In The

DC Court of Appeals

Appeal No. 20-CV-0556

1417 BELMONT COMMUNITY DEVELOPMENT LLC

Appellant,

v.

DC

Appellee

On Appeal from the Superior Court
of the District of Columbia,
Civil Case No. 2010 CA 007158 B
(Hon. Michael L. Rankin)

BRIEF OF APPELLANT

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List of Parties

The Plaintiff in this case is 1417 Belmont Community Development, LLC. Belmont is owned by Khalid Babiker Mohamed Eltayeb.

The Defendant in this case is the District of Columbia.

Table of Contents

List of Parties i

Table of Contents ii

Table of Authorities iii

Statement of Final Order vi

Statement of the Issues 1

Statement of the Case 2

Statement of Facts 5

Standard of Review 8

Summary of the Argument 9

Argument 11

I. The District Did Not Satisfy the Statutorily-Required Service Requirement, Which Means that the District Breached Belmont's Due Process Rights 12

A. The District Can Raze Buildings Only After Providing Notice to the Property Owner Using One of the Statutorily-Prescribed Methods of Service 12

B. The Law Requires Strict Compliance With the Notice Service Requirements 15

II. Municipal Liability Attaches to the District Under *Monell* 18

III. The Superior Court Erred in Imposing a Deliberate Indifference Requirement 24

Conclusion 32

Table of Authorities

United States Supreme Court Decisions

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 31

*Bryan County v. Brown, 520 U.S. 397 (1997) 25, 25-26, 29

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 21

Connick v. Thompson, 563 U.S. 51 (2011) 19

Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701 (1989) 21

Los Angeles Cty. v. Humphries, 562 U.S. 29 (2010) 18-19

McMillian v. Monroe Cty., 520 U.S. 781 (1997) 20-21

*Monell v. Dep't of Social Services, 436 U.S. 658 (1978) 18, 22, 23

Monroe v. Pape, 365 U.S. 167 (1961) 31

Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 20

Owen v. City of Independence, 445 U.S. 622 (1980) 31

Pembaur v. Cincinnati, 475 U.S. 469 (1986) 20, 21, 22

United States v. Classic, 313 U.S. 299 (1941) 18

District of Columbia Court of Appeals Decisions

Allen v. Yates, 870 A.2d 39 (D.C. 2005) 8

*Associated Estates, LLC v. Caldwell, 779 A.2d 939 (DC 2001) 15, 16

Boddie v. Robinson, 430 A.2d 519 (D.C.1981) 16

Cherry v. DC, 164 A.3d 922 (D.C. 2017) 8

Hosp. Temps Corp. v. DC, 926 A.2d 131 (D.C. 2007) 8

Keatts v. Robinson, 544 A.2d 716 (D.C.1988) 16

Potomac Bldg. Corp. v. Karkenny, 364 A.2d 809 (D.C.1976) 16

Federal Appeals Court Decisions

City of Providence ex rel. Napolitano, 404 F.3d 4 (1st Cir. 2005) 28
Haley v. City of Bos., 657 F.3d 39, 51 (1st Cir. 2011) 27
*Miles v. DC, 510 F.2d 188 (D.C. Cir. 1975) 12, 12-13, 17
Rabkin v. Oregon Health Scis. Univ., 350 F.3d 967 (9th Cir. 2003) 26-27
Robinson v. Pezzat, 818 F.3d 1 (D.C. Cir. 2016) 27
Thompson v. DC, 832 F.3d 339 (D.C. Cir. 2016) 21
Thompson v. DC, 967 F.3d 804 (D.C.Cir. 2020) 21

Federal District Court Decisions

Arrington v. Jenkins, 2005 WL 8157966 (N.D. Ala. May 19, 2005) 28
Ashford v. DC, 306 F.Supp.2d 8 (D.D.C. 2004) 28
Barrow v. Greenville Indep. Sch. Dist., 2005 WL 1867292 (N.D. Tex.),
aff'd, 2007 WL 3085028 (5th Cir. Oct. 23, 2007) 28
Biberdorf v. Oregon, 243 F.Supp.2d 1145 (D. Or. 2002) 27
Brooks v. D.C., 2006 WL 3361521 (D.D.C. Nov. 20, 2006) 28
Cohen v. Univ. of DC, 311 F.Supp.3d 242 (D.D.C. 2018) 28-29
Draper v. Astoria Sch. Dist. No. 1C, 995 F.Supp. 1122 (D. Or. 1998) 26
Hilchey v. City of Haverhill, 537 F.Supp.2d 255 (D. Mass. 2008) 27
McElroy v. City of Lowell, 741 F.Supp.2d 349 (D. Mass. 2010) 27
*Miles v. DC, 354 F.Supp. 577 (D.D.C. 1973) 16-17
O'Connor v. Barnes, 1998 WL 1763959 (N.D.N.Y. Mar. 18, 1998) 27
Rossi v. Town of Pelham, 35 F.Supp.2d 58 (D.N.H. 1997) 26
Scalpi v. Town of E. Fishkill, 2016 WL 858955 (S.D.N.Y. Feb. 29, 2016) 27
Secot v. City of Sterling Heights, 985 F.Supp. 715 (E.D. Mich. 1997) 27

Other State Court Decisions

Johnson v. Vanderkooi, 918 N.W.2d 785, 792 (Mich. 2018) 27

Federal Statutes

42 U.S.C. § 1983 .....18, 19, 25, 30, 31

DC Statutes

All citations to the DC Code refer to the 2009 version, which governs here.

DC Code § 6-801 .....12, 13, 24
DC Code § 42-3131.01 .....12, 13, 14
DC Code § 42-3131.03 .....14, 15, 24
DC Code § 42-3171.02 ..... 12, 13
DC Code § 6-903 ..... 12, 13
DC Code § 28-3903.....23

Other Authorities

Super. Ct. Civ. R. 56.....
DCMR 12A-103.1 (2009) 22

Statement of Final Order

This appeal arises from a final order that disposes of all claims of all Parties, to wit the grant of summary judgment to the District of Columbia issued on June 16, 202.

STATEMENT OF THE ISSUES

1. Whether the District of Columbia violated Belmont's due process rights and the Takings Clause when it razed Belmont's building without first serving notice of the violation in the manner required by the DC Code.[1]

2. Whether the Director of DCRA has final policy making authority regarding the enforcement of construction code violations such that she was a final policymaker pursuant to Monell v. Dep't of Social Services as to the raze action at issue in this case.[1]

3. Whether the Superior Court erred in holding that Belmont was required to demonstrate that the DCRA Director issued the raze order with deliberate indifference when the requirement to show deliberate indifference (or some other additional demonstration of culpability) only applies when the final policymaker's action was on its face valid but caused a constitutional violation only because of some "downstream" consequence.

4. Whether the Superior Court erred in holding that Belmont a final policymaker's actions cannot be attributed to the municipality merely because the action violated law.

[1] The Superior Court held that the District violated Belmont's due process rights when it razed Belmont's building without first serving notice in the statutorily-required manner. The Superior Court has also held that Ms. Argo was acting as a final policymaker when she issued the orders in this case. Belmont has not appealled those orders and the District has filed no cross-appeal. Thus, those questions are not at issue in this appeal, but are listed in the Statement of the Issues because they are fundamental prerequisites of the case.

STATEMENT OF THE CASE

On March 30, 2009, the District issued a Notice of Violation and Notice of Abatement ("Notice") to Belmont because of unsafe conditions at Belmont's construction site but it failed to serve Belmont with that notice in the manner required by DC law. Hearing nothing from Belmont, the District razed the building. Belmont filed suit against the District because the District's notice did not meet the plain requirements of District law and therefore the razing violated Belmont's Fifth Amendment due process rights and constitutes a violation of the Takings Clause of the Fifth Amendment.

Following ordinary proceedings and several cross motions for summary judgment, the Superior Court granted summary judgment in favor of Belmont on June 24, 2016. The court determined that DC failed to provide notice consistent with the DC Code, that strict compliance was required, and that the District was liable for the loss of the property.

But two years later, the Superior Court vacated the grant of summary judgment. The court reiterated its holding that Ms. Argo was a final policymaker, but held that the grant of summary judgment for Belmont was not warranted because it remained unresolved whether Ms. Argo was "deliberately

indifferent to known or obvious consequences of a due process violation when approving the raze permit".

And after another two years, the Superior Court issued another decision holding that "the decision of a DCRA employee to violate a binding statutory policy with respect to Belmont cannot, as a matter of law, be the basis of municipal liability under *Monell*". It further held that, "when the legislative branch establishes policy through legislation, a decision by an executive branch official to violate the policy does not constitute an exercise of policy-making authority or an act of the municipality". Consequently, the court granted summary judgment to the District.

The Superior Court made four incorrect rulings.

The first and second errors relate to the Superior Court's determination that DCRA Director Linda Argo's action was not on its face unconstitutional and that therefore according to the Supreme Court's decision in Bryan County v. Brown Belmont had to demonstrate that she was deliberately indifferent to known or obvious consequences of a due process violation when she approved the raze permit. The first error reflected here is the court's incorrect conclusion that Ms. Argo's authorization of the raze without ensuring that Belmont receive due process was not on its face unconstitutional. The second error reflected here is the court's imposition of the duty to show deliberate indifference

because a plaintiff need not prove culpability through deliberate indifference or any other standard when the final policymaker directly causes the constitutional violation, as is the case here.

Third, the Superior Court erred in holding that the decision of a government official to violate law cannot, as a matter of law, be the basis of municipal liability under *Monell*. It has been established for many decades that it is irrelevant whether the final policymaker's action violates enrolled law.

Similarly, it was error to conclude that an official's decision cannot constitute "action by a final policymaker" when the decision violates law.

Belmont filed its appeal because of these errors.

STATEMENT OF THE FACTS

The material facts in this case are uncontested.

1. Plaintiff-Appellant 1417 Belmont LLC (hereinafter "Belmont"), a DC-based limited liability company, purchased the parcel of real property located at 1417 Belmont Street (hereinafter the "Property") in August 2006 for the purpose of redeveloping it into living units. [App'x 277 ¶ 1.]

2. Belmont worked on the redevelopment of the Property over the course of the next several years. [App'x 277 ¶ 2.]

3. On March 30, 2009, DCRA inspector Ken Wilson inspected the Property and issued a notice of violation (hereinafter the "Notice"). [App'x 279 ¶ 9.] The notice informed Belmont that it had fifteen days to cause construction to commence, remove exterior building supports, and re-open the rear alley, or, in the alternative, to apply for a raze permit. [Id.]

4. DCRA posted the Notice on the front door of the Property. [App'x 277 ¶ 10.]

5. DCRA also mailed the Notice to Belmont via First Class United States Mail. [App'x 277 ¶ 11.]

6. The District did not provide Belmont with a copy of the Notice by personal service. [*See* 0144 ¶¶ 6, 7.]

7. The District did not provide Belmont with a copy of the Notice by certified or registered mail. [*See* 0144 ¶¶ 6, 7.]

8. The District had on prior occasion provided notices to Belmont via certified mail. [0196-97 ¶¶ 6-7.]

9. The District's records contained in numerous places the location of Belmont's offices and the name of Belmont's owner. [App'x 0081 ¶ 3; 0090 ¶ 1; 0143 ¶ 3.]

10. Belmont did not receive a copy of the Notice.

11. On or about May 15, the District declared the Property to be a dangerous building pursuant to DCMR 12-115 because there had been a cave-in under a sidewalk adjacent to the building near a gas line and the footings of the building were settling. [App'x 0083 ¶ 23.]

12. Belmont's owner made numerous efforts to communicate with the District regarding the unsafe conditions. [*See*, *e.g.*, App'x 0085.]

13. On June 23 and June 25, the District issued a Determination and Findings for an Emergency Procurement. [App'x 0097-101.]

14. Both of the Determinations were signed by Linda K. Argo. [App'x 0097-101.]

15. Ms. Argo was at that time the Director of DCRA. [App'x 0097-101.]

16. The District issued a Raze Permit on July 2, 2009. [App'x 0102.]

17. The Raze Permit was also signed by Ms. Argo. [App'x 0102.]

18. The District razed the Building on or about July 10, 2009. [App'x 0088.]

19. The District provided Belmont with no hearing before razing the property.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, applying the same substantive standards which are applied by the trial court. Allen v. Yates, 870 A.2d 39, 44 (D.C. 2005). Interpretation of statutes presents a question of law that this Court also considers *de novo*. Cherry v. DC, 164 A.3d 922, 925 (D.C. 2017). A party is entitled to summary judgment if, when the facts are viewed "in the light most favorable to the non-moving party . . . there [are] no genuine issue[s] of material fact and [] the moving party is entitled to judgment as a matter of law." Super. Ct. Civ. R. 56 (c); Hosp. Temps Corp. v. DC, 926 A.2d 131, 134 (D.C. 2007).

SUMMARY OF THE ARGUMENT

On March 30, 2009, the District issued a Notice of Violation and Notice of Abatement ("Notice") to Belmont because of unsafe conditions at Belmont's construction site. The notice, issued pursuant to DC Code § 42-3131, stated that the property owner must either remediate the issues identified or apply for a raze permit within fifteen days. The District states that it posted the Notice on the Property and sent the Notice to Belmont via USPS First Class mail (though Belmont did not receive the notice). Hearing nothing from Belmont, the District razed the building.

The District failed to serve the notice according to the plain requirements of the DC Code. This Court has directed that notice must be served in strict compliance with the terms of the Code, else the government's action constitutes a breach of the property owner's due process rights. As such, the District's razing of Belmont's building violated Belmont's Fifth Amendment due process rights and constitutes a violation of the Takings Clause of the Fifth Amendment.

The Director of DCRA has final policy making authority regarding the enforcement of construction code violations like the one at issue in this case. Therefore, because the action which caused the deprivation of Belmont's

property—the raze order—was made by the Director of DCRA, the action was taken by a final policymaker and so the District is not shielded by *Monell*.

The Superior Court held that Belmont had failed to present a sound Section 1983 action because it did not demonstrate that the DCRA Director (the final policymaker) issued the raze order with deliberate indifference. The requirement of showing deliberate indifference (or some other additional demonstration of culpability) does not apply in this case. It applies only in due process cases in which the final policymaker's action was on its face valid and caused a constitutional violation only because of some "downstream" consequence. Because that is not the case here, it was error for the Superior Court to look for such proof.

Finally, the Superior Court erred in holding that a final policymaker's actions cannot be attributed to the municipality merely because the action violated law. When a government official acts in a matter for which she is a final policymaker—as is clearly the case here—the municipality is liable.

ARGUMENT

The material facts of this case are simple and uncontested.

On March 30, 2009, a DCRA inspector determined that Belmont's building, which was then under construction, was unsafe. The inspector issued a notice of violation stating that Belmont had fifteen days to commence construction, remove exterior building supports, and re-open the rear alley, or, in the alternative, to apply for a raze permit.

The District posted the Notice on the front door of the Property and mailed it to Belmont via First Class United States Mail. The District did not provide Belmont with a copy of the Notice by personal service. The District did not mail the Notice by certified or registered mail.

On June 23 and June 25, the District issued a Determination and Findings for an Emergency Procurement. The two Determinations were signed by Linda K. Argo, who was at that time the Director of DCRA. The District issued a Raze Permit on July 2, also signed by Ms. Argo. It razed Belmont's building on or about July 10 but provided Belmont with no hearing before razing the building.

As the following discussion demonstrates, the District violated Belmont's due process rights and the Takings Clause when it razed the building without affording Belmont with constitutionally-required notice.

I. The District Did Not Satisfy the Statutorily-Required Service Requirement, Which Means that the District Breached Belmont's Due Process Rights.

Before the District government razed Belmont's building, it issued a notice of violation and instruction to remediate, as is required by law. It did not, however, *serve* Belmont with the notice as required by law. The District's failure to comply with the statutorily-prescribed notice service requirements means that the District violated Belmont's due process rights when it razed Belmont's building. As such, the District must provide Belmont with a remedy for its improper taking.

A. The District Can Raze Buildings Only After Providing Notice to the Property Owner Using One of the Statutorily-Prescribed Methods of Service.

The District clearly has the authority to demolish unsafe buildings. *See*, *e.g.*, Miles v. DC, 510 F.2d 188 (D.C. Cir. 1975). In fact, four separate provisions of District law authorize the District to do so under various circumstances. *See* DC Code §§ 6-801, 42-3131.01, 42-3171.02, and 6-903.

But the due process clause of the United States Constitution demands that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. V. Accordingly, a "municipality must, before destroying a building, give the owner sufficient notice, a hearing and ample opportunity to demolish the building himself . . . as to accord due process of law." *Miles*, 510

F.2d at 192. Thus, in each of the DC laws which authorize demolition, the laws direct the District to provide notice to the property owner before it can destroy the property.

And, at the heart of this case, each of these laws also specifies in detail the method of service required for that notice:

			Notice Methods			
	Provision Authorizing Razing	Provision Requiring Notice	Personal Delivery to Owner	Deliver to Owner's Place of Business	Reg. Mail with Return Receipt	Email
DC can redress unlawful building conditions	42-3131.01	42-3131.03	Y	Y	N	Y
DC can redress unsafe buildings	6-801	6-807	Y	Y	Y	N
DC can redress unsanitary buildings	6-903	6-910(a)(1)	Y	Y	Y	N
DC can acquire abandoned or deteriorated property	42-3171.02	42-3173.05	Post + mail by certified mail return receipt + publish in a DC newspaper of gen. circ. + publish in the DC Register + send to the local ANC + file with the Recorder of Deeds			

All four laws require service of the notice either by delivering it to the property owner in-person or by leaving it at the owner's place of business or residence with a suitable person. Two of the laws permit DC to serve notice by mail—but in both cases the mailing must be by certified or registered mail with a return receipt. One of the laws also permits notice via email. (Additional methods are available if these primary methods are unsuccessful or unavailable.) *See* DC Code §§ 6-807, 42-3131.03, 42-3173.05, and 6-910(a)(1).

Here, the notice of violation was issued and served by Ken Wilson, the District's Supervisor of Building Inspections. He served using two methods. First, he posted it on the front door of the Property. Second, he mailed it to Belmont using United States Postal Service First Class Mail.

The notice was issued pursuant to DC Code § 42-3131.01 (as it states on its face). As such, the service requirements stated in DC Code § 42-3131.03 apply to this notice. Section 42-3131.03 prescribes service via (i) hand-delivery or (ii) via email or (iii) by leaving the notice with a proper person at the owner's office. DC Code § 42-3131.03(1). As a backup to those three methods, in cases where an office cannot be located in the District, DC must serve the notice by leaving it with a suitable person at the office of an agent of the owner. Id. at § 42-3131.03(2). If neither the owner's office nor an agent's office can be found in the District, the government is permitted to serve via First Class mail. Id. at § 42-3131.03(3). Service by posting is permitted only if no address can be determined or if a mailed notice is returned undelivered. Id. at § 42-3131.03(4).

It is undisputed that the District did not deliver the notice using any of the three required methods—in person, via electronic mail, or by leaving it with someone at Belmont's business location. Because Belmont had an office in the District (as the District knew because it had been in routine contact with

Plaintiff's corporate representative[2]), the backup methods of service were impermissible. *See* DC Code §§ 42-3131.03(2)-(4). As such, the District's service by posting and by First Class mail did not meet the clear and simple requirements of the law.

B. The Law Requires Strict Compliance With the Notice Service Requirements.

The District has never argued that its service complied with the requirements of Section 42-3131.03. Instead, it argues that its service was adequate to satisfy Belmont's right to due process. But that argument is plainly wrong because this Court has held that the government's service of notice must comply strictly with the statutory service requirements before it may permanently and irretrievably deprive someone of their property. Associated Estates, LLC v. Caldwell, 779 A.2d 939, 944 (DC 2001).

In *Associated Estates*, DC sold a property for failure to pay property taxes. The purchaser of the tax lien later sought, and DC issued, a tax deed. Before issuing the tax deed, DC provided notice to the property owner of the imminent expiration of the redemption period, but DC served the notice via First Class mail. That service did not meet the requirements of the statute, which specified

[2] The District also knew the owner's telephone number and email address. [*See* 0073 ¶¶ 3-4.]

that notice be served by registered or certified mail. This Court rejected the District's argument—identical to its argument here—that substantial compliance was sufficient:

> It is firmly established in this jurisdiction that the District of Columbia may effect a valid conveyance of property for nonpayment of real estate taxes only by strict compliance with the tax sale statute and regulations. Strict compliance is required to guard against the deprivation of property without due process of law, and because it is the policy of the state to give the delinquent taxpayer every reasonable opportunity, compatible with the rights of the state, to redeem his property. Accordingly, if the District fails to comply in every respect with the statute and regulations, the sale is invalid and must be set aside.

Associated Estates, 779 A.2d at 943 (cleaned up), *quoting* Boddie v. Robinson, 430 A.2d 519, 522 (D.C.1981), Potomac Bldg. Corp. v. Karkenny, 364 A.2d 809, 812 (D.C.1976), and Keatts v. Robinson, 544 A.2d 716, 719 (D.C.1988).

The decision in *Associated Estates* directs the outcome in this case: Just as strict compliance with notice service requirements is required to guard against loss of property through tax sale, so too strict compliance is surely required to guard against the permanent and irretrievable loss of property through razing. As the District Court put it:

> This Court can discern no persuasive reason in this case for approving a mode of service that is less effective than that directed by the D.C. Code in those situations where a property owner is sent notice

> compelling him to show cause why his building should not be condemned.

Miles v. DC, 354 F.Supp. 577, 581 (D.D.C. 1973), *aff'd and quoted in* 510 F.2d 188 (D.C.Cir. 1975).

Associated Estates makes clear that in razing cases the service required to meet due process and the service required to meet statutory requirements are coterminous. *Associated Estates*, 779 A.2d at 943. This determination was echoed by the *Miles* court (in both the District Court decision and in its affirmance by the D.C. Circuit):

> When the Board entrusted the notice of its determination to demolish the subject buildings to the safekeeping of the normal channels of the postal service, it selected a less adequate method than that specified by the Code, and it also failed to comport with basic constitutional prerequisites.

See Miles, 354 F.Supp. at 585. Thus, under this Court's decision in *Associated Estates* and the D.C. Circuit's decision in *Miles*, violation of statutory notice requirements amounts, *ipso facto*, to a breach of due process rights.

The District government did not comply with the service requirements of the applicable DC statute. Its failure to comply with those service requirements means that it breached Belmont's due process rights.

II. Municipal Liability Attaches To the District Under *Monell*.

As explained in Part I, the District razed Belmont's building without first providing notice consistent with the explicit requirements of DC law. As such, the District violated Belmont's due process rights. The District argues, though, that it cannot be held to account for that violation because it is shielded by Monell v. Dep't of Social Services, 436 U.S. 658 (1978).

Federal law provides that, "Every person who, under color of any [law or custom] subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable" for that deprivation. 42 U.S.C. § 1983. The Supreme Court has explained that the phrase "under color of law" refers to actions that are "made possible only because the wrongdoer is clothed with the authority of state law". United States v. Classic, 313 U.S. 299, 326 (1941). This language, in turn, means that the government can be held responsible if and only if the violative action was taken by the government; actions taken by a government employee cannot cause Section 1983 liability because the government is not subject to vicarious liability for due process violations. *Monell*, 436 U.S. at 692.

This creates something of a challenge. A municipality is a corporate entity, lacking corporeal presence. That means that a municipality cannot act by itself; it must act through agents. *See* Los Angeles Cty. v. Humphries, 562 U.S.

29, 34-35 (2010). The difficult task, then, is to distinguish between actions taken by a municipality's agents for which liability would arise solely through vicarious liability (which will *not* trigger Section 1983 liability) and actions taken by a municipality's agents in which the agent's actions are deemed to be the actions of the municipality (which *will* trigger Section 1983 liability).

The rule is generally stated that actions are deemed to be the actions of a municipality when the actions were taken "pursuant to official municipal policy". Connick v. Thompson, 563 U.S. 51, 61 (2011). "Official municipal policy", in turn, means "the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Id.

In other words, there is "official municipal policy"—and therefore municipal liability—when either (i) the action was the official action of the municipality because it was taken consistent with a municipality's officially-promulgated law; or (ii) the action was taken by an official with policymaking authority and is therefore considered to be the official action of the municipality; or (iii) the action is the result of persistent and widespread practice such that even though the practice has not received formal approval through the body's official decisionmaking channels it constitutes the custom in the municipality. *See Humphries*, 562 U.S. at 36 (the phrase "policy or

custom" encompasses all routes to municipal liability under Section 1983). Here, the District razed Belmont's building according to official municipal policy because the action was taken by an official with policymaking authority.

The District has never seriously argued that Linda Argo was not a final policymaker. *See*, *e.g.*, DC Opp. to Belmont Mot. Summ. J., 07-17-2013, p. 3 (arguing that *Monell* was not satisfied because of a lack of "policy or custom"); DC Renewed Mot. Summ. J., 08-12-2013, pp. 11-14; *but see* DC Mot. Summ. J., 05-13-2016, p. 18. Nevertheless, it is worth making clear that Linda Argo plainly was a final policymaker as to raze decisions.

As noted, a municipality can be held liable for a due process violation if the person who caused the harm is a final policymaker as to the action that caused the harm. Pembaur v. Cincinnati, 475 U.S. 469, 480 (1986) (plurality opinion); Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). The government actor need not be a final policymaker as to *all* matters; a government actor has "final policymaking authority" if he or she is a policymaker in the particular area or particular issue about which the claim has arisen:

> Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue.

McMillian v. Monroe Cty., 520 U.S. 781, 785 (1997); *citing* Jett v. Dallas Ind. Sch. Dist., 491 U.S. 701, 737 (1989) (question is whether school superintendent "possessed final policymaking authority in the area of employee transfers"); *see* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion); *Pembaur*, 475 U.S. at 482-83 (plurality opinion).

The identification of policymaking officials is generally determined by reference to the authority granted to an official by state law. City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988).

"An official assuredly acts as a final policymaker . . . if his or her decisions are unconstrained by policies enacted by others and are unreviewable by other policymakers of the municipality." Thompson v. DC, 967 F.3d 804, 810 (D.C.Cir. 2020). Thus, whenever an official "exercise[s] his [or her] authority . . . without any control by other District officials," the official is a final policymaker. Id. at 811. Importantly, formal law does not constrain that identification. "[T]he law is concerned not with the niceties of legislative draftsmanship but with the realities of municipal decisionmaking, and any assessment of a municipality's actual power structure is necessarily a practical one[.]" Id. Thus, final policymaker status is determined to the actual practice of the government official regardless of the process envisioned by formal law. Thompson v. DC, 832 F.3d 339, 349 (D.C. Cir. 2016).

Further, although the term "official policy" frequently refers to rules and procedures that establish fixed plans of action to be followed under particular circumstances, even a course of action tailored to a particular situation and not intended to control later decisions can represent an act of official government policy if it is made by the government's authorized decisionmakers. *See Pembaur*, 475 U.S. at 481. Likewise, a single action when done by the official with final policymaking authority can be sufficient to create a custom. *Pembaur*, 475 U.S. at 480, *citing Monell*, 436 U.S. at 694.

In this case, the actions affecting Belmont were taken by the Director of the DC Department of Consumer and Regulatory Affairs. DC Regulations invest the DCRA Director with the authority of the District's Code Official. DCMR 12A-103.1 (2009). The 2009 Construction Building Codes granted the "Code Official" the following powers, all of which would constitute final policymaking:

- to enforce all provisions of the Construction Codes;
- to promulgate administrative rules to interpret and implement the Codes;
- to receive all applications for the erection, razing, demolition, alteration, and use of buildings and structures to enforce compliance with the code;
- to approve all permits and certificates issued for the erection, razing, demolition, alteration, and use of buildings and structures to enforce compliance with the code;

- to issue necessary notices and orders to cause the removal of illegal or unsafe conditions (DCMR 12-113.2 (2009));
- to ensure compliance with the applicable code requirements for the safety, health, and welfare of the public;
- to institute administrative and legal actions to correct violations or infractions; to issue required permits for building, demolition, and razing; to deem a structure unsafe;
- to notify an owner that its structure has been determined to be unsafe and specify required repairs or require the unsafe building to be demolished within a period of time (DCMR 12-113.2 (2009)); and
- to make emergency repairs on a building which presents imminent danger.

See 55 D.C. REG. 13094.

Furthermore, under DC law, the DCRA director is responsible for establishing final policy regarding the enforcement of construction and remediation codes. *See*, *e.g.*, DC Code § 28-3903(3), (13) (2009).

Thus, under the DC Code and applicable implementing regulations, the Director of the DCRA has final policy making authority regarding the enforcement of construction code violations like the one at issue in this case. Because the raze decisions were all made by Linda Argo, who was then the Director of DCRA, the decisions were made by a final policymaker. As such, the District is not shielded by *Monell*.

III. The Superior Court Erred in Imposing a Deliberate Indifference Requirement.

In mid-2016, the Parties filed cross-motions for summary judgment. The Superior Court granted Belmont's motion, finding that neither DC Code § 42-3131.03 nor DC Code § 6-801 authorized service in the manner which the District had used and, therefore, that the District's razing of Belmont's building violated Belmont's due process rights. The Superior Court also held, after conducting a careful survey of applicable District law, that DCRA Director Linda Argo's authorization of the razing of Belmont's building was actionable under *Monell* because she was clearly a final policymaker as to razing decisions. Thus, the only matter remaining to be determined was the value of the damages that Belmont suffered.

But two years later, at a status hearing, the Superior Court vacated the grant of summary judgment. The court reiterated its holding that Ms. Argo was a final policymaker, but held that the grant of summary judgment for Belmont was not warranted because it remained unresolved whether Ms. Argo was "deliberately indifferent to known or obvious consequences of a due process violation when approving the raze permit".

That decision was wrong because there is no deliberate indifference requirement in most Section 1983 cases. The deliberate indifference

requirement applies only when the final policymaker does not him- or herself cause the constitutional injury, which is not this case.

The Supreme Court imposed the deliberate indifference requirement in Bryan County v. Brown. The Court began with the predicate to the rule:

> [a plaintiff in a due process claim must] demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Bryan County, 520 U.S. 397, 404 (1997). That portion of the Court's holding was an unremarkable application of already-established law. But the court then stated, "[i]n any § 1983 suit . . . the plaintiff must establish the state of mind required to prove the underlying violation." *Bryan County*, 520 U.S. at 405.

It is easy to misread the Court's statement that a "plaintiff must establish the state of mind required to prove the underlying violation" to mean that every Section 1983 plaintiff must contend with an additional element to make out a case. That is not so—*as the Court's further discussion made clear*:

> Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. Section 1983 itself "contains no state-of-mind requirement independent of that necessary to state a violation" of the underlying federal right. * * * [T]he conclusion that the action

> taken or directed by the municipality or its authorized decisionmaker itself violates federal law will . . . determine that the municipal action was the moving force behind the injury of which the plaintiff complains.

Bryan County, 520 U.S. at 404–05.

Thus, *Bryan County* means that when a final policymaker makes a decision which *leads* to a deprivation, some additional proof of culpability (such as proof of deliberate indifference to a known risk) is necessary to show that the municipality is culpable. But this is distinct from the case of a final policymaker who makes a decision which *itself* causes the deprivation. As one District Court phrased it, *Bryan County* governs cases where the municipal policy is not itself unconstitutional, but rather is said to cause a "downstream constitutional violation." Rossi v. Town of Pelham, 35 F.Supp.2d 58, 74 (D.N.H. 1997). Another court explained:

> In *Bryan County*, the causation element was very attenuated because the county did not directly cause the injury. Rather, the Sheriff allegedly failed to conduct a proper background investigation before hiring an employee, who in turn committed an intentional tort against a third party. * * * The Court carefully distinguished those circumstances where the causation element is not similarly attenuated[.]

Draper v. Astoria Sch. Dist. No. 1C, 995 F.Supp. 1122, 1136–37 (D. Or. 1998), *abrogated on irrelevant grounds by* Rabkin v. Oregon Health Scis. Univ., 350 F.3d 967 (9th Cir. 2003); *see also* Robinson v. Pezzat, 818 F.3d 1, 12 (D.C. Cir. 2016)

(court required proof of deliberate indifference when the allegation is that the final policymaker made a decision (or failed to act) which had a downstream effect of causing a deprivation, generally by an employee who is not the final policymaker).

Countless subsequent cases have made clear that the additional culpability requirement is inapplicable in cases where the due process violation was caused by the municipality (either through legislative pronouncement or through the conduct of a final policymaker). *See, e.g.*, Haley v. City of Bos., 657 F.3d 39, 51 (1st Cir. 2011); Johnson v. Vanderkooi, 918 N.W.2d 785, 792 (Mich. 2018); Hilchey v. City of Haverhill, 537 F.Supp.2d 255, 263 (D. Mass. 2008); Secot v. City of Sterling Heights, 985 F.Supp. 715, 718 (E.D. Mich. 1997); McElroy v. City of Lowell, 741 F.Supp.2d 349, 355 (D. Mass. 2010); O'Connor v. Barnes, No. 97-CV-1489, 1998 WL 1763959, at *6 (N.D.N.Y. Mar. 18, 1998); Scalpi v. Town of E. Fishkill, No. 14-CV-2126 (KMK), 2016 WL 858955, at *6 (S.D.N.Y. Feb. 29, 2016); Biberdorf v. Oregon, 243 F.Supp.2d 1145, 1155 (D. Or. 2002) ("'deliberate indifference' is a critical element when the policy at issue is one of omission or failure to act, and the Supreme Court's decisions in City of Canton and Board of County Comm'rs of Bryan County, Oklahoma v. Brown apply when establishing Monell liability under this standard"); Young v. City of Providence ex rel. Napolitano, 404 F.3d 4, 12, 26 n. 18 (1st Cir. 2005)

(limiting *Bryan County* to deficient hiring procedures cases); Arrington v. Jenkins, No. CV 04-AR-2274-M, 2005 WL 8157966, at *4 (N.D. Ala. May 19, 2005); Barrow v. Greenville Indep. Sch. Dist., No. 3:00-CV-0913-D, 2005 WL 1867292, at *8 (N.D. Tex. Aug. 5, 2005), *aff'd*, No. 06-10123, 2007 WL 3085028 (5th Cir. Oct. 23, 2007) (refusing to apply *Bryan County* where the violative action was caused by the final policymaker); *see also* Ashford v. DC, 306 F.Supp.2d 8, 13 (D.D.C. 2004).

Thus, in some cases, a final policymaker's decisions—such as those involving training, employee hiring, and employee supervision, for example—may be entirely sound but they nevertheless cause a "downstream constitutional violation". In those cases, *Bryan County* teaches, something more is required in order to satisfy *Monell's* requirement that the municipality be the moving force behind the injury for the municipality to be held liable; the mere fact of the final policymaker's training or hiring or supervision decision does not prove that moving force. Brooks v. D.C., No. CIV A 05-362 GK, 2006 WL 3361521, at *7 (D.D.C. Nov. 20, 2006). But, on the other hand,

> [when] "a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straight forward." Once a Court concludes that the municipal action itself is unconstitutional, it can easily find "that the municipal action was the moving force behind the injury. . . ."

Cohen v. Bd. of Trustees of Univ. of D.C., 311 F.Supp.3d 242, 258 (D.D.C. 2018), *quoting Bryan County*, 520 U.S. at 404–05.

The Superior Court misunderstood *Bryan County*. It held that Belmont had to demonstrate that Ms. Argo acted with culpability because Ms. Argo's decision was not on its face unconstitutional. That is incorrect as a matter of both law and fact.

As to the law, as explained above, *Bryan County* means that because Ms. Argo was a final policymaker, the municipality is liable; no further proof is required.

As to the facts, the Superior Court erred in concluding that Ms. Argo's action was not on its face unconstitutional. Ms. Argo ordered that Belmont's building be razed. She issued that order *without* requiring that Belmont be afforded the process to which it was due. She issued that order even though the District had failed to properly serve Belmont with the notice of violation. Thus, Ms. Argo's decision was, indeed, unconstitutional on its face. The Superior Court's decision was error.

In June 2020, the Superior Court grossly compounded its error.

It held that "the decision of a DCRA employee to violate a binding statutory policy with respect to Belmont cannot, as a matter of law, be the basis of municipal liability under *Monell*". It further held that, "when the legislative

branch establishes policy through legislation, a decision by an executive branch official to violate the policy does not constitute an exercise of policy-making authority or an act of the municipality". These pronouncements were plain misstatements of law.

The Superior Court was, perhaps, misled because it relied on the District Court's decision in Thompson v. DC. Reliance on that decision was imprudent because it was at that time pending appeal. Indeed, only a month later the Circuit Court reversed the District Court—and in so doing it left the Superior Court's decision entirely without support.

The District of Columbia argued in the Superior Court (just as it had in *Thompson*) that a final policymaker never has authority to act contrary to the enrolled law and that it cannot be held liable when a final policymaker "goes rogue". But this argument is plainly contrary to well-established law. The Supreme Court has held repeatedly that actions under color of law for which Section 1983 provides remedy *include* actions taken in violation of law.

Sixty years ago, the Supreme Court wrote:

> There can be no doubt . . . that Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it.

Monroe v. Pape, 365 U.S. 167, 171-72 (1961). Ten years later, the Court reiterated that principle, holding that a cause of action stands when there is a violation of due process rights, regardless of "whether or not the actions of the police were officially authorized, or lawful." Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). And again, yet another decade later, the Court reiterated the fundamental principal that:

> [t]he central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

Owen v. City of Independence, 445 U.S. 622, 651 (1980), *quoting Monroe*, 365 U.S. at 184.

Section 1983 is designed to provide remedy for deprivations of constitutional rights when those deprivations are caused by the government. It would be nonsensical to hold, as the District has repeatedly argued, that unlawful conduct by a final policymaker is never "governmental action"; to do so would both eviscerate virtually every Section 1983 claim and it would ignore the well-established law that actions by final policyholders constitute governmental action.

The Superior Court erred in holding that a final policymaker's actions are not the municipality's merely because the action violated law. If the official acts

in a matter for which she is a final policymaker—as is clearly established here—the municipality is liable under Section 1983. And because Ms. Argo's raze order was issued without providing the requisite process, it violated Belmont's due process rights; no further proof of culpability is required. The Superior Court correctly granted summary judgment but erred when it vacated that grant.

CONCLUSION

Belmont is entitled to a grant of summary judgment because the District clearly did not comply with the service requirements in the DC Code, and those requirements are strictly applied. Belmont is entitled to damages for that breach, so the case should be remanded for the conduct of a trial as to the value of the loss. The District is not shielded by Monell v. v. Dep't of Social Services because the violative decision—the issuance of a raze order without providing due process—was made by a final policymaker. It is irrelevant to the final policymaker determination (or the culpability of the District) that the final policymaker's order was contrary to law; to claim otherwise would overturn decades of binding precedent and eviscerate Section 1983. Nor is there any requirement of a heightened culpability showing because those showings are required under Bryan County v. Brown only in cases where the final

policymaker takes action which does not itself violate the plaintiff's due process rights—not the case here.

Thus, this Court should vacate the grant of summary judgment to the District and remand with instructions to the Superior Court to enter judgment in Belmont's favor and to conduct a hearing on damages.

Respectfully submitted,

December 15, 2021

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Certificate of Service

I certify that the foregoing Plaintiff-Appellant's Revised Opening Brief and the accompanying Appendix were electronically filed with the Court of Appeal's online filing system on this the fifteenth day of December in the year 2021. I further certify that the e-filing system will serve counsel for the Respondent and counsel for Intervenor electronically. I certify further that the requisite printed copies of the brief and appendix have been dispatched by to the printer for printing and mailing on this date.

Respectfully submitted,

December 15, 2021

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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

20-CV-0556

Case Number(s)

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