewalks, and sewers--in a safe condition); *Johnson v. District of Columbia*, 580 A.2d 140, 142-43 (D.C. 1990) (holding that District could be held liable if the affirmative negligence of ambulance service actively worsens plaintiff's injuries).

Indeed, the public duty cases cited by the District in support of dismissal generally hinged upon the happening of an unexpected event (violence, fire, sudden medical emergency) and the alleged failure of the District to subsequently provide adequate protection to the plaintiff in the usual course. *See Hoodbhoy, supra* (alleged failure to protect member of the public from shooting by patient on

conditional release from Saint Elizabeth's Hospital); *Klahr, supra* (plaintiff's decedents murdered by escaped convict from halfway house operated by the District); *see also Allen*, 100 A.3d at 70 ("[a]ny negligence of [EMT's] Mason (and Johnson) in treating Allen occurred once their role evolved from basic monitors to emergency responders"). *Cf. District of Columbia v. Carlson*, 793 A.2d 1285, 1292 (D.C. 2002) ("...the District is not liable for a decision not to install a traffic control device at an intersection, but once it does so, it may be liable if it fails to maintain that device").

The only "non-emergency" case cited by the Court below in support of the applicability of the public duty doctrine to this case is actually inapposite to that specific issue. Appendix at 98. In *District of Columbia v. Forsman*, 580 A.2d 1314, 1316-18 (D.C. 1990), dismissal was granted "on the basis that the District did not owe [p]laintiffs a duty to ensure all appropriate permits were required of a construction project." Appendix at 98. However, the applicability *per se* of the public duty doctrine was not at issue in *Forsman* (unlike *Allen)* and the case turned on the existence of the "special relationship" exception to the public duty doctrine, to be discussed in Section F, *infra*. *Forsman*, 580 A.2d at 1319. The "special relationship" issue also was central to the outcome in *Platt v. District of Columbia*, 467 A.2d 149, 1151 (D.C. 1983) (no special relationship between the District of

Columbia and members of the public injured in a fire at a cinema where the District of Columbia failed to enforce building and fire codes).

In contrast, and having put in place a policy requiring MPD sworn officers to remain at their MPD worksites (*see* Appendix at 67), the District undertook direct action and a corresponding duty to SMB, by and through her parents, and her mother in particular, to put in place and execute adequate safety procedures, including contact tracing, to prevent COVID-19 exposure. *See Wagshal v. District of Columbia*, 216 A.2d 172, 174 (D.C. 1966) ("[t]he District need not have put up the [stop] sign, but once it did, it had a duty to maintain it properly in order to keep the intersection reasonably safe for motorists"). Appellants expressly contended in their Complaint that appropriate COVID-19 protocols put in place *directly by the District itself for use in its own police station* were not followed and that 5D became a COVID hot spot as a result, culminating in SMB's infection and death. *See* Message from Police Chief Peter Newsham "To the Force: COVID-19 Update & Testing" (November 18, 2020), Appendix at 82.

This case does not present a situation like the circumstances presented in either *Forsman* or *Platt* where the allegation was that the District failed to enforce regularly implemented statutes against third parties and regulations in locations out of its control. Rather, SMB's death was the tragic result of the District falling below the standard of care required in order to mitigate the risk of COVID exposure in its

own facilities. In this regard, this matter has more in common with a premises liability case than it does a public duty doctrine case. To be certain, it is well established that the District of Columbia owes a duty of care to invitees on its property and the public duty doctrine has no application in those premises liability cases. *See, e.g., Washington Metro. Area Trans. Auth. v. Davis*, 606 A.2d 165, 175 (D.C. 1992) (the District has a duty to maintain roadways in a reasonably safe condition and can be held liable where it has actual or constructive notice of a hazardous condition); *Rajabi v. Potomac Elec. Power Co.*, 650 A.2d 1319, 1322 (D.C. 1994).

The District was not entitled to dismissal of Plaintiffs' complaint under the terms of the public duty doctrine because it was the District's direct lack of due care that caused SMB's death, not an unknown or unexpected external factor or force found in the public sphere. The public duty doctrine does not apply under such a circumstance.

I. A "Special Relationship" Exists Between SMB and the District of Columbia.

Even if the public duty doctrine is found to apply to this case, an exception applies because a special relationship existed between SMB and the District of Columbia. As indicated previously, "[w]hether a special relationship exists turns on the distinction between duty to protect the public-at-large and duty to protect the injured party, not on the existence or nature of that duty in the abstract. In other

words, no matter how obvious or great the general danger—or how blameworthy the District's omissions with regard to that danger—the public duty doctrine bars liability in a failure to protect case absent a showing that the District assumed a special duty to the injured party." *Hoodbhoy*, 292 A.3d at 1100. A special relationship exists where there is (1) a direct or continuing contact between the injured party and a governmental agency or official, and (2) a justifiable reliance on the part of the injured party. *Miller*, 841 at 1246. A special relationship also can be established by a statute prescribing mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole. *Powell*, 602 A.2d at 1129 (internal quotation omitted).

1. SMB Cannot Act In Her Own Right Before Birth.

SMB's distinct personhood should be noted for purposes of the special relationship analysis under the public duty doctrine. District of Columbia law has long recognized negligent injury to a fetus as a valid cause of action. *See Greater Southeast Cmty. Hosp. v. Williams*, 482 A.2d 394, 397 (D.C. 1984) ("[i]f a viable is a "person injured" at the time of the injury, the perforce the fetus is a "person" when [she] dies of those injuries, and it can make no difference in liability under the wrongful death and survival statutes whether the fetus dies of the injuries just prior to or just after birth"). Obviously, SMB cannot act independently until such time as she is born. She can act only derivatively through the actions of her mother. *See*

Turner v. District of Columbia, 532 A.2d 662, 667 n. 5 (D.C. 1987) (stating without deciding, "[i]t could be argued that appellant Turner was the "victim" or that her report that her children were being abused might be considered a vicarious "justifiable reliance" on the part of the children, in which case the [two-part] test may indeed have been met.") (citation omitted). Nevertheless, SMB's personhood was explicitly pled in the complaint by way of the assertion of her viability notwithstanding the negligent COVID exposure, as well as through the specific allegation of a special relationship and continuing contact between SMB and the District while SMB's mother was on the job. Appendix at 16-18.

2. SMB Had "Direct and Continuing Contact" With the District of Columbia Through Her Mother's Employment with the Metropolitan Police Department.

The fact that the District of Columbia did not enact any explicit "special protections" for pregnant MPD sworn officers is of no ultimate significance. The obvious solution for protecting pregnant MPD officers and their unborn children would have been to send them home for telework for the duration of the pandemic, as the District had done for civilian employees (the pregnant and the non-pregnant alike). Having taken that relief off the table (*see* Appendix at 67), thereby effectively forcing Mrs. Boutaugh to continue to work in-person at 5D, the District owed SMB a legal duty not to worsen the baby's peril by effectively performing actions (masking, health checks, contact tracing, social distancing) that would have served

to protect her prenatal health and safety. *See* Appendix at 84; *see also* Metro. Police Dept. Executive Order EO-20-043 "Coronavirus 2019: Updated Mask Requirements" (July 22, 2020), attached hereto at Appendix p. 89. Mrs. Boutaugh's ongoing compelled presence at 5D necessarily created a direct and continuing contact between SMB and the District of Columbia for the duration of the pregnancy, thereby entitling Plaintiffs to the benefit of an exception to the public duty doctrine.

3. SMB's Mother Relied on Representations Made by the District of Columbia.

Moreover, by continuing to come to work, Mrs. Boutaugh relied on the representation made by the District that it would effectively institute and execute the COVID policies itself enacted in an effort to protect her, as an MPD officer, at work, and, by extension, protecting SMB in the womb. *Cf. Flemmings v. District of Columbia*, 719 A.2d 963, 964 (D.C. 1998) (rejecting a special relationship between the District of Columbia and a Metropolitan Police Department officer shot and killed *off-duty* by his romantic partner, who also was a MPD member); *Allen*, 100 A.3d at 70 (District of Columbia EMT's were converted from observers to emergency responders, and an EMT candidate into a member of the general public, when a medical emergency involving the candidate developed suddenly during fitness testing). This includes the representation that a prompt and diligent contact tracing regimen would provide the Boutaugh family with timely notice of Mr. Boutaugh's COVID exposure such that immediate action to protect the baby could

be taken. Said reliance by SMB on the promise of a safe workplace made by the District of Columbia also entitles Appellants to the benefit of an exception to the public duty doctrine.

4. Statutory and Regulatory Authority Also Indicates a Special Relationship Between SMB and the District of Columbia.

Two sources of authority also support the existence of a special relationship between SMB and the District, by and through SMB's mother, Mrs. Boutaugh. First, the District of Columbia has enacted the "Protecting Pregnant Workers Fairness Act," D.C. Code §32-1231.01 *et seq.* (requiring District of Columbia employers to make reasonable accommodations related to pregnancy and child birth); *see also* Appendix at 65. This statute provides pregnant workers in the District of Columbia, including those workers employed by the District of Columbia itself, with a range of workplace remedies well beyond those provided to non-pregnant workers. *Id.*

Second, the District of Columbia issued a telework policy in response to COVID-19 that was specifically tailored to MPD sworn officers and not the general public. Metro. Police Dept. Exec. Order EO-020-010, attached hereto at Appendix p. 67. As the policy states as to its "Purpose"

> As the primary law enforcement agency in the District of Columbia (DC), it is essential for the Metropolitan Police Department (MPD) to maintain continuity of operations. In light of the recent Coronavirus 2019 (COVID 19) developments, the MPD is assessing how to best ensure that our workforce is able to maintain the maximum service delivery level possible, while maintaining flexibility with our workforce. While MPD's sworn

> workforce is deemed essential, and will continue to report to work to respond to the needs of our residents, there are civilian employees that can continue to perform their job duties offsite through telework during this period. *Id.*

Taken together, these two sources constitute evidence of a duty on the District to protect the narrowly defined and otherwise helpless class of pregnant sworn MPD officers from COVID-19 exposure. *See Turner, supra*, 532 A.2d at 668 (Child Abuse Prevention Act created a special relationship to protect abused children). Therefore, the District of Columbia's duty of care with regard to its pregnant employees, such as Mrs. Boutaugh, as well as the duty owed to MPD officers, is greater than the duty owed to the general public, thereby indicating a special relationship between SMB, an unborn child, Mrs. Boutaugh, and the District of Columbia for purposes of a public duty doctrine analysis. The dismissal below should be reversed in light of this special relationship.

Further, there is no evidence that assurances implied in MPD's COVID-19 orders and protocols were intended for the benefit of both the public and MPD officers generally. To the contrary, Metropolitan Police Department Executive Order EO-20-040 is entitled "Coronavirus 2019 Employee Health Assessments and System Reporting" and states that "[d]ue to the Coronavirus 2019 (COVID-19) emergency, and in order to maintain a healthy and safe workplace, employee wellness monitoring will be on-going. The purpose of this executive order is to provide updated procedures for monitoring and screening Metropolitan Police

Department (MPD) sworn and civilian members' health and to update reporting procedures for members who experience symptoms consistent with COVID-19 or the flu. To the extent that provisions in this executive order conflict with existing directives, the provisions set forth in this executive order shall prevail." *See* EO-20-040, attached hereto at Appendix p. 84[1]. Nowhere in this Order does it reference "the general public," outside of a passing statement that visitors to MPD facilities should wear face masks and should be provided with a face covering if they do not have one. *See* Appendix at 85. Otherwise, the Order refers only to MPD employees, and not at all to the public at large.

No case relied on below stands for the proposition that a MPD order cannot by definition create a duty of care for purposes of public duty analysis narrower than the duty owed to the general public at large. For example, in *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C. 1990), the injured party attempted to argue that EMS protocols and procedures created a duty of care to a special class consisting of "sick people" such that the public duty doctrine would not apply to bar a claim of allegedly negligently provided ambulance services. Similarly, in *Morgan v. District of Columbia*, 468 A.2d 1306, 1317 (D.C. 1983), the case turned on the fact that MPD General Orders provide no more protection to a police officer's wife than a member

[1] This Executive Order supplemented and superseded Executive Order 20-019, previously cited in the papers herein.

of the general public. In both of these cases, the purported class of people to be protected by way of the relied-upon General Order was so broad as to be indistinguishable from the general public for public duty doctrine purposes. *Id.*, 468 A.2d at 1317 ("[n]or do the police department's 'general orders' which require an investigation, report and recommendation whenever an improper use of an officer's service revolver is reported, establish a duty to protect [the injured plaintiff]. Aside from whether [MPD] did or did not substantially comply with them, the orders...apply when *any member* of the public files such a report") (ellipsis added) (emphasis in original).

As the trial court stated below, the reference to Metropolitan Police Department general orders in *Wanzer* is *dicta*. Appendix at 108; *see also* 580 A.2d at 133. The reference in *Wanzer* is entirely collateral to the issue presented therein and the case does not mention any specific general order, nor does it analyze the specific language of any particular general order. Under such circumstances, it should be indisputable that the decision in *Wanzer* was not intended to create a *per se* rule that <u>only</u> statutes or regulations can create a special relationship for public duty doctrine analysis. Rather, public duty doctrine review requires close consideration of the language of the submitted authority in order to determine whether a special class is being created as opposed to the rote application of a bright-line rule barring the use of MPD General Orders. The language from *Turner* cited

in *Hoodbhoy* is helpful in illustrating the point. *Hoodbhoy*, 282 A.3d at 1099. Statutes and regulations may be used to establish a special duty, but the possible authority available to establish a special duty is not strictly limited to those two items. As was stated in *Turner*,

> "this court [has] recognized other circumstances in which a special duty can be shown to exist. In *Morgan v. District of Columbia,* we noted that a statute or regulation ***may*** describe a special duty to a particular class of individuals. To create such a duty, the language of the statute or regulation must set forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole. 532 A.2d at 667 (*citing Morgan,* 468 A.2d at 1314 (internal citation and quotation omitted) (emphasis added).

Viewed through this lens, the factual situations in *Wanzer* and *Morgan* are not applicable where the relevant MPD Executive Order is addressed specifically to MPD employees. Both *Wanzer* and *Morgan* dealt with circumstances where plaintiffs were attempting to circumvent the public duty doctrine by relying on authority which delineated a duty of care ultimately no narrower than the duty owed to the general public. Hence, the plaintiff in *Wanzer* tried to convert the general public into an ostensibly narrower class of "sick people" in order to fit within the special relationship exception to the public duty doctrine. *Id.* at 133. That effort is in no way similar to the situation here, where the relevant authority concerns the limited class of Metropolitan Police Department Officers on its face and, by logical extension, the unborn children of pregnant officers. *See* Section F(1), *supra.*

G. Reversal of the Dismissal Below Will Not Subject the District to Mass Exposure to Liability Because This Case is Entirely Unique and Limited by its Specific Circumstances.

It bears mentioning that the "special relationship" exception to the public duty doctrine appears to have become so narrow as to be virtually non-existent. *Turner, supra,* is perhaps one of the only cases in public duty doctrine jurisprudence where a statute was found to be drafted narrowly enough to create a special relationship with a class of at-risk individuals, in that case, the class of abused children. Looking at the body of public duty case law as a whole, it is unclear how the class of approximately 24 EMT candidates in *Allen* can be can be considered "too broad" but an undefined number of abused children can be considered "narrowly drawn" for purposes of a public duty analysis[2].

The District's complaint that "[t]o agree with [Appellants] would imply a special relationship with every member of MPD, and perhaps every District employee…" is misplaced. Appendix at 42 (citing *Varner v. District of Columbia*, 891 A.2d 260, 276 (D.C. 2006)). This is because almost all tort claims against the District by its employees are barred by way of the exclusive remedy provided by workers' compensation. *See Hicks v. Allegheny E. Conf. Ass'n of Seventh Day Adventists*, 712 A.2d 1021, 1022 (D.C. 1998). And, the District of Columbia has

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[2] A class that, tragically, undoubtedly consists of hundreds, if not thousands, of District of Columbia children who are actually subjected to abuse, let alone the possibility that <u>any</u> child in the District of Columbia potentially could become a victim of abuse and subsequently identified to Child Protective Services.

established a presumption of compensability under workers' compensation for COVID for its highest risk employees. *See* Appendix at 73, 84, and 89. For this reason, it is critical to underscore SMB's separate, distinct, and independent identity from Mrs. Boutaugh, thereby entitling SMB to bring a cause of action in tort for her fatal prenatal injury. *Greater Southeast Cmty. Hosp.*, 482 A.2d at 395. It is difficult to imagine a scenario where another District of Columbia employee would be entitled to bring a tort claim directly against the District of Columbia short of a derivative claim such as the one presented herein – a claim brought on behalf of a child negligently injured in the womb of a District employee. Indeed, this case may be *sui generis* in its ability to fit within an exception to the public duty doctrine, assuming that the public duty doctrine applies here at all. The idea that a reversal of the dismissal below will potentially expose the District to mass liability for COVID infection is entirely speculative.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Honorable Court vacate the trial court's order granting the District of Columbia's Motion to Dismiss, thereby remanding this case for further proceedings and trial on the merits, and granting them such other relief as the Court may deem just and proper under the circumstances presented herein.

DATED: December 7, 2023

Respectfully Submitted,

PRESSLER SENFTLE & WILHITE, P.C.

By: /s/ Matthew J. Focht
Patrick G. Senftle, #412191
psenftle@presslerpc.com
Marc L. Wilhite, #468535
mwilhite@presslerpc.com
Matthew J. Focht, #480906
mfocht@presslerpc.com
1432 K Street, N.W., 12th Floor
Washington, D.C. 20005
(202) 822-8384 (telephone)
(202) 331-7587 (facsimile)

Attorneys for Appellants Lauren D. Boutaugh, Individually and As Personal Representative of the Estate of SMB, a deceased minor, and Joshua M. Boutaugh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of December, 2023, I have caused a copy of the foregoing to be served via email, electronic service, and first-class mail, postage prepaid, on:

Caroline VanZile, Esq.
Solicitor General
Office of the Attorney General for the District of Columbia
400 6th Street, N.W., Suite 8100
Washington, D.C. 20001
Caroline.VanZile@dc.gov

/s/ Matthew J. Focht
Matthew J. Focht, Esq.