APPEAL NO. 22-CV-760

DISTRICT OF COLUMBIA
COURT OF APPEALS

ALEXA MOORE, ET AL.

Plaintiffs, Appellants

v.

DISTRICT OF COLUMBIA, ET AL.

Defendants, Appellees

Appeal from the Superior Court for the
District of Columbia, Civil Division
Case No. 2021 CA 003834 B
(The Honorable Heidi M. Pasichow, Judge)

REPLY BRIEF OF APPELLANT ALEXA MOORE

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SUMMARY OF ARGUMENT

First, the District did not meet its burden in asserting the affirmative defense of sovereign immunity. Second, Plaintiff Moore alleged specific acts and omissions that are ministerial functions, not solely discretionary functions. Third, relevant statutes preclude the finding of discretionary functions under applicable law. Finally, the applicable standard of review and burden of proof demands that this case not be dismissed on the basis of sovereign immunity at this stage of litigation.

Moreover, jurisdiction is proper because the trial court, rather than the Plaintiff, determined the finality of the matter. The District's attempt to characterize the September Order as an "administrative order" that is "non-final" and "non-appealable" ignores the plain language of the order. Moreover, the District's arguments on jurisdiction wrongly rely on rigidity in determining "finality," which is an argument routinely rejected by this Court.

I. THE DISTRICT FAILED TO MEET ITS BURDEN IN ASSERTNG THE AFFIRMATIVE DEFENSE OF SOVEREIGN IMMUNITY

The District's brief first primarily argues that Ms. Moore's entire Complaint describes only discretionary acts. The District further argues that not a single one of the allegations could plausibly be considered ministerial in nature. However, the District appears to concede that the trial court did not take all the allegations as true

and it failed to apply the standard of review requiring interpretation of facts in the light most favorable to the plaintiff.

The District next ignores the absence of any record showing that this jurisdiction's established method of evaluating discretionary versus ministerial functions was actually applied by the lower court. But for a single sentence in its ruling (App. 130), there is no indication that the trial court distinguished between ministerial and discretionary functions as described in the pleadings.

The District next appears to recognize that sovereign immunity does not apply to ministerial functions, but instead denies any were plausibly described. The District further argues that expecting the trial court to consider the entire complaint, by reading each paragraph of the actual pleading, is an unrealistic burden.

The District finally appears to recognize the existence of governing policies and directives but argues that the specific provision of electronic records should not be assumed to include the inherent duty to keep such records reasonably secure. Each of the District's positions should be discarded.

A. The Complaint Alleges Specific Acts and Omissions that are Ministerial Functions, not Solely Discretionary Functions

The District offers no basis for countering the Appellant's argument that "Cyber Security" had been improperly evaluated as a single overarching category, compared to evaluating each of the discrete functions described in the Complaint.

The District's contention that such a level of analysis is not required does not align with the extensive analysis actually contained in the case cited for that proposition. *See* Br. 21-23, *Aguehounde v. District of Columbia*, 666 A.2d 443, 448 (D.C. 1995).

Appellant has already explained how numerous allegations in Moore's Complaint plausibly described ministerial functions, rather than only design and policy decisions. *See* Br. 16-17. Specific instances in the pleadings, among others that appear throughout the Complaint, are listed again here:

- P 188 "negligent in maintaining sufficient security of the information…"
- P 189 "failed to exercise reasonable care and implement adequate security systems, protocols, and practices sufficient to protect the PI of Plaintiff…"
- P190 "failed to detect the breach…"
- P193 "failed to segregate storage of information"
- P194 "failed to utilize an encrypted gateway"
- P195 "failed to encrypt the data files"
- P196 "failed to use a simple alphanumeric code"
- P198 "not engaging in actions to mitigate damages"
- P199 "failed to follow appropriate security procedures…"
- P200 "did not act reasonably…to prevent loss…"
- P201 "…only intermittently engaged" (with the response)

App. 79-81. Each and every one of the above allegations is about acts or omissions as part of ministerial functions, not policy decisions as part of discretionary function. Therefore, this case is inapposite to *Abulwali*, where the plaintiff in that matter had alleged failures in the design of warning signs, but not

about the maintenance of the sign. *See Abdulwali v. Washington Metro. Area Transit Auth.*, 315 F.3d 302 (D.C. Cir. 2003).

The District wrongly and misleadingly argues that the content of Moore's complaint simply boils down to a single overarching question as to whether or not there was a "state-of-the-art" computer network in place. The District focuses extensively on policy making aspects, but discounts that "implementing" and "maintaining" computer security is not just about making high-level policy decisions. The crux of this case is the day-to-day routine ministerial actions that are necessary for District employees and other actors to undertake, that occur *after* the implementation of a policy. The law is clear that these ministerial acts are those which reflect "the execution of policy as distinct from its formulation." *Elgin v. District of Columbia*, 119 U.S. App. D.C. 116, 118-19, 337 F.2d 152 (D.C. Cir. 1964). These failures could occur, and did occur, because of flaws and errors in the District's day-to-day execution of acts.

B. Plaintiff's Allegations are not Conclusory and Clearly Implicate Ministerial Functions

The District's argument that Moore's claims lack required detail is itself a conclusory statement and contrary to the record. It is ironic for the District to raise the rule of separating "conceivable" from the "plausible" because it is undisputed that the District's negligent acts *did* lead to a bad actor obtaining highly sensitive information.

This Court requires all allegations in a complaint to be taken as true, but the court must also draw all reasonable inferences in favor of a plaintiff. *See Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 572 (D.C. 2011). Cases where courts found pleadings lacking are nothing like the present one. For example, in *Tingling-Clemmons v. District of Columbia*, the court found the complaint lacked information about critical elements of the underlying statutes and found allegations to be "sketchy" and "implausible." *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 248 (D.C. 2016). Moore's Complaint has no such shortfalls, no similar findings by the trial court, and the District has never even attempted to make such an argument. To the contrary, the District has acknowledged the allegations are comprehensive in nature *and* has admitted that the breach and data theft occurred.

The District's argument that the breadth of the pleadings confer immunity show that it does not understand cybersecurity or, alternatively, is seeking to lead the Court astray by confusing underlying concepts. Cybersecurity involves hundreds of discrete decisions and acts on any given day, but even a single critical mistake in a seemingly minor task can directly result in a system-wide failure that impacts thousands. Like a steel chain that is only as strong as its weakest link, the entire computer network is at risk when a single software application is improperly configured by a system administrator or when an employee neglects to install a

required patch even after being directed to do so. Once the security of a single computer fails, the content of all of its information is exposed, potentially impacting thousands or millions of victims.

The District's statement that Moore "did not complain of a single act or omission or discrete set of acts or omissions" is not accurate. The Complaint does contains allegations about not just one, but several discrete set of acts or omissions. App. 79-81. Which one of the numerous alleged acts or omissions was the prevailing cause of the failure is something *known only to the District* and therefore it was not only proper, but necessary, for the Complaint to be broadly inclusive.

The District accuses Moore of asking the Court to search through hundreds of allegations for "something that might qualify as ministerial." Then the District mischaracterizes Moore's Complaint as being solely about a security architecture "badly conceived at the design level" in hopes that the Court will gloss over the allegations of failures in execution of various day-to-day ministerial cyber security functions. *See* Appellee Brief at 42.

The District fails to substantively address Appellant's core argument: that creating computer security architectures may be discretionary design functions at the initial stages but the maintenance, updates, and proper use of installed software are ministerial functions. *See* Br. 31-37. The District also fails to consider how the

prevalence of computers and software in day-to-day operations of modern enterprises has been considered in numerous cases. *See* Br. 35 *citing Biscoe v. Arlington County*, 738 F.2d 1352, 1362 (D.C. Cir. 1984); *Carter Carlson*, 447 F.2d 358, 363-64 (D.C. Cir. 1971), *Florian v Johnson*, 2014 WL 5460815 (NJ Super App Div 2 Oct. 29, 2014), *Pelham v United States*, 661 F Supp. 1063 (D.N.J. 1987).

The District's reliance on *McKethean v. WMATA*, 588 A.2d 708, 715 (D.C. 1991) overlooks the importance of distinguishing between design decisions and maintenance operations. *See* Br. 33 The District did not respond to Appellant's argument that this rule, supported by over a century of case law detailed in *Walen v. United States*, Civil Action No. 15-1718 (BAH), 2019 U.S. Dist. LEXIS 153191 (D.D.C. Sep. 9, 2019) shows day-to-day maintenance of the computer network's security was clearly a ministerial function. *Id.* at 13, 33-34.

The District also looks to *Nealon* for support, but the instant case is not like *Nealon*, because the allegations in that case only attacked specific decisions made by the District. *Nealon v. District of Columbia*, 669 A.2d 685 (D.C. 1995). The allegations described in those pleadings include some failures of decisions, and others where it is presently uncertain if a decision was made or there was a failure through "mere obedience to orders or performance of a duty in which the

municipal employee has little or no choice." *Nealon*, 69 A.2d 690 (quoting 18 E. McQUILLIN, MUNICIPAL CORPORATIONS § 53.22.10, at 274 (3d ed. 1984)). Furthermore, in *Nealon* this Court explained that its analysis started by recognizing the "provision of water service through a fire hydrant may be viewed as part of the city's fire protection function." In this case, the "cyber security" function is similar to the overarching "fire protection function." Unlike in this case, the *Nealon* court did not stop its work by simply analyzing whether the "fire protection function" was discretionary but instead completed the necessary analysis by evaluating component elements. *Nealon*, 669 A.2d 689. This included two different discrete decisions, first the decision to limit water pressure at certain locations and times, and second the decision-making process put in place to increase pressure. *Id.*

The same step-by-step analytic process must be applied here. The analysis cannot merely categorize "cyber security functions" but must examine the specific allegations. *Id.* at 690. Lastly, the "analysis must include a determination of whether judgment was exercised, as well as whether the decision called for policy considerations." *Id.* at 691.

The importance of the detailed context-based analysis, absent in the trial court's decision here, was underscored in *Wash. Metro. Area Transit Auth. v. Nash-Flegler*, 272 A.3d 1171, 1181 (D.C. 2022). "[N]early every government

action is, at least to some extent, subject to 'policy analysis,'" and a decision is not protected by sovereign immunity simply because it involves "the faintest hint of policy concerns." *Cope v. Scott*, 45 F.3d 445, 448-49 (D.C. Cir. 1995); *Usoyan v. Republic of Turk.*, 6 F.4th 31, 45 (D.C. Cir. 2021). Furthermore, "the mere presence of choice ... does not trigger" sovereign immunity. *Cope*, 45 F.3d at 449. Immunity extends only "where the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency." *Id.* at 450 (internal quotation marks omitted); *Usoyan*, 6 F.4th at 45.

Next, the District attempts to twist the findings of *Potomac Dev. Corp. v. Dist. of D.C.* to argue that Moore's allegations do not plausibly contain ministerial failures. However, in *Potomac*, the court concluded it would require speculation to infer the government had acted arbitrarily, improperly, or in bad faith and that some of the content of the complaint was "pejorative spin." *Potomac Dev. Corp.. v. Dist. of D.C.*, 28 A.3d 531, 547 (D.C. 2011). This is quite different from the current case, where no such speculation of ill motive is expected, and there were no similar shortfalls identified in Moore's complaint.

Potomac should be applied to support the finding that, in contrast to that case, a context specific analysis in this case shows Moore did allege facts permitting reasonable and plausible inferences that some aspects of the District's failures were ministerial. *Id.* When there are well-pleaded factual allegations, a

court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 544.

C. Relevant Policies and Statutes are Applicable to the Sovereign Immunity Determination in this Case

Plaintiff previously explained that D.C. Code imposes a statutory obligation that precludes a finding of sovereign immunity in this matter. *See* Brief at 39-42 (citing D.C. Code § 5-113.01(a)(3) and D.C. Code § 5-113.07). Notably, this Court previously explained that no immunity exists when a statutory obligation exists. *Casco Marina Dev., L.L.C. v. D.C. Redevelopment Land Agency*, 834 A.2d 77, 82 (D.C. 2003) (reversing a finding of immunity for the D.C. Redevelopment Land Agency). This Court's holding is consistent with the United States Supreme Court's holding that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 1958-59 (1988).

The District's argument that the Complaint does not cite the specific governing cybersecurity policies and directives by title or number is unavailing. First and foremost, none of the Plaintiff's claims are "statutory claims." Second, Plaintiff did raise and specifically identify these statutes at the trial court level, and the Superior Court directly acknowledged them. A. 129. Moreover, the D.C. Code is well known to the Court and all the parties, including the District, which cannot

seriously argue that it is ignorant of its own governing statutory framework. The District eventually argues that the statutes are not applicable to the District's conduct at issue.

To the contrary, the relevant statutes cited at the trial level and during this appeal speak directly to the challenged conduct because this case is exactly about the improper preservation of personnel records. To hold otherwise would be akin to endorsing the District leaving a stack of files out in the open for the public to peruse at their leisure. Security of files is an inherent part of their maintenance and preservation. Negligence through improper computer security, for a file stored within cyberspace, should apply in the same way as careless placement of a paper file would in the physical world.

The *Usoyan* case cited by the District in support of the argument that these statutes "operate at too high a level of generality" neglect to mention this ruling was limited to situations where they did not "impose any special obligations on the employee whose conduct is challenged." *Usoyan v. Republic of Turk*, 6 F.4th 31, 44 (D.C. Cir. 2021). Of particular note, the *Usoyan* case noted that immunity was *not* available in a situation where "alleged violation of WMATA's Standards of Conduct which prohibited, *inter alia*, leaking confidential information." *Id.* at 44 (*citing Banneker Ventures, LLC v. Graham*, 418 U.S. App. D.C. 398, 423, 798

F.3d 1119, 1144 (2015)). The factual background in *Banneker*, where immunity was not sustained, is quite similar to the factual background in the instant case.

D. The Applicable Standard of Review and Burden of Proof in Asserting Affirmative Defenses Precludes the Matter from Being Dismissed on the Basis of Sovereign Immunity

Contrary to the District's positions, Moore does not contend sovereign immunity cannot be determined on a motion to dismiss, but that the applicable standard was simply not applied by the trial court. Thus, a Complaint should only be dismissed at this stage of the litigation if it contains allegations which cannot plausibly be read to include a failure in a ministerial function. Some complaints may have this shortfall, but the present one clearly does not. Compare the current case with *Logan v. Lasalle Bank Nat'Lass'N*, 80 A.3d 1014, 1020 (D.C. 2013) (finding that "After *scrutinizing the entirety* of the complaint and *granting appellant every inference* to which his allegations are entitled, we hold that several of the counts in appellant's complaint must be dismissed for failure to state a claim.") (emphasis added).

What the District's employees did, why they did it, and whether or not they actually exercised discretion remain facts *known only to the District*. The District failed to rebut Moore's position that her allegations include plausible contentions that careless attendees 'flipped the wrong switch,' clicked on the wrong hyperlink (a.k.a. phishing attack victim), misconfigured a firewall (a.k.a. did not install

software patches), or otherwise failed to pay attention in routine tasks by rote memory. *See* Br. 31.

In extending the analogy, these actions are no different than forgetting to latch a gate that prevents release of the barn animals. All of these actions are clearly ministerial rather than discretionary failures. The actions of the 21st century information technology specialist must be evaluated the same way as those of the 20th century assembly line worker or 19th century farmhand.

Despite the rule that all reasonable inferences should be made in favor of Moore, the District appears to contend the Court should assume the District made intentional policy decisions to rely on an inadequate cybersecurity posture. *See Potomac Dev. Corp. v. Dist. of D.C.*, 28 A.3d 531, 544 (D.C. 2011) (noting "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.")

There was no basis for the trial court to infer that all the alleged failures in day-to-day operational activities were the result of a "delicate balancing of competing considerations." *See* Appellee Brief at 33 (citing *District of Columbia v. Pace*, 498 A.2d 226, 229 (D.C. 1985)). Nor would evaluating them require "jury speculation" or implicate "concern for separation of powers." *Id.* Instead, the reasonable inferences here clearly support the finding that Moore's complaint does

describe some failures that were ministerial functions. This is particularly true where one party, the District, controls all of the relevant evidence that would allow the parties to determine the specific acts undertaken.

For all of the above reasons, the dismissal of the Complaint on the basis of sovereign immunity was erroneous.

II. JURISDICTION IS PROPER

As to the jurisdiction question, the District attempts to re-litigate matters already ruled upon by this Court. Among other things, the District continues to wrongly assert that Moore's appeal was taken solely from the September Order rather than including the issues derived from the March and June orders as designated in the notice of appeal. *See* Notice of Appeal, Supp. App. at 96. At best, the District's arguments on jurisdiction offer a theoretical alternate set of proceedings where a court could possibly have made decisions not to consider the matter ripe for appeal. However, the actual record shows both the Superior Court and this Court already made determinative judgements on the matter.

A. The Superior Court, not the Plaintiff, Determined Finality

The District suggests that Moore, and not the court, attempted to falsely manufacture the necessary finality for appeal. The District continues to rehash arguments that were presented months ago, in their "Motion to Dismiss for Lack of

Jurisdiction" and "Opposition to Appellant's Motion to Reinstate Her Appeal" which this Court already considered, addressed, and otherwise ruled upon.

After due consideration of those matters, this Court's panel of three Judges found that "Appellant may file a motion to reinstate this appeal after filing the necessary notices in Superior Court. See Super. Ct. Civ. R. 41(a)(1)(A)(i)." *See* June 8 Order of this Court. Plaintiff followed the directives and the matter was subsequently reinstated.

The District's primary position is that appellate jurisdiction is impossible when a party is voluntarily dismissed without prejudice. The District cites *Blue v. District of Columbia Public Schools*, 764 F.3d 11 (D.C. Cir. 2014) in support of its proposition. However, in *Blue*, the trial court had specifically denied the Plaintiff's request to enter final judgment, citing concerns over "piecemeal appeals." *See Blue*, 764 F.3d at 15. Only after that denial did *Blue* engage in the voluntary dismissal procedure, making herself vulnerable to the argument that she sought to short circuit the process. In contrast to *Blue*, the record here shows that the trial court *affirmatively engaged* in its "Dispatcher" or "Gatekeeper" role. *Id.* at 18. As the *Blue* decision explained, the "judge, not the parties, is meant to be the dispatcher who controls the circumstances and timing of the entry of final judgment." *Id.* In this case, Moore *expressly sought* to have the case closed before pursuing her appeal. The trial court issued an "Order Closing Case" in direct

response to Moore's request. Moore's appeal was subsequently filed only after the entry of the trial court's "Order Closing Case."

The *Microsoft* matter raised by the District is not remotely similar to the present case because Moore has no remaining claims against the District. *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017). *Microsoft* involved a case against one defendant, and the putative class claims against that sole defendant were denied. The class in *Microsoft* continued to have the right to "pursu[e] their individual claims to final judgment on the merits." *Id.* at 1704. Instead of pursuing claims that were still available to them, the putative class dismissed the case against the one defendant, and then sought an appeal based on their dismissal of the only defendant in that case.

Here, Ms. Moore's claims against the District were *completely dismissed* and Ms. Moore had no remaining claims. Ms. Moore never sought to certify a class, because she never had any opportunity to do so. Furthermore, Ms. Moore had no opportunity to pursue individual claims against the District in this case. While it is true that Ms. Moore dismissed claims against other parties, she did not "voluntarily" dismiss her claims against the District. Ms. Moore has no remaining claims against the District that could possibly be pursued at the trial level.

As to the later question of "reinstating" the appeal, this Court had no obligation to give specific guidance as to what actions were necessary to reinstate

the appeal. However, this Court chose to give precise direction in its rulings on how to reinstate the appeal, which the District now wishes to have ignored and replaced with its own recipe.

B. The District's Attempt to Characterize the September Order as an "Administrative Order" that is "Non-final" and "Non-appealable" is Without Merit.

In analyzing the current matter, the District mostly cites situations where courts had removed cases from their active files without making final adjudication, which is entirely different from what occurred in the instant matter. The District's argument is a highly technical one, which ignores the substance of the mandate that a party should not employ the "concept of finality in a rigid fashion." *Woodroof*, 147 A.3d at 785. Moreover, the District's argument that the September Order was "administrative" has no support in the record. The Order, entitled "ORDER CLOSING CASE" does not contain the word "administrative" or provide any other indication that the case was anything other than "closed" for all purposes.

The District cites to a First Circuit ruling that involved "a case, though not dead, [that was] likely to remain moribund for an appreciable period of time." *Lehman v. Revolution Portfolio L.L.C.*, 166 F.3d 389, 392 (1st Cir.1999). Moreover, the lower court in that case "opted to reopen the case" and the trial court in that matter concluded that it "had swept too broadly in closing the entire file."

Id. Despite citing *Lehman*, the District ignores the fact that the First Circuit expressly recognizes circumstances where there is a "a separate document to signal the court's "view that the case had concluded." *Id.* at 392 (citing *Corion Corp. v. Chen*, 964 F.2d 55, 56-57 (1st Cir. 1992)).

The *Lehman* matter is completely inapposite to the present matter. The instant case was not "moribund." To the contrary, it was, and continues to be, actively litigated. The case was "Closed" by an order of the Superior Court, and the trial court never reopened the matter. The District made no effort to have the case reopened, and never filed any objection to the "Order Closing Case." Moreover, the Superior Court undertook an active role in the conclusion of the case by filing a "separate document" that "signaled the court's view that the case had been concluded."

The District's citation to *United States v. 27.09 Acres of Land* is similarly misleading. In that case, a group of cases were "administratively closed" all of which were "pending for over three years . . . and there having been no action for over twelve months." *United States v. 27.09 Acres of Land*, 1 F.3d 107, 110 (2d Cir. 1993). The court in that case also expressly stated that "[n]othing contained in this minute order shall be considered a dismissal or disposition of these matters." *Id.* This case is completely inapposite, as already discussed herein.

The District further cites to a federal matter where a trial court incorrectly issued an order despite the fact that the court had "heard nothing further from the parties and ma[de] no inquiry of them." *Penn W. Assocs. v. Cohen*, 371 F.3d 118, 121 (3d Cir. 2004). In contrast to Cohen, the instant case has included extensive dialog and specific interactions focused on proper closure and ensuring finality of the case by the Superior Court and this Court.

The District cites other inapposite cases. *Rolinski* was a case that involved issues of *forum non conveniens* and involved the "collateral order doctrine" which no party in the instant dispute argues is applicable here. *Rolinski v. Lewis*, 828 A.2d 739, 745 (D.C. 2003). Again, the District simply ignores the clear language of the order and this Court's consistent holding that "some trial court rulings that do not conclude the litigation nonetheless are sufficiently conclusive in other respects that they satisfy the finality requirement of our jurisdictional statute." *Rolinski*, 828 A.2d at 746. The District's legal position should not be adopted.

C. "Rigidity" in Determining "Finality" is Routinely Rejected by this Court

This Court of Appeals previously explained that:

> We have not construed the concept of finality in a rigid fashion. There is no statutory definition of a "final order," and our case law, which as a "general rule" deems an order or judgment final when "all issues as to all parties have been disposed of," does not strictly enforce that definition.

Woodroof v. Cunningham, 147 A.3d 777, 785 (D.C. 2016) (*citing Stuart v. Walker*, 6 A.3d 1215, 1221 (D.C. 2010) (Steadman, J., dissenting). Moreover, there

is a recognized practice of giving finality a "practical rather than a technical construction." *Id.* (*citing Stuart*, 6 A.3d at 1223 (*quoting Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)).

The District not only seeks to strip the judiciary's flexibility in making such determinations, but also seeks to dictate the sole acceptable path for resolving what would be at most a simple administrative discrepancy.

The District cites numerous other federal cases that address "non-final" decisions. However, the Superior Court's Order in combination with the clear direction and Orders from the Court of Appeals serve plainly as "an affirmative finality determination" in this case. *See Blue*, 764 F.3d at 19.

This Court should forego adopting the "technical" and "rigid" nature of the Appellee's jurisdictional arguments, consistent with this Court's precedent. *See Woodroof*, 147 A.3d at 785. Such a result is particularly appropriate here, where the "gatekeeper" function was fulfilled through affirmative guidance issued by a Superior Court Judge and ruling of the Appeals panel.

CONCLUSION

Jurisdiction is proper in this Court. Given that jurisdiction is proper, the Court can, and should, reverse and remand this matter for further proceedings.

* * *

Respectfully submitted,

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STATEMENT AS TO TYPEFACE

The font used in this Brief is Times New Roman and the type size is 14 point.

/s/ Eric Menhart
Eric J. Menhart

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 taxpayeridentification 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

22-CV-760

Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, a copy of the foregoing was delivered via the Court's electronic case filing system.

/s/ Eric Menhart
Eric J. Menhart