RECORD NO. 20-CV-14

In The
District of Columbia
Court of Appeals

SABRATHIA DRAINE ISHAKWUE,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

ON APPEAL FROM NO. 2017 CA 000788 B IN THE DISTRICT OF COLUMBIA SUPERIOR COURT, CIVIL DIVISION, THE HONORABLE HIRAM E. PUIG-LUGO, JUDGE PRESIDING

REPLY BRIEF OF APPELLANT

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	)	
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DISTRICT OF COLUMBIA,	)	
Appellee	)	
_____	)	

REPLY BRIEF OF APPELLANT SABRATHIA DRAINE ISHAKWUE

I. INTRODUCTION

A. The Protected Tuberculosis Disclosures

The parties agree that Ishakwue gains whistleblower status as a matter of law upon proof of a good faith, "objectively reasonable" belief that the information she disclosed to her managers revealed a potentially serious public health danger. The parties also agree that objective reasonableness is evaluated solely on the basis of information known to Ishakwue, or reasonably ascertainable by her, at the time of her disclosures. (Dist. Br. at 30, citing Zirkle).[1]

The District does not challenge Ishakwue's integrity or good faith. Nor does the District dispute that at the time of her disclosures, Ishakwue did not know whether the at risk DYRS residents were contagious. The District nonetheless challenges the objective reasonableness of Ishakwue's beliefs - - despite

[1] Zirkle v. District of Columbia, 830 A.2d 1250, 1259-60 (D.C. 2003).

undisputed facts that the beliefs were grounded in DYRS policies and shared by her own managers at the time of the disclosures.

The District acknowledges that Ishakwue would have been entitled to whistleblower protection if the DYRS residents reporting or exhibiting symptoms of tuberculosis had turned out to have "active" tuberculosis. (Dist. Br. at 32-33). The District argues, however, that Ishakwue was not entitled to whistleblower status because the residents turned out to have "only" latent tuberculosis and did not "appear" sick. Id. at 32. As shown below (pp. 6-7), Ishakwue unquestionably acted to avert a real potential of widespread contagion, and cannot be denied statutory protection simply because the worst did not happen.

The District pays lip service to "objective reasonableness," but really asks the Court to adopt a far more rigid standard that would deny protection to (1) whistleblowers whose beliefs, even though reasonable at the time of the disclosures, turn out to have been mistaken based upon subsequently acquired information; and (2) whistleblowers who can prove that public health and safety was significantly threatened, but cannot prove that the threat materialized. The Council that originally enacted the DCWPA - - and certainly the Council that amended the statute in 1998 to broaden its protections - - could not conceivably have intended the result for which the District argues. Raphael v. Okyiri, 740 A.2d 935, 957 (D.C. 1999).

In light of the foregoing, the jury verdict of "no protected disclosures," which is unsupported by probative evidence and contrary to law, must be set aside.

B. Contributing Factor

The District argues that if the Court agrees with Ishakwue on the issue of protected disclosures, the Court should remand for a new trial rather than enter judgment in her favor on liability. Remand is required, the District insists, to allow a jury to consider its position that there were so many good reasons for firing Ishakwue that no bad reason could have played a part.

No jury could reasonably accept the District 's position for reasons explained below (pp. 12-15). For present purposes, consider simply that protected disclosures can play a part, whether small or large, in an adverse action no matter the number of purportedly legitimate reasons.

C. The District's Statutory Affirmative Defense

The District is in an even worse position on its statutory affirmative defense. At trial, the District offered no relevant evidence in support of its affirmative defense. See Ishakwue opening brief at 38-41.

On appeal, the District argues that the government can satisfy its "clear and convincing" burden of proof simply by articulating nondiscriminatory reasons, whether or not relied upon by decisionmakers, for firing Ishakwue. As shown below, the District's argument offends common sense and is contrary to law. See,

e.g., Miller v. Dept of Justice, 842 F.3d 1252, 1262 (Fed. Cir. 2016) (the government "provided no evidence that the treatment of Mr. Miller is comparable to similarly situated employees who are not whistleblowers, and the court may not simply guess what might happen absent whistleblowing").

D. The Prejudicial Evidentiary Rulings

Ishakwue vigorously maintains that the jury's verdict of "no protected disclosures" was not supported by record evidence and was at odds with the Court's "objectively reasonable" standard. However, if the Court disagrees, Ishakwue argues that jurors could well have decided differently **if** they had been permitted to consider the evidence excluded by the trial court. The excluded evidence included (1) a report by a DOH investigator, who corroborated Ishakwue's belief that DYRS residents at risk of tuberculosis were improperly released to the community; and (2) evidence that DYRS's communicable disease protocols had long been a target of investigation by court monitors in the Jerry M. litigation. See Ishakwue's opening brief at 18-19 and 41-45.

Surely, the foregoing evidence could have persuaded jurors that Ishakwue was neither an outlier nor the sorely misguided, poorly informed or simply incompetent nurse that the District portrayed at trial. In short, the excluded evidence could well have changed jurors' minds on the issue of protected disclosures.

II. ARGUMENT

A. The Protected Tuberculosis Disclosures: Ishakwue's Beliefs Were Grounded In Her Employer's Policies; Supported By Her Managers; And, Accordingly, "Objectively Reasonable" As A Matter Of Law

1. A trilogy of decisions

In Zirkle v. District of Columbia, 830 A.2d 1250, this Court articulated the basic proposition that a whistleblower's beliefs are objectively reasonable if a "disinterested observer," with the knowledge and experience of the whistleblower, would have shared her beliefs. 830 A.2d at 1259-60. Mr. Zirkle, who claimed to believe that an order of his supervisor was illegal, failed the "disinterested observer" test because he had helped to develop the very policy on which the allegedly illegal order was based. Accordingly, his subsequent challenge of its legitimacy did not ring true, and raised questions of his good faith and integrity. 830 A.2d at 1260.

In Freeman v. District of Columbia, 60 A.3d 1131 (D.C. 2012), the Court, clarifying or elaborating upon Zirkle's "disinterested observed" test, adopted a standard that initially requires consideration of the evidentiary basis of the whistleblower's belief, and then consideration of the evidence, if any, that "detracts from" reasonableness. The court in Freeman emphasized that an employee who intentionally ignores known or easily acquired information that "refute[s]" or "cast[s] doubt on" her disclosures cannot claim whistleblower status.

60 A.3d at 1152. On the other hand, an employee who has simply overlooked, but not wilfully disregarded, countervailing information, or an employee who is justifiably unaware of information that undercuts her beliefs, may still claim whistleblower status.[2]

In Ukwuani v. District of Columbia, 241 A.3d 529 (D.C. 2020), Mr. Ukwuani failed the "disinterested observer" test because his charges were refuted by facts that he **knew** to be true and that in any event were contradicted by a previous admission.

The common thread among the three unsuccessful whistleblowers was that they acted, not on the basis of fact, but on the basis of personal pique. Not so with Ishakwue, who, as explained in detail in her opening brief (pp. 23-25), and as summarized below, acted on the basis of established facts; in accordance with DYRS policy; and with the support of her managers. No jury could rationally have denied Ishakwue whistleblower status.

2. The affirmative evidence supporting objective reasonableness

The affirmative evidence supporting objective reasonableness is both undisputed and compelling. First, Ishakwue's beliefs were based upon first-hand knowledge of the relevant facts. (Ishakwue Br. at 25-26).

[2] In Freeman, a MPD police officer disclosed alleged illegal conduct by the MPD. He failed the "disinterested observer" test, not because he was wrong on the merits, but because he did nothing to learn the truth that a reasonable inquiry would have revealed. 60 A.3d at 1152-53.

Second, her beliefs were grounded in DYRS policy, which requires testing and isolation of residents with "suspected" tuberculosis, and identifies coughing blood among the symptoms "suggestive" of the disease. Id. at 5-6 and 24.

Third, Ishakwue's beliefs were shared by Bellard, the chief medical officer, who, in an email to nursing staff on December 29, 2015, responded to Ishakwue's first tuberculosis disclosure by pointedly asking: "Is there any reason that our index of suspicion for TB was not raised when the youth reportedly was coughing up blood?" (J.A. 419).[3]

3. Bellard's shifting mindset

The Bellard **at the time of the disclosures** agreed with Ishakwue that DYRS residents reporting classic symptoms of tuberculosis must be deemed capable of transmitting the disease, and must be tested and isolated before reintegration into the community. District counsel acknowledged as much, and did not dispute, either at the summary judgment stage or at the pre-trial conference, that the tuberculosis disclosures were statutorily protected. (J.A. 27-45, 135-227).

[3] At trial, Bellard testified to "a series of emails [in December, 2015] stating that this kid should not have been sent to the general population because he... could have had active tuberculosis." (J.A. 265 at 52, l. 25; 276 at 53, ll. 1-3). Bellard also testified that at an indeterminate date, he reviewed the patient's chart, and consulted with a clinician who explained, or attempted to explain, why the at-risk resident was released to the community in disregard of DYRS policy. Bellard accepted her explanation because "no harm was done to the kid or to any other youth in our custody..." (J.A. 276 at 43, ll. 4-11). Bellard's "no harm, no foul" position has no place in whistleblower law. See Ishakwue's principal brief at 32-34.

The Bellard **at the time of trial** articulated a new set of beliefs to accommodate the District's new legal theory that the tuberculosis disclosures were unprotected. Bellard's new set of beliefs regarding the two at-risk DYRS residents was designed to portray Ishakwue as a misguided or ill-informed nurse, who should have known better than to sound the alarm.

As shown below, Bellard's change of heart at trial cannot serve to undermine the objective reasonableness of Ishakwue's beliefs, which, as the District acknowledges (above, p. 1), is evaluated solely on the basis of information known to Ishakwue at the time of her disclosures. Accordingly, the Bellard at the time of the disclosures, rather than the Bellard at the time of trial, is the only Bellard who matters.

4. The facts on which the District relies to defeat objective reasonableness are irrelevant

At trial, Bellard testified that tuberculosis is a rare disease in the general teenage population; that coughing blood can indicate diseases other than tuberculosis; that DYRS has no record that a resident "with active tuberculosis was ever admitted to the facility"; and that neither of the two DYRS residents in question was shown to have contracted the disease. (J.A. 275 at 50, l. 14, 51, ll. 10-21; 276 at 53, ll. 12-14; 276 at 54, ll. 4-5). Bellard also explained at trial the differences between "latent" and "active" tuberculosis. (J.A. 275 at 49, ll. 9-19).

As Bellard noted, "[a] person who has active tuberculosis has a cough, has night sweats, has fevers, looks sick." (J.A. 275 at 49, ll. 9-10).

A patient with latent tuberculosis, on the other hand, is "perfectly fine." Id. at ll. 13-14. Perhaps not "perfectly fine" because, as Bellard also testified, patients who report coughing blood "could" have **active** tuberculosis and should "absolutely" be given a "full" examination to rule active tuberculosis in or out. (J.A. 276 at 53, ll. 1-3; 284 at 86, ll. 3-10). Thus, even at trial, where Bellard attempted to walk back his email of December 29, 2015 (above, p. 7), he at least implicitly recognized the potential threat to public health and safety of a release to the community of asymptomatic, at-risk patients who have not been given a "full" examination.

In its brief (pp. 29, 31-32), the District argues that Bellard's testimony provided "ample" support for the jury decision in its favor, even though the jury reasonably could have decided in Ishakwue's favor. The cold reality, however, is that Bellard's testimony regarding objective reasonableness was irrelevant absent **additional** testimony, which the District did not provide, that, at the time of the disclosures, Ishakwue knew facts that refuted or cast doubt on her charges.

On appeal, the District at least tacitly acknowledges that at the time of her disclosures, Ishakwue knew of nothing that undercut her beliefs. Accordingly, the District argues instead that unidentified information was "available" to Ishakwue,

which purportedly would have refuted or cast doubt on her charges. (Dist. Br. at 34).[4]

The District, however, fails to identify the **particular** information that was "available" to Ishakwue and that she unjustifiably ignored. The District also fails to explain precisely **how** the information she supposedly ignored would have refuted or cast doubt on her charges.

Indeed, District trial counsel did not even ask Ishakwue whether she had considered "available" information before leveling her charges. Moreover, if countervailing information **were** available to Ishakwue at the end of December, 2015, why would Bellard, responding to her first protected tuberculosis disclosure, have asked nursing staff why the "index of suspicion" was not raised by the reported coughing of blood? (J.A. 419). Surely, Bellard would have written a very different email (or no email at all) if information then "available" to Ishakwue had confirmed that the DYRS resident was not in fact contagious.

In any event, the facts relied on by the District do not meaningfully detract from objective reasonableness. The fact that tuberculosis is encountered only rarely among teenagers is beside the point. The question is whether the **subset** of teenagers who report or exhibit classic symptoms of tuberculosis can safely be

[4] The District's perfunctory argument that Ishakwue "should" have known at the time of her disclosures that the DYRS residents were not contagious ignores the fact that **no one** knew, and that everyone agreed that testing was required to find out. (Dist. Br. at 34).

reintegrated into the community without testing or isolation. The answer is an unequivocal "no."

The fact that classic symptoms of active tuberculosis may indicate a different, perhaps less dangerous, disease does not detract from reasonableness. Covid symptoms, for example, clearly overlap with symptoms of other, more benign infections, including the common cold and the flu. Yet, the overlap of symptoms could not conceivably justify a failure to conduct covid testing of patients with overlapping symptoms.

In addition, the fact that latent tuberculosis is less worrisome than active tuberculosis, and the fact that neither DYRS resident "appeared" sick, do not detract from objective reasonableness. At the time of the disclosures, Bellard himself did not distinguish between latent and active tuberculosis. On the contrary, he recognized in his December 29, 2015, email, the potential dangers of even latent tuberculosis (above, p. 7). A whistleblower's belief that is reasonable at the time of disclosure cannot be rendered unreasonable by management's litigation-driven, revisionist views.

Moreover, the fact that the two DYRS residents seeking medical treatment did not "appear" sick does not detract from objective reasonableness. Evidently, the District argues that if patients do not "appear" sick, they are not sick - - or, if they are, better not to know. The argument cannot be taken seriously.

Finally, the District mistakenly contends that "DYRS health care providers **carefully considered** the condition of the youth who claimed to have previously coughed up blood before placing him in a group setting..." (Dist. Br. at 32-33; emphasis added). On the contrary, he was placed in a group setting even though a chest x-ray to rule tuberculosis in or out had not been performed. (J.A. 301 at 154, ll. 11-19 and 155, ll. 12-15).

In light of the foregoing, the jury verdict of "no protected disclosures," which is unsupported by probative evidence and contrary to law, must be set aside.

B. Contributing Factor: This Court's Decision In Raphael Requires Entry Of Judgment In Ishakwue's Favor, Rather Than Remand For New Trial

In Raphael v. Okyiri, 740 A.2d 935 (D.C. 1999), plaintiff proved that her protected disclosures were a "substantial factor" in the District's decision to fire her. Raphael's proof of causation was remarkably similar to Ishakwue's proof. See Ishakwue's principal brief at 37-38. If Raphael satisfied her burden of proof on causation, surely Ishakwue also satisfied her burden under the far more forgiving "contributing factor" standard.[5]

[5] Curiously, the District argues that Raphael is of no help to Ishakwue because the Court did not explicitly address the question "of what evidence might establish causation **as a matter of law**." (Dist. Br. at 47; emphasis in original). The Court's "failure" to invoke the District's magic words cannot obscure the essential point that Raphael's success in proving causation dictates similar success for Ishakwue.

The District insists, however, that the jury would have been free to decide contributing factor - - and its statutory affirmative defense - - in its favor because there were so many good reasons for firing Ishakwue that no bad reason could have played a part. (Dist. Br. at 43).[6] Thus, the District cites a laundry list of Ishakwue's alleged performance deficiencies, including alleged conflicts with co-workers at New Beginnings. (Dist. Br. at 44). The District then claims that problems continued after Ishakwue transferred to Youth Services Center where she allegedly "complained" about other nurses; "objected to" her heavy workload; failed to report for work on January 6, 2016; and, on January 8, "requested 30 minutes of compensatory time for staying late to finish a task..." Id. at 45.

The District's laundry list of alleged performance deficiencies could not have provided the jury adequate evidentiary support for a verdict in its favor. As a threshold difficulty, the **only** reason decisionmakers gave in January, 2016, for firing Ishakwue was that she assertedly was not a "good fit for our team." (J.A. 403). Additional reasons conjured up by District counsel on appeal, but not relied upon by decisionmakers, cannot serve to disprove "contributing factor" - - the most relaxed causation standard imaginable. Raphael v. Okyiri, 740 A.2d at 957

[6] The District conflates the analytically distinct issues of contributing factor and affirmative defense, either to obscure differences in burdens of proof ("preponderance of the evidence" vs. "clear and convincing"), or to obscure the bankruptcy of its affirmative defense.

(requiring nothing more than a showing that whistleblowing activities were "relevant" to an adverse action).[7]

The jury could not rationally have concluded that Ishakwue's tuberculosis disclosures had nothing to do with her firing. A finding in Ishakwue's favor on contributing factor is compelled by undisputed evidence that the tuberculosis disclosures coincided in time with the decision to fire Ishakwue; that the **only** stated reason for the decision was alleged performance deficiencies at New Beginnings where she had not worked since October 1, 2015 (J.A. 405-418); that decisionmakers did not single out Ishakwue for blame for the alleged disharmony among nurses at New Beginnings; that Jackson essentially gave Ishakwue a clean bill of health at their six-month performance review; and that the clean bill of health was given **after** the last alleged incident of poor performance. (below, pp. 11-12). (J.A. 249 at 82, ll. 12-19; see also Ishakwue Br. at 8-9).

The District does not seriously dispute that Jackson gave Ishakwue a clean bill of health at their meeting. (J.A. 248 at 80, ll. 4-7). Rather, the District attempts to explain away the clean bill of health. First, the District downgrades the meeting from a formal performance review to an informal "check-in." (Dist. Br. at 46).

[7] The District evidently confuses the "contributing factor" and "motivating factor" causation standards. See Dist. Br. at 45 (arguing that "the jury had ample evidence to find... that the purported protected disclosures were not a **motivating** factor in DYRS's decision to terminate Ishakwue...") (emphasis added). The jury was simply asked to decide whether Ishakwue's protected disclosures were "relevant" to the adverse action, not whether they were a precipitating cause of the adverse action.

The District's spin on the meeting cannot obscure the fact that Jackson did not then criticize Ishakwue's job performance, or indicate that her job was in jeopardy.

Second, the District argues that the clean bill of health was not important because the "key acts" that allegedly precipitated the firing decision, including an alleged absence without leave on January 6 and a request for compensatory time, occurred only "**after**" the performance review meeting. (Dist. Br. at 46; emphasis in original). On the contrary, the "key acts" must have occurred **before** the meeting because they were discussed **at** the meeting. (J.A. 249 at 84, ll. 7-25; 250 at 85, ll. 1-7).

Equally important, the assertedly "key" acts could scarcely have been very key because they are nowhere mentioned in the "justification" Jackson drafted on or before January 13 to support Ishakwue's firing. (J.A. 405-418). As noted previously, Jackson and Bellard gave one reason, and one reason only, for firing Ishakwue: "**not a good fit for our team**." (J.A. 403; emphasis added).

In light of the foregoing, the jury could not rationally have decided in the District's favor on the issue of contributing factor.

C. The District's Statutory Affirmative Defense: An Utter Failure Of Proof

To prevail on its statutory affirmative defense, the District was required to prove, by "clear and convincing" evidence, that Ishakwue would have been fired even in the absence of her protected disclosures. The District cannot prevail

simply by arguing that Ishakwue was a bad employee who deserved to be fired. (Dist. Br. at 45-46, 48-49).

Jurors considering the issue of whether Ishakwue would have been fired in any event would have to ask themselves: Were other nonwhistleblowing employees fired because they were not a good fit for the team? Did the District decide to fire Ishakwue **before** she engaged in protected activities? Does District policy mandate, rather than merely permit, discharge for the asserted performance deficiencies?

Nothing in the record would have allowed the jury to answer the foregoing questions in the affirmative; accordingly, nothing in the record would have allowed the jury to find in the District's favor on its affirmative defense. Appellate counsel's laundry list of Ishakwue's alleged performance deficiencies, which had nothing to do with her firing, cannot satisfy the government's "clear and convincing" burden of proof because the jury **still** would have been required to improperly speculate about what would have happened to Ishakwue if her protected disclosures were taken out of the equation. E.g., Watkins v. District of Columbia, 944 A.2d 1077, 1085 (D.C. 2008) (the District failed to meet its "burden of showing that it **would have** discharged the employee because of the misconduct, not simply that it **could have** done so") (emphasis in original).

In light of the foregoing, the jury could not rationally have decided in the District's favor on its affirmative defense.

D. The Prejudicial Exclusion Of Evidence: Jurors Never Learned Critical Information That Could Well Have Persuaded Them That Ishakwue's Tuberculosis Disclosures Were Protected

1. The DOH investigations

As shown previously, the protected character of Ishakwue's tuberculosis disclosures hinges on whether her beliefs were objectively reasonable. Ishakwue's considerable evidence of reasonableness evidently did not satisfy the jury, which presumably was swayed by Bellard's testimony, echoed by District counsel in closing, that Ishakwue should have "know[n] better" than to sound the alarm. (Dist. Br. at 34).

Evidence that an independent DOH investigator generally agreed with Ishakwue's assessment of the public health dangers would have defused Bellard's testimony and countered the District's portrayal of Ishakwue as out of touch or simply incompetent. Exclusion of the evidence was extraordinarily unfair to Ishakwue. See Brooks Report (J.A. 83-86 at 85, ¶7).[8]

[8] In his report, Investigator Brooks described an at-risk youth whom DYRS transferred to a shelter house without knowing whether he was infected with tuberculosis. Upon his return to the medical unit, DYRS referred him to a tuberculosis clinic for treatment. Brooks described the similar experience of a second youth with elevated PPD levels who was reintegrated into the community before treatment was completed. Id.

The District argues that the trial court, in excluding the evidence, "reasonably" concluded that the District could not have fired Ishakwue because of a government investigation that she set in motion only after she left DYRS. (Dist. Br. at 37, 38). The District misconceives the purpose of the proposed evidence.

Ishakwue sought to introduce the evidence solely to support a claim that her tuberculosis disclosures were protected. Ishakwue has never contended that the DOH investigations were relevant to the issue of why she was fired. Accordingly, whether the investigation was conducted before or after Ishakwue was fired, is of no consequence. See Ishakwue's principal brief at 42-43.

Also of no consequence is the fact that Ishakwue "could not have relied on... [Brooks's] report [] to support her subjective belief... that her concerns regarding tuberculosis were reasonable." (Dist. Br. at 38). Reliance, however, is not the issue.

The issue is whether corroboration of the validity of Ishakwue's first tuberculosis disclosure by a government agency - - and, particularly, by the very agency (DOH) charged with preventing the spread of tuberculosis - - is evidence that could have persuaded the jury that Ishakwue acted reasonably and that, accordingly, her tuberculosis disclosures were protected. The answer is plainly "yes."

Alternatively, the District argues harmless error because the DOH reports added "no new information that would have affected the jury's verdict." (Dist. Br.

at 40, n. 15). On the contrary, the harm was palpable. Information that DOH shared Ishakwue's misgivings would have spoken volumes to the jury.

2. The Jerry M. investigation

As explained more fully in Ishakwue's principal brief (pp. 43-45), the adequacy of DYRS's medical services, including the treatment of residents with communicable diseases, has long been a target of investigation by Jerry M. monitors. The jurors may well have viewed the tuberculosis disclosures more favorably if they had known that Ishakwue was not alone in challenging DYRS's communicable disease protocols.

The District argues that admission of the evidence would have been unfair because they had not been put on notice that they would have to defend a claim that DYRS violated the Jerry M. consent decree. (Dist. Br. at 40-41). As noted, Ishakwue proposed to introduce the evidence, not to prove that DYRS violated the decree, but simply to show that she was not an outlier.

The District also argues that the proposed evidence was irrelevant to objective reasonableness. Id. at 41-42. The relevance is that Jerry M. court monitors were raising questions along the lines of the questions Ishakwue raised regarding DYRS's treatment of residents suspected of tuberculosis. Accordingly, the proposed evidence was relevant under Zirkle's "disinterested observer" standard. (above, p. 5).

As shown elsewhere, the jury could not rationally have returned a verdict of "no protected disclosures" on the evidence presented. If the Court disagrees, Ishakwue urges remand for a new trial because the excluded evidence surely could have tipped the scales in her favor on the issue of protected disclosures.

CONCLUSION

For reasons stated, Ishakwue requests the relief requested in her principal brief. (p. 45).

Respectfully submitted,

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March 11, 2021

CERTIFICATE OF FILING AND SERVICE

I hereby certify that this 11th day of March, 2021, I caused a true and correct copy of the forgoing Reply Brief of Appellant to be electronically filed with the Clerk of Court using the Electronic Filing System (EFS), which will send notification of such filing to the following:

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