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

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

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ARGUMENT

I. Notice Pleading Requires Only that Defendant Be Given "Fair Notice" of Plaintiffs' Claims and the Grounds Therefor.

As previously stated, 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).

It should be underscored for purposes of the instant appeal that the District of Columbia is a notice pleading jurisdiction pursuant to Super. Ct. Civ. Rules 8(a) and (e) and as such,

> a complaint is sufficient so long as it fairly puts the defendant on notice of the claim against him. Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. The provisions for discovery are so flexible and the provisions for pretrial procedure and practice so effective that attempted surprise in District of Columbia practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court. *Warren v. Medlantic Health Group, Inc.*, 936 A.2d 733, 742 (D.C. 2005) (internal citations and quotations omitted); *see also Taylor v. D.C. Water & Sewer Auth*, 957 A.2d 45, 50 (D.C. 2008).

"[A] complaint should not be dismissed because the court doubts that a plaintiff will prevail on a claim. Nor should a complaint be dismissed under Rule 12(b)(6) on the ground that no evidence has been offered by Plaintiffs since…the facts alleged in the complaint [are taken] as true and the presentation of evidence to counter a Rule 12(b)(6) motion is not required." *Sarete, Inc. v. 1344 U St. Ltd. P'ship.*, 871 A.2d 480, 497 (D.C. 2005) (internal citations and quotations omitted). Dismissal is impermissible, as it is here, 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).

"A defendant raising a 12(b)(6) defense cannot assert any facts which do not appear on the face of the complaint itself. When the trial court decides a Rule 12(b)(6) motion by considering factual material outside the complaint, the motion shall be treated as if filed pursuant to Rule 56, which permits the grant of summary

judgment if there are no material facts in dispute and the movant is entitled to judgment as a matter of law. [W]hen treating a Rule 12(b)(6) motion as a motion for summary judgment, where outside factual material is not excluded, the trial court must give the parties notice of its intention to consider summary judgment and an adequate opportunity to present affidavits or other matters appropriate to a ruling on such a motion." *Washkoviak v. Sallie Mae*, 900 A.2d 168, 178 (D.C. 2006) (internal citations and quotations omitted). No such notice was provided by the Court with regard to the underlying motion, thereby making this appeal appropriate for resolution under the *de novo* motion to dismiss standard.

II. "Direct Acts" of Negligence on the Part of the District of Columbia Were Pled in the Complaint.

The District of Columbia contends in its brief that the Boutaughs did "not identify any District action that could have directly harmed SMB by increasing the risk that Ms. Boutaugh would contract COVID beyond what would have existed had the District done nothing to suppress the spread of COVID." Appellee's Brief at 16. To the contrary, the Boutaughs expressly alleged below, both in their Complaint and during the underlying motions practice, 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 the Metropolitan Police Department 5th District ("MPD 5D") office became a COVID hot spot as a result, culminating in SMB's infection and death. *See* Appendix at 10 - 13 and 55. The idea that these contentions were somehow waived

at some point of litigation is entirely unsupported. Indeed, the Complaint identifies, among many instances, the following "direct" actions on the part of the District of Columbia, stated affirmatively[1]:

- Required Ms. Boutaugh to report for work in person at 5D despite her pregnancy. Appendix at 10, ¶ 22;
- Denied Ms. Boutaugh permission to telework, as civilian employees were permitted to do, despite her pregnancy. Appendix at 10, ¶ 23;
- Allowed maskless individuals to be present in the 5D office. Appendix at 11, ¶ 29;
- Inaccurately performed health assessments and/or temperature checks. *Id*;
- Allowed non-essential personnel to access the 5D workspace in violation of social distancing guidelines. Appendix at 12, ¶ 34; and
- Delayed relaying the results of contact tracing to Mr. and Mrs. Boutaugh. Appendix at 13, ¶ 39.

This argument, made explicitly for the first time on appeal, reveals the flaw in the District's aggressive strategy to have this case disposed of by way of a motion to dismiss as opposed to potentially by way of summary judgement on a full

[1] The argument that "failures" cannot be considered direct conduct should not apply here, since all of the Appellee's conduct can be described in the converse, no matter how they are styled in the text of the Complaint.

discovery record, including expert testimony. Had this case been permitted to proceed through discovery, Mr. and Mrs. Boutaugh would have had an opportunity to develop evidence demonstrating that the conduct on the part of the District of Columbia identified in the complaint worsened Mrs. Boutaugh's and SMB's position such that the public duty doctrine would not apply in light of their "special relationship" with the District of Columbia and otherwise "normal" premises liability law in turn would apply. Appendix at 106.

If such evidence ultimately proved insufficient, summary judgment would have been available to the District in order to resolve the case short of trial[2]. However, at the pleading stage, Mr. and Mrs. Boutaugh are entitled to the inference that such conduct did in fact change their condition for the worse and this matter should be remanded on this ground for further litigation. The Boutaughs should not be required to make a special request for early discovery in order to reap the benefit of the inferences they are entitled to as a matter of law at the pleading stage.

Johnson v. District of Columbia, cited by the District, is illustrative in this regard. In *Johnson*, the case was remanded for further fact finding on the ground that the complaint alleged that "the firefighters failed to properly assess [plaintiff's]

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[2] Perhaps for this reason, it seems that comparatively few public duty doctrine cases are resolved at the 12(b)(6) stage, as compared to by way of summary judgment or post-trial motions practice. *See, e.g.*, *Johnson v. District of Columbia*, 580 A.2d 140 (D.C. 1989); *District of Columbia v. Forsman*, 580 A.2d 1314 (D.C. 1990); *Stoddard v. District of Columbia*, 623 A.2d 1152 (D.C. 1992).

condition, failed to provide proper cardiopulmonary resuscitation, [and] failed to properly manage [plaintiff's] airway or otherwise comply with reasonable standards of emergency care." 580 A.2d at 143. In remanding *Johnson*, this Court held that "[w]hile such facts could not sustain liability insofar as they merely represent the failure of the firefighters to perform any particular step that might have alleviated [plaintiff's] condition, such is not the case if any such step actually taken affirmatively worsened her physical condition. If on remand, a clarification of plaintiff's position cannot manifest the existence of any such material facts in dispute, summary judgment for the District would be in order." *Id.*

Moreover, remand was granted in *Johnson* when only limited discovery had been taken as of the time of summary judgment. *Id.* In contrast, <u>no</u> discovery was taken in this case (because it was filed as a motion to dismiss on the pleadings), so there was no opportunity below to make a factual record as to a worsening of position on the part of Mr. and Mrs. Boutaugh and SMB. The Boutaughs were thus entitled to rely on the facts pled in their complaint in the light most favorable to them. *See Owens*, 373 A.2d 890.

Further, the District did not make their *Johnson* argument until their brief in the instant appeal and it was not relied upon by the Court below, as the case was dismissed specifically on Public Duty Doctrine grounds. Appendix at 110. As this Court found in *Johnson*, "it is not obvious, however, that [the] opportunity for further

discovery would be irrelevant in light of the principles discussed above." *Johnson,* 580 A.2d at 143-44. The same principles are present in this case and a similar remand for additional fact finding would be appropriate under the circumstances presented herein.

III. The District's Arguments as to Causation are Premature at the Motion to Dismiss Stage and Require Discovery and Expert Opinion Before They Can Be Granted.

Similarly, the District's opening brief is replete with argument raised for the first time on appeal that Mr. and Mrs. Boutaugh have locked themselves into one theory of causation or another based on the language of the complaint. *See* Appellee's Brief at 25. Such argument is not ripe at the stage of a motion to dismiss, and the issues of causation raised herein are properly resolved at summary judgment, at the earliest, and only with the benefit of a full discovery record and expert opinion as to the more likely than not situs of Mrs. Boutaugh's COVID infection, *e.g.*, the 5D Administrative Office vs. the Boutaugh home vs. a cumulative exposure encompassing repeated exposure to the virus with an ever-increasing viral load. *See Grant v. Am. Nat'l Red Cross*, 745 A.2d 316, 319-20 (D.C. 2000); *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1177 (D.C. 2005). Indeed, it is beyond axiomatic that expert opinion will be necessary in order for Appellants to prevail in this matter. *Hill v. Metro. African Methodist Episcopal Church*, 779 A.2d 906, 908 (D.C. 2001) ("a plaintiff must put on expert testimony…if the subject in question is distinctly

related to some science, profession or occupation as to be beyond the ken of the average layperson.") That said, the complex issues of causation presented in this case are entirely inappropriate for resolution on the pleadings and this case should be remanded for such a factual record to be established for later determination.

"Normally, the existence of proximate cause is a question of fact for the jury. The question becomes one of law, however, when *the evidence adduced at trial* will not support a rational finding of proximate cause." *District of Columbia v. Freeman*, 477 A.2d 713, 715 (D.C. 1984) (emphasis added) (internal citation and quotation omitted). "Only if there were absolutely no facts or circumstances from which a jury could reasonably have found that appellees were negligent and that such negligence was the proximate cause of the injury, would the question have been one for the court. But if, as here, the facts are such as to cause reasonable men to differ, then the question is clearly one for the jury." *McCoy v. Quadrangle Dev. Corp.*, 470 A.2d 1256, 1259 (D.C. 1983).

"Where there are no eyewitnesses to an accident and the cause thereof cannot be established by direct proof, then the facts which can be established circumstantially may justify an inference by the jury that negligent conditions produced the injury. In such as case, a jury is not left in the domain of speculation, but they have circumstances upon which, as reasonable minds, they may ground their conclusions." *Id.* at 1259-60. Without question, such inferences should be afforded

to Mr. and Mrs. Boutaugh when viewing their initial pleading in the light most favorable to them.

In its brief, the District ventures to select for the Boutaughs which theory of causation will be advanced at trial, pushing the theory that Mrs. Boutaugh was exposed to COVID in the Boutaugh family home by Mr. Boutaugh. Appellee's Brief at 29-30. However, nowhere in the Complaint do Mr. and Mrs. Boutaugh limit themselves to a particular theory of negligence or causation, nor are they required to do so at the stage of an initial pleading under a notice pleading regime. *See* Section I, *supra.* All the fact section of the Complaint is intended to do is set forth in a narrative form the events, incidents, and conduct on the part of the District of Columbia leading up to SMB's tragic death. However, without question, Mr. and Mrs. Boutaugh are entitled to notice plead their substantive claims in the alternative with summary judgment available after discovery in order to separate the claims viable for trial from the legally unsupported claims.

It appears that the District has pre-judged this case, characterizing it as "speculative" without the benefit of any evidence whatsoever, in an apparent effort to secure a quick victory. Appellee's Brief at 28-29. In fact, the District engages in rank speculation when they argue that there was no causal nexus between SMB's death and the common-law special duty of care arising out of Mrs. Boutaugh's employment with the District. Appellee's Brief at 32. No discovery has been taken

on this point, nor is any required in order to resolve a motion to dismiss on the pleadings. *See Martin v. Bicknell*, 99 A.3d 705, 712 (D.C. 2014) ("[w]hen considering a Rule 12(b)(6) motion, trial courts are generally limited to the four corners of the complaint"). The inferences fairly raised from the complaint therefore should have been sufficient to survive a motion to dismiss.

It was likewise error for the Court below to make a causation determination in dicta without the benefit of factual evidence, and without notice to the parties that factual evidence was required for resolution of the motion, when ultimately dismissing the case as a matter of law on Public Duty Doctrine grounds. *Washkoviak*, 900 A.2d at 178; Appendix at 108.

IV. SMB, By and Through Both of Her Parents, Justifiably Relied on the Assurances of the District of Columbia That COVID Mitigation Actions Would Be Appropriately Performed.

Contrary to the District's argument in its brief, a duty in tort was owed to both of SMB's parents, Mr. and Mrs. Boutaugh, jointly and severally, in that a COVID mitigation regimen, including contact tracing, was put in place by the District covering both parents as MPD employees. They were thus entitled to rely on the representation that these activities would be done in a manner sufficient to protect them from COVID as they continued their respective work tasks. Otherwise, the entire program provides nothing more than a mere illusion of safety, as there is no accountability backing its purported benefits.

With regard specifically to contact tracing, the entire purpose is to ensure that all potentially infected individuals can take appropriate steps for their health and safety once they have been informed of their potential exposure to COVID. For this obvious purpose, contact tracing[3] does not stop at first-level exposures (such as Mr. Boutaugh). Rather, its benefits flow to derivative exposures such as Mrs. Boutaugh and, ultimately, SMB. In this regard, contact tracing has been defined as "a public health practice that is used to identify and notify people who have been exposed to someone with an infectious disease. Through contact tracing, people who may have been exposed to certain infectious diseases are contacted and given information *to help them protect themselves and their loved ones.*" *See* California Department of Public Health "COVID-19 Contact Tracing" July 13, 2023, tiny.cc/ceykzz (emphasis added).

Stated in other words, the District contends that having put in place COVID-prevention measures in its police station for the benefit of its members, it was not obligated to reasonably enforce those measures, or even to enforce them at all. The Court below formulated this issue slightly differently, focusing on the external nature of COVID and its wide-ranging global effects before concluding that

[3] As is the case above, expert testimony regarding the scope, purpose, and execution of a successful contact tracing program would have been helpful in deciding the issues herein, thereby rendering it inappropriate for resolution on a motion to dismiss. The causation arguments set forth above are likewise incorporated by reference as if fully set forth herein.

"[r]egardless of how stringent MPD's policies were, some front-line officers and MPD employees with whom the Boutaughs came in contact were unfortunately going to contract COVID-19." Appendix at 108. The history of the past four-plus years bears this statement out as true to a degree. However, it is not dispositive as to the issue at hand. 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. Mr. and Mrs. Boutaugh relied on this set of protections, ultimately to SMB's detriment.

By way of analogy, the range of COVID mitigation programs enacted by MPD operate similarly to a traffic control sign, or in a manner similar to the duty to keep property owned and/or maintained by the District of Columbia in a reasonably safe condition. Having made the policy decision to have COVID mitigation actions in its police facilities for the benefit of its officers/employees (akin to the decision regarding whether and where a traffic control sign should be posted), the District owed a duty to make sure that those safety actions were "maintained" through effective performance in accordance with the operable standard of care[4]. To do

[4] In this regard, the analysis mimics the discretionary/ministerial distinction of sovereign immunity, albeit in the context of the Public Duty Doctrine.

otherwise nullifies the benefits of the policy. *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"). And by not "maintaining" its COVID policies through enforcement and best practices, the District did, in fact, increase the risk for MPD officers, and by extension, SMB, to be exposed to COVID, thereby taking this case out of the protections available to the District the Public Duty Doctrine. *See Murphy v. Schwankhaus*, 924 A.2d 988, 992 (D.C. 2007)

The primary concept advanced by the District in its brief is that it would have been justified in doing nothing to enforce its COVID-prevention measures, as the "alleged failure to enforce [such] measures did not put [Mrs. Boutaugh] in a worse position than had it never adopted the measures." Appellee's Brief at 9. This concept should be strongly rejected strictly as a matter of policy. The District of Columbia should not be permitted to rely on "doing nothing" to protect the health and safety of its police officers during a pandemic as a defense to liability.

To their credit, MPD did do "something," in that they enacted a wide range of COVID protections for their officers. But having done so, they owed a duty to SMB to make sure that these protections were performed in accordance with the standard of care.

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

As has been the case throughout this action, 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).

"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. Specifically, 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).

The District has conceded for purposes of this appeal "that the complaint plausibly alleges a special relationship with SMB through [Mrs.] Boutaugh's employment with MPD." Appellee's Brief at 33. Therefore, the first prong of the "special relationship" test has been satisfied. Mr. and Mrs. Boutaugh's justifiable reliance on the representations of the District of Columbia with regard to COVID safety are discussed above in Section IV, which is incorporated by reference as if fully set forth herein. Based on the fulfillment of these two factors, an exception to the public duty doctrine applies to this case in light of the "special relationship" between SMB and the District of Columbia, and this case should be remanded to the Superior Court for further proceedings as to the issue of negligence.

Alternatively, 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 v. District of Columbia*, 602 A.2d 1123, 1129 (D.C. 1992) (internal quotation omitted). While Appellees have established a "special relationship" exception to the public duty doctrine on the grounds stated herein, a special relationship between SMB and the District of Columbia also can be evidenced through the range of Metropolitan Police Department General Orders and the District of Columbia "Protecting Pregnant Workers Fairness Act," D.C. Code §32-1231.01, *et seq.* *See* Appellants Brief at Section I(4), which is incorporated by reference as if fully set forth herein. Said authority expands 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, beyond 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, the relevant Metropolitan Police Department orders refer specifically to "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." Appendix at 84. No case relied on below stands for the proposition that a MPD order *per se* cannot create a duty of care for purposes of public duty analysis narrower than the duty owed to the general public at large. Cases rejecting the use of orders, policies, and/or procedures for public duty doctrine purposes have turned on the fact that said materials were duplicative of the duty of care owed to the general public. That is not the case here where a specific duty was owed to MPD officers. *See Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C. 1990); *Morgan v. District of Columbia*, 468 A.2d 1306, 1317 (D.C. 1983).

CONCLUSION

For the reasons set forth above, Mr. and Mrs. Boutaugh respectfully renew their 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: September 6, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of September, 2024, I have caused a copy of the foregoing to be served via email and electronic service on:

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