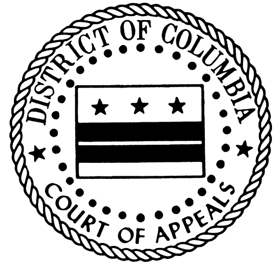

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Appeal No. 23-CV-298 & Appeal No. 23-CV-299

DISTRICT OF COLUMBIA COURT OF APPEALS

GERALDINE LUMBIH,)
)
Appellant,)
)
v.)
)
CAROLYN WILSON, *et al.*)
)
Appellees.)

APPEAL FROM THE DISTRICT OF COLUMBIA SUPERIOR COURT
Case Nos. 2016-CA-005209-R(RP) consolidated with 2018-CA-006980-B

BRIEF OF APPELLEE CAROLYN WILSON

/s/ Vanessa Carpenter Lourie
Vanessa Carpenter Lourie, #250068
4400 MacArthur Blvd., NW, Suite 205
Washington, D.C. 20007-2521
(202) 342-8000 (Office)
(202) 342-9000 (Facsimile)
vlourie@carpenterlourie.com
Counsel for Appellee Carolyn Wilson

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Certificate Required by Rule 28(a)(2)(A) of the General Rules of the District of Columbia Court of Appeals

The undersigned, counsel of record for Appellee, Carolyn Wilson, certifies that the following listed parties appeared below:

I. Appellant

Geraldine Lumbih

Tyler Jay King, Esquire
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
Trial Counsel for Appellant

Clarissa T. Edwards, Esquire
2402 L'Enfant Square, S.E.
Washington, D.C. 20020
Trial Counsel for Appellant

Christopher Viviani, Esquire
Franklin Square Law Group
700 12th Street, NW, Suite 700
Washington, D.C. 20005
Trial Counsel for Appellant

James A. Sullivan, Esquire
Miles & Stockbridge
11 North Washington Street, Suite 700
Rockville, MD 20850
Trial Counsel for Appellant

II. Appellee

Carolyn Wilson

Karen Todd, Esquire
1101 Connecticut Avenue, NW
Suite 450
Washington, D.C. 20036
Counsel for Appellee

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Vanessa Carpenter Lourie, Esquire
4400 MacArthur Blvd., NW, Suite 205
Washington, D.C. 20007-2521
Counsel for Appellee

III. Appellee

Ntaky Management, LLC

Brian L. Kass, Esquire
John E. Arness, II., Esquire
Michelle L. LaRue
Kass Legal Group, PLLC
4301 Connecticut Ave., N.W., #434
Washington, D.C. 20008
Trial Counsel for Appellee
Ntaky Management, LLC

These representations are made in order that the judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

/s/ Vanessa Carpenter Lourie
Vanessa Carpenter Lourie, Esquire
Counsel for Appellee Carolyn Wilson

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

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LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

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OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

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LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

I. SUMMARY OF APPELLEE CAROLYN WILSON'S ARGUMENT

On July 15, 2016 Appellant Geraldine Lumbih (hereinafter referred to as "Lumbih") sued her real estate agent and the realtor's brokerage company, as well as Appellee Carolyn Wilson (hereinafter referred to as "Wilson"), for an alleged failure to disclose an easement on property she purchased from Wilson, and for nuisance because of the alleged illegal operation by commercial entities in the rental properties allegedly owned by Wilson, which were adjacent to Lumbih's property.

Lumbih did not include a claim regarding an erroneous legal description of the property contained in her Deed in the lawsuit, although she was aware of the discrepancy as early as March 30, 2011. Lumbih settled her claim against her realtor and the brokerage company. Lumbih's lawsuit against Wilson was dismissed on June 10, 2019, and she appealed the dismissal. On appeal, this Court affirmed dismissal of the claim regarding the existence of the easement, but reversed dismissal of the nuisance claim.

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

By letter dated September 4, 2018 Appellee Ntaky Management, LLC (hereinafter referred to as "Ntaky") notified Lumbih that an HVAC unit, deck and stairs she installed were encroaching on its adjacent property and demanded that she remove all of the identified items. App 226-230. Lumbih failed and refused to remove the items. As a result, Ntaky filed its lawsuit on October 3, 2018 requesting declaratory relief clarifying and confirming Ntaky to be the sole legal and equitable owner of the entirety of Lot 826 in Square 3024. Ntaky also alleged that it was entitled to cause the removal of the encroachments attached to and benefitting Lumbih's property at the cost, risk and expense of Lumbih. In response to the Ntaky lawsuit against her, Lumbih filed a Third-Party claim against Wilson seeking damages for the losses she claims to have suffered in having to defend herself against the Ntaky lawsuit.

Lumbih had obtained an accurate survey of the property on March 30, 2011 but she did not file her Third Party Claim until November 8, 2019, more than three (3) years later. Lumbih's separate lawsuit for negligence against Wilson was consolidated with the Ntaky lawsuit. Not only was Lumbih's claim against Wilson filed after the expiration of the applicable statute of limitations, but she failed to introduce any proof to support her claim for negligence.

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Ntaky filed a cross-claim against Wilson for damages in the event its quiet title action against Lumbih failed. Since it was granted the relief it had requested against Lumbih, no damages were assessed against Wilson in favor of Ntaky. Ntaky is not entitled to any damages against Wilson since Lumbih was ordered to remove the items at her expense.

II. STATEMENT OF FACTS

Wilson was the owner of real property located in the District of Columbia which was designated as Lot 824 in Square 3024. In 2009 Lot 824 was subdivided into Lots 825, 826 and 827 in preparation for Wilson's planned sale of the improvements which were on Lot 824. App. 070, 10/03/2022 Trial Transcript, lines 17-22. The subdivision was prepared by the title company in conjunction with the sales of the lots. App. 098-099; 10/03/2022 Trial Transcript, lines 14-25. App. 099, lines 1-2.

The property located at 4203 9th Street, NW, Washington, D.C. was known for tax purposes as Lot 826 in Square 3024 (hereafter referred to as "Lot 826"). Ntaky obtained title to Lot 826 on or about August 28, 2009. The property located at 4201 9th Street, NW, Washington, D.C. was known for tax purposes as Lot 825 in Square 3024 (hereafter referred to as "Lot 825").

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Lumbih obtained title to Lot 825 on September 24, 2010. Dolphin and Evans handled the closing on the sale of Lot 825 to Lumbih on behalf of Lumbih. App. 210, 10/03/2022 Trial Transcript, lines 22-25. Dolphin and Evans prepared the Deed transferring title to Lot 825 from Wilson to Lumbih. App. 114, 10/03/2022 Trial Transcript, lines 12-16. Lumbih obtained a "survey" of Lot 825 from Vyfhuis & Associates ("Vyfhuis") prior to the time she closed on her purchased the property. App. 231.

The Vyfhuis "survey" specifically stated that "[t]his is not a property line survey." The records maintained by the Office of the Surveyor for the District of Columbia (the "Survey Records") contain the details of all lot subdivisions approved in the District of Columbia. App. 054, 10/03/2022 Trial Transcript, lines 21-25; App. 055, lines 1-20. The Survey Records reflect and establish the boundaries and lot lines separating taxable real property lots located in the District of Columbia. App. 042, 10/03/2022 Trial Transcript, lines 8-17.

The Deed prepared on Lumbih's behalf properly identified the Lot which Lumbih purchased, Lot 825, but contained the erroneous description of the boundaries of the Lot contained in the Vyfhuis "survey". App. 232-233. The boundary lines contained in the Deed matched the boundary lines in the Vyfhuis "survey," and not the property boundaries contained in the

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Survey Records. App. 231.

On the date of her purchase of Lot 825, Lumbih executed a HUD-1 Settlement Statement. App. 234-238. On Line 1109 of the HUD-1 a payment from Lumbih to Dolphin & Evans, the closing agent, was documented. On Line 1305 of the HUD-1 a payment from Lumbih to Vyfhuis "survey" was documented. App. 234-238.

Lumbih was represented by a real estate agent during the settlement and her agent was with her the entire time. App. 215, 10/03/2022 Trial Transcript, lines 11-17; App. 216. 10/03/2022 Trial Transcript, lines 20-22. No time restriction was placed on Lumbih for review of the settlement documents. App. 216, 10/03/2022 Trial Transcript, lines 14-19.

On March 30, 2011, while in the process of applying for a permit to make improvements to her property, Lumbih was given an accurate boundary survey of her Lot from the District of Columbia Office of the Surveyor which indicated 30.0′ on the 9th Street Side, and not 38′ as described in the Vyfhuis "survey". App. 239-240. On April 6, 2011 Lumbih submitted an Application for a Permit for a "Window for a Door and relocate steps to front". App. 171, 10/03/2022 Trial Transcript, lines 19-22; App. 241-242. Lumbih proceeded with the improvements despite her knowledge of the correct boundary lines, and despite the fact that she did not obtain the permit.

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

During negotiations for the sale of its Lot 826, Ntaky discovered that improvements that Lumbih had made to her property, specifically the installation of stairway, deck, fence, and HVAC Unit, encroached onto its property. JA-000099, 10/04/2022 Trial Transcript at p. 13, lines 10-17; p. 14, lines 3-6. The prospective purchaser, a developer, had obtained a survey which established that the area upon which Lumbih had installed her exterior improvements were actually a part of Lot 826 and not 825.

On August 16, 2018 Ntaky obtained its own survey which was performed by Duley and Associates ("Duley Survey"). App. 243-244. The Duley Survey contained boundary lines that were consistent with the City's Survey Records. By letter dated September 4, 2018 from its counsel to Lumbih, Ntaky demanded the removal of the encroaching improvements. App. 226. Lumbih refused to remove the improvements. JA-000110, 10/04/2022 Trial Transcript, lines 22-24. As a result of Lumbih's refusal to remove the improvements, Ntaky filed its lawsuit.

Specifically, Ntaky alleged that the stairway, deck, fence, and HVAC Unit benefitting and attached to Lumbih's property was located on Ntaky's property. Lumbih filed a counter-claim against Ntaky seeking declaratory relief that title to the disputed portion should be quieted in her favor in conformance with the Deed that was prepared by her title company.

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Wilson had no direct communications with Lumbih regarding her purchase of Lot 825. App. 088; 10/03/2022 Trial Transcript, lines 4-22; App. 114, lines 3-6. Wilson made no representations to Lumbih about her right to use the area of land between Lots 825 and 826. App. 076, 10/03/2022 Trial Transcript, lines 4-15. Wilson did not provide Lumbih with a survey of Lot 825. App. 076, 10/03/2022 Trial Transcript, lines 16-20. Wilson did not prepare the Deed transferring title from herself to Lumbih. App. 077, 10/03/2022 Trial Transcript, lines 1-5. Wilson did not prepare the legal description of Lot 825 that was included in the Deed transferring the Lot from herself to Lumbih. App. 077, 10/03/2022 Trial Transcript, lines 6-7. Wilson did not refer Lumbih to Dolphin for settlement on her purchase of Lot 825. App. 097, 10/03/2022 Trial Transcript, lines 8-14; App. 114, 10/03.2022 Trial Transcript, lines 17-19.

III. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion By Refusing to Apply the Doctrine of Implied Indemnity.

Lumbih has argued that her liability for removal of her encroaching property should have been shifted to Wilson. Lumbih never entered any evidence of the cost of removing the property, nor did she ever offer any evidence of any diminution of the value of her property. The basis of her argument was that since the Deed transferring title to her from Wilson had an incorrect

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

description of the boundary lines, that she was entitled to be indemnified by Wilson.

This court has held that indemnity is "restricted generally to situations where the indemnitee's conduct was not as blameworthy as that of the indemnitor" when based on equitable principles." Quadrangle Development Corp. v. Otis Elevator Co., 748 A.2d 432, 435 (D.C. 2000). As stated in one of the cases cited by Lumbih, District of Columbia v. Washington Hospital Center, 722 A. 2d 332 (1998), "[c]ontribution is one of several theories used to apportion damages among **tortfeasors** to an injured party. Id. at 336. [emphasis added}.

As the trial court held, recovery for implied indemnity relates to tort claims, not claims for breach of contract. Quadrangle Development Corp. v. Otis Elevator Co., 748 A.2d 432 (2000); Griffin Consumer Company v. Spinks, 608 A.2d 1207 (1992). Lumbih's claim sounded in contract, and not in tort. "[A] breach of contract may only give rise to a tort claim when there is an independent basis for the duty allegedly breached. KBI Transport Services v. Medical Transp. Management, Inc., 679 F. Supp. 2d 104 (2010).

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

When a complaint includes a breach of contract claim and a tort claim, "the tort must exist in its own right independent of the contract, and any duty upon which the tort is based must flow from considerations other than the contractual relationship." As such, "[t]he tort must stand as a tort even if the contractual relationship did not exist." Rayner v. Yale Steam Laundry Condominium Association, 289 A.3d 387, 399 (D.C. 2023) citing Choharis v. State Farm Fire & Cas. Co., 961 A.2d 1080, 1089 (D.C. 2008).

Even if the claim could be considered an independent tort, Lumbih had three (3) years from the date of the alleged injury, or the discovery of the alleged injury if later than three (3) years, to file her lawsuit. The property was purchased in 2010, and Lumbih had an opportunity to obtain a correct boundary survey prior to proceeding with the purchase. She clearly sought to obtain a survey. Dolphin and Evans used the boundaries contained in the Vyfhuis "survey" to prepare the description of the property lines in the Deed. Unfortunately for Lumbih, that description was inaccurate.

On March 30, 2011, while in the process of applying for a permit to make improvements to her property, Lumbih was given an accurate boundary survey of her Lot from the District of Columbia Office of the Surveyor which indicated 30.0′ on the 9th Street Side, and not 38′ as described in the Vyfhuis

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

"survey". App. 239-249. Thus, at the latest, she knew about the discrepancy in the boundary lines in 2011, but she did not file her Third Party Claim until November 8, 2019, almost eight years later. D.C. Code §12-301(a)(3). In Beard v. Edmondson and Gallagher, 790 A.2d 541, 546 (D.C. 2002), this Court held:

> The statute of limitations on a tort claim ordinarily begins to run when the plaintiff sustains a tortious injury or—if the so-called "discovery rule" applies because "the relationship between the fact of injury and the alleged tortious conduct [is] obscure," *Colbert v. Georgetown Univ.,* 641 A.2d 469, 472 (D.C.1994) (en banc)—when the plaintiff knows or reasonably should know that the cause of action exists.8 *See id.* at 473; *see also Mullin v. Washington Free Weekly, Inc.,* 785 A.2d 296, 298-299 (D.C.2001); *Diamond v. Davis,* 680 A.2d 364, 372 (D.C.1996) (holding that under the discovery rule, cause of action accrues "when the plaintiff has either actual notice of her cause of action or is deemed to be on inquiry notice because if she had met her duty to act reasonably under the circumstances in investigating matters affecting her affairs, such an investigation, if conducted, would have led to actual notice"). At the latest, therefore, a cause of action accrues for limitations purposes when "the plaintiff 'knows' or 'by the exercise of reasonable diligence should know (1) of the injury, (2) its cause in fact, and (3) of some evidence of wrongdoing.' " *Hendel v. World Plan Executive Council,* 705 A.2d 656, 660-61 (D.C.1997) (quoting *Bussineau v. President & Dirs. of Georgetown Coll.,* 518 A.2d 423, 435 (D.C.1986)). Under this rule, the plaintiff does not have "*carte blanche* to defer legal action indefinitely if she knows or should know that she may have suffered injury and that the defendant may have caused her harm." *Hendel,* 705 A.2d at 661. Nor need all damages be sustained, or even identified, for the cause of action to accrue; "[a]ny 'appreciable and actual harm flowing from the [defendant's] conduct' is sufficient." *Id.* (quoting *Knight v. Furlow,* 553 A.2d 1232, 1235 (D.C.1989)).

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Lumbih took the risk of installing an HVAV unit, and making other improvements past her Lot line with actual knowledge that she did not own the disputed space. Having assumed that risk, she is solely responsible for any damage she incurred as a result of her decision.

B. The Trial Court Did Not Abuse Its Discretion By Denying the Appellant's Claim for Breach of Contract.

The land which a purchaser is entitled to receive is the land identified in the contract of purchase. *Howenstein Realty Corporation v. Richardson*, 135 F. 2d 803 (1943). Lumbih contracted to purchase Lot 825 in Square 3024, and that is all the land that she was entitled to receive. The burden is on the purchaser to conduct a proper inspection of the property, a title search and a survey prior to closing. *Cadet v. Draper & Goldberg, PLLC*, 2007 WL 2893418 (D.C. 2007).

Vyfhuis was hired by Lumbih to prepare a survey and he thus was acting as her agent for purposes of properly identifying the boundaries of her Lot 825. Lumbih's surveyor erroneously described Lot 825 as 38.0′ on the 9th Street side of the property. Although Lumbih argues in her Brief that it was Wilson who obtained the Vyfhuis survey, no evidence was offered at trial to support such an assertion.

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Dolphin and Evans was hired by Lumbih to conduct the closing on her purchase of the property, and was thus her agent for purposes of properly preparing all documents related to the transfer of title of Lot 825 from Wilson to her. Dolphin and Evans, acting as Lumbih's closing agent, using the erroneous Vyfhuis description of Lot 825, prepared a Deed which included a portion of Lot 826.

Since "[a] title examiner is charged with notice of whatever appears in the land records in the chain of title to the property involved…," Wilson cannot be held liable for the erroneous description of Lot 825. *Fireison v. Pearson,* 520 A.2d 1046, 1051 (1987) citing *Williams v. Skyline Development Corp*, 265 Md. 130, 164, 288 A.2d 333, 353 (1972).

If "the means of knowledge are at hand, and the purchaser undertakes to make an examination of the land records, he cannot say that he was deceived and injured by misrepresentations of the vendor." *Fireison v. Pearson,* 520 A.2d 1046, 1050 (1987) citing *Piper v. Jenkins,* 207 Md. 308, 314, 113 A.2d 919, 922 (1955). See also, *Shappirio v. Goldberg*, 192 U.S. 232, 24 S.Ct. 259, 48 L.Ed. 419 (1904); *Ryan v. Brady* 34 Md. App. 41, 366 A. 2d 745 (1976). In cases where there is no precedent in District of Columbia law, this court may look to Maryland law for guidance. *Bernstein v.* Fernandez, 649 A.2d 1064 (1991); Nationwide *Mutua Fire Insurance Company*, 960 F. Supp. 2d 263

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

(2013).

Even if Lumbih had a valid claim, she waited too long to bring it. In the case of Robinson v. Orem, 198 F.2d 86 (D.C. 1952) the court affirmed summary judgment against a purchaser on the basis that the three (3) year statute of limitations had lapsed on a boundary dispute. The Robinson court determined that where the contract for purchase only identified the property by the lot and square, the purchaser had the means to "ascertain the true boundaries and dimensions." Id. at 86.

IV. CONCLUSION

To the extent that there was any factual dispute as between Lumbih and Wilson regarding what transpired, this Court must "view the evidence in the light most favorable to the prevailing party and … defer to the trial court's credibility determinations unless they are clearly erroneous…Where the facts admit of more than one interpretation, [this court] must defer to the trial court's judgment". Govan v. SunTrust Bank, 289 A.3d 681, 690 (D.C. 2023) citing Reed v. Rowe, 195 A.3d 1199, 1204 (D.C. 2018).

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

Consequently, for all of the reasons articulated herein, the judgment of the trial court should be upheld and affirmed.

Respectfully submitted,

/s/ Vanessa Carpenter Lourie
Vanessa Carpenter Lourie, Esquire
vlourie@carpenterlourie.com
Counsel for Appellee Carolyn Wilson

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee Carolyn Wilson was eServed on February 5, 2024 to:

Tyler Jay King, Esquire
700 12th Street, N.W., Suite 700
Washington, D.C. 20005
tyler@lawgroupfs.com
Counsel for Appellant
Geraldine Lumbih

John E. Arness, II., Esquire
Brian L. Kass, Esquire
Andrew J. Lavin, Esquire
Kass Legal Group, PLLC
4301 Connecticut Ave., N.W., #434
Washington, D.C. 20008
arness@kasslegalgroup.com
briankass@kasslegalgroup.com
alavin@kasslegalgroup.com
Attorneys for Appellee
Ntaky Management, LLC

/s/ Vanessa Carpenter Lourie
Vanessa Carpenter Lourie, Esquire

LAW OFFICES
OF
VANESSA CARPENTER LOURIE, P.C.
4400 MACARTHUR BLVD, N.W.
SUITE 205
WASHINGTON, D.C.
20007-2521
(202) 342-8000

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.

Signature

23-CV-298 & 23-CV-299
Case Number(s)

Vanessa Carpenter Lourie
Name

02/05/2024
Date

vlourie@carpenterlourie.com
Email Address