DISTRICT OF COLUMBIA COURT OF APPEALS

No. 22-CV-298

Clerk of the Court
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JOSE$PH MANCUSO, *et al.*

Appellants

v.

CHAPEL VALLEY LANDSCAPE COMPANY, *et al.*

Appellees

Appeal from the District of Columbia Superior Court

APPELLANTS' BRIEF

Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 463-0880 197137
FWS888@aol.com

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2. Does an injured party lose his or her right to sue the tort feasor for damages in excess of those reimbursed by a collateral source if the collateral source had a contractual or Common Law right of subordination?

3. Does an injured party have the right to reasonably mitigate damages without the mitigation being a superceding cause freeing the tortfeasors from liability?

4. The Office of Administrative Appeals granted a joint motion to dismiss the tortfeasors' appeal of DCRA Notices of Infraction prior to a determination on the merits. Does the dismissal prior to a determination on the merits preclude the introduction of the Notices of Infraction in a suit by the injured party against the tortfeasors?

STATEMENT OF FACTS AND PROCEDURAL CONTEXT

This Statement of Facts is adopted primarily from those set out by the Superior Court as germane in several of her Orders. Mr. And Mrs. Mancuso (Appellants) are confident that Chapel Valley Landscape and Grunley Construction (Appellees) will identify in their brief any minor inaccuracies and

add additional facts that they believe are necessary. Corrections to the Appellees' rendition, if necessary, will be set out in Mr. and Mrs. Mancuso's Reply Brief.

This appeal arises out of the collapse of a three-story parking garage at the Watergate Complex in Washington, D.C. on May 1, 2015. Grunley was the general contract for the renovation of the Hotel and grounds at the Watergate Complex and Chapel Valley was the landscaping subcontractor. Mr. and Mrs. Mancuso reside at 2150 Virginia Avenue NW, Washington, D.C. 20037, which is an apartment building within the Watergate Complex. They parked their automobile on the bottom floor of the parking garage and had some personalty in the garage space as well.

Following the collapse the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) retained an Engineer to determine whether any District of Columbia regulations had been violated. The Engineer determined that both Grunley and Chapel Valley had violated DC regulations. Consequently DCRA issued Notices of Infractions in this regard against both Grunley and Chapel Valley with associated fines. Both Chapel Valley and Grunley filed appeals with the D.C. Office of Administrative Appeals. Prior to the hearing the parties agreed to dismiss the appeal "because they have settled all issues." There was no hearing or dismissal "on the merits."

Mr. and Mrs. Mancuso had filed a claim with Progressive Insurance Company, their automobile vehicle carrier, folowing their collapse. Progressive was less generous than its commercials would suggest and Mr. and Mrs. Mancuso recovered $ 28,800.97 on their claim after a $1,000 deductible (later slightly reduced) and the denial of some minor claimed damages. App. 100

Mr. and Mrs Mancuso then filed suit in the Superior Court against Grunley and Chapel Valley as they were entitled to do under the Collateral Source Rule. Mr. and Mrs. Mancuso filed their Complaint on March 15, 2018, alleging one count of negligence against all parties. App. 39 They requested damages for the destruction of their vehicle ($29,097.04), reduction in the size of their parking space ($15,000), reimbursement for a rental vehicle ($978.17), loss of golf clubs and equipment destroyed in vehicle ($2,147.98), loss of miscellaneous personal property destroyed in the vehicle ($611.93), and loss of personal property destroyed in the parking space (134.35).[1] App.44

Unbeknownst to Mr. And Mrs Mancuso (and the Superior Court) until approximately three years after Mr. and Mrs. Mancuso filed suit Progressive had

[1]Following the dismissal of their claim for the reduction in the size of their parking space Mr. and Mrs. Mancuso were advised that they had used the incorrect measure of their loss. They did not seek to amend their Complaint as the issue was moot until and if this Court restores that claim. *See* discussion below.

prior to suit being filed utilized some non-specific policy language or the Common Law to exercise subrogation rights against Grunley and Chapel Valley.[2] Grunley prevailed in an insurance company arbitration and Progressive settled for a recovery (This ruling will be discussed below.)

Finally, in an Order issued on March 22, 2022 the Superior Court concluded that the language which it had not previously considered a subrogation clause was in fact a subrogation clause which stripped Mr. and Mrs. Mancuso of any right to sue either Chapel Valley or Grunley. App. 19, *et seq.*

SUMMARY OF ARGUMENT

The Superior Court was in error when it ruled that a subrogation clause in Mr. and Mrs. Mancuso's insurance policy transferred all rights to the chose in action to the carrier and barred Mr. and Mrs. Mancuso from suing the tortfeasors despite the Collateral Source Rule. The Superior Court was also in error when it ruled that a joint motion to dismiss the Department of Consumer Affairs Notices of Infraction protected the tortfeasors from the introduction of the DCRA findings at trial even though there was no hearing or determination on the merits. Finally,

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[2] In its Answer Grunley set out a smorgasbord of 15 affirmative defenses, many of which were inapposite, which included arbitration and award without further explanation. App. 50 In its Answer Chapel Valley set out 22 defenses, many of which were inapposite, including "payment" and "release" without further explanation. App. 59 These defenses ran against Progressive and not Mr. and Mrs. Mancuso as will be discussed below.

the Superior Court was in error when it ruled that the reasonable reconstruction of the parking garage was a superceding cause of Mr. and Mrs. Mancuso's injuries relating to the reduction in size of their parking space thus freeing the tortfeasors from liability for causing its collapse.

ARGUMENT'

I. Standard of Review

As this Court recently put it in *Radbod v. Moghim*, 269 A.3d 1035, 1041 (D.C. 2022):

> Our review of the Superior Court's order granting summary judgment is *de novo*. *Zere v. District of Columbia*, 209 A.3d 94, 98 (D.C. 2019). We apply the same standard the Superior Court was required to apply in considering whether the motion for summary judgment should be granted. *Kuder v. United Nat. Bank*, 497 A.2d 1105, 1106-07 (D.C. 1985). We view the evidentiary materials in the record, including any depositions, documents, electronically stored information, affidavits, declarations, admissions, and interrogatory responses, in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Liu v. U.S. Bank Nat'l Ass'n*, 179 A.3d 871, 876 (D.C. 2018); Super. Ct. Civ. R. 56(c). Summary judgment is properly granted only if the record contains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Liu*, 179 A.3d at 876; Super. Ct. Civ. R. 56(a).

To the extent that a ruling is based on both fact and law, this Court "treat the relevant factual findings as presumptively correct unless they are clearly erroneous or without foundation in the record, [and] "we review *de novo* the trial court's ultimate holding." (Finding that a contract was unconscionable.) *Simon v. Smith*, 273 A.3d 321, 331 (D.C. 2022)

II. The Superior Court erred when it granted Summary Judgment to Grunley and Chapel Valley and entered Judgment for them.

On March 22, 2022, the Superior Court reversed its prior holding and granted the motion for summary judgment of Grunley and Chapel Valley.[3] App. App. 19, *et seq.*

The erroneous nature of the ruling will be discussed in full below, but first a review of the relevant legal principles will be helpful.

A. The Collateral Source Rule: A Rule of Evidence and a Rule of Damages.

The Collateral Source Rule is a long standing Common Law rule of evidence and damages applied in suits where the plaintiff has recovered (or will recover) part or all of his or her damages from most unrelated collateral sources.[4] The principal as to insured losses was set out in *Monticello v. Mollisonn* 58 U.S.

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[3] While this final and dispositive Superior Court ruling was the third in time it is addressed first. If, *arguendo*, this Court determines that this final summary judgment ruling was not error, the prior erroneous rulings by the Superior Court become moot and can be dealt with by dropping a footnote about as long as this one stating so.

[4] Jurisdictions have whittled around the edge of collateral sources which fall under the Rule depending on the influence of insurance carriers with legislature and regulatory bodies. For example, in the District of Columbia Medicare and private insurance payments fall under the Rule while Medicaid payments do not. *District of Columbia v. Jackson*, 451 A.2d 867, 871 (D.C. 1982) and decisions it cites. Other jurisdictions have excluded expenses which were "written off," but not the District. *Hardi v. Mezzanotte*, 818 A.2d 974, 984 (D.C. 2003) None of the digressions from the Collateral Source Rule are implicated in this appeal.

152, 155 (1854), an admiralty collision decision, which described "the doctrine [as] well established at common law." The Restatement (Second) of Torts puts it this way:

> § 920A Effect of Payments Made to Injured Party
>
> (1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.
>
> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.
>
> COMMENTS & ILLUSTRATIONS
>
> Comment:
>
> * * * * *
>
> Benefits from collateral sources. Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him. One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the

> net loss that the injured party receives. Compare § 924, Comment c (recovery for harm to earning capacity though plaintiff was on vacation), § 914A (recovery for damage to earning capacity ordinarily not reduced by amount of income tax that was not imposed).
>
> Perhaps there is an element of punishment of the wrongdoer involved. (See § 901). Perhaps also this is regarded as a means of helping to make the compensation more nearly compensatory to the injured party. (Cf. § 914A, Comment b).

District of Columbia law, in this Court and in the D.C. Circuit, adheres to this view. As the Court said in *Jacobs v. H. L. Rust Co*., 353 A.2d 6, 7 (D.C. 1976), the decision generally cited for the proposition:

> The collateral source rule provides that when a tort plaintiff's items of damage are reimbursed by a third party who is independent of the wrongdoer, the plaintiff may still seek full compensation from the tortfeasor even though the effect may be a double recovery. RESTATEMENT OF TORTS, § 920, comment e (1939). The rationale of this principle is that: [in] general the law seeks to award compensation, and no more, for personal injuries negligently inflicted. Yet an injured person may usually recover in full from a wrongdoer regardless of anything he may get from a "collateral source" unconnected with the wrongdoer. Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted. Legal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover the injured person seldom gets the compensation he "recovers", for a substantial attorney's fee usually comes out of it. There is a limit to what a negligent wrongdoer can fairly, i.e., consistently with the balance of individual and social interests, be required to pay. But it is not necessarily reduced by the injured person's getting money or care from a collateral

source. *Hudson v. Lazarus*, 217 F.2d 344, 346 (1954).]

> Thus, the receipt of payment from a collateral source may not be injected into a trial to mitigate damages or in any manner which would mislead, improperly influence or prejudice the jury. *Eichel v. New York Central Railroad Co.*, 375 U.S. 253, 84 S. Ct. 316, 11 L. Ed. 2d 307 (1963); *Tipton v. Socony Mobil Oil Co., Inc.,* 375 U.S. 34, 84 S. Ct. 1, 11 L. Ed. 2d 4 (1963); *Ridilla v. Kerns*, D.C.Mun.App., 155 A.2d 517 (1959); *LaMade v. Wilson*, 512 F.2d 1348 (1975).

See also District of Columbia v. Jackson. supra at 871: *Ceco Corp v. Maloney*. 404 A.2d 935 (D.C. 1979)

B. Subrogation

As the Superior Court pointed out, and as this Court has held, "[s]ubrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant. *HSBC Bank USA, N.A. v. Mendoza,* 11 A.3d 229, 232 n.4 (D.C. 2010) (quoting DAN B. DOBBS, LAW OF REMEDIES § 4.3, at 404 (2d ed. 1993))." It exists in a number of contexts where one party lays out money for the benefit of another party.

Insurance carriers having to satisfy the claims of their insured have come to believe that if there is to be a double recovery it belonged to them and not to the injured insured who sues or settles as discussed below. Since carriers tend to travel in packs they tend to utilize essentially the same subrogation contractual

language in their policies as discussed below. In addition there exists an equitable Common Law right to obtain funds paid out to the insured (minus attorney fees and other offsets) in an independent action by the insured. For a somewhat convoluted view, described by the Court as "procedural threads becom[ing] rather tangled," consider *Travelers Ins. Co. v. Haden*, 418 A.2d 1078, 1080 (D.C. 1980).

C. Circumstances of this appeal.

The Progressive policy which Mr. And Mrs. Mancuso had provided in part:

OUR RIGHTS TO RECOVER PAYMENTS

> **We** are entitled to the rights of recovery that the insured person to whom payment was made has against another, to the extent of **our** payment. That insured person may be required to sign documents related to the recovery and must do whatever else **we** require to help **us** exercise those recovery rights, and do nothing after an accident or loss to prejudice those rights. (Emphasis in original) App. 85

This is a notice of a right to subrogation although that term is not specifically used. In this case it established a right of recovery/cause of action initiated by Progressive and required the cooperation of Mr. and Mrs. Mancuso as necessary. Since it is part of the Progressive policy it is a contractual term.

The Progressive policy also provided:

> When an insured person has been paid by **us** and also recovers from another, the amount recovered will be held by the insured person in trust for **us** and reimbursed to **us** to the extent of **our** payment. If **we** are not reimbursed **we** *may* pursue recovery of that amount directly against that insured person. "Our Right To Recover Payment," App. 85

This is not a subrogation clause. It is a contractual clause. It presupposes a successful recovery by Mr. and Mrs. Mancuso through suit, settlement or other means and the retention by them of that part of the recovery representing the amount in excess of the amount Progressive had paid out. The contractual language did not require Progressive's permission for the Mancuso's to file suit nor did it suggest or require a role for Progressive in the suit.

Nothing barred Mr. And Mrs. Mancuso from paying that sum into the Court's registry or counsel's escrow account and challenging the amount, if any, to be reimbursed on any numbers of grounds such as insurance malfeasance. Progressive anticipated such circumstances as it reserved in the last sentence the right to sue for that amount or not. Further, nothing in the provision barred Mr. And Mrs . Mancusos from retaining any amount in excess of the amount paid out in reimbursement to Progressive.

The Defendants' first motion for summary judgment claimed that the second clause was a subrogation clause. App.85 The Superior Court initially found it was not based on the language of the provision. App. 36 The Superior Court was correct. This clause did not allow Progressive to step into the shoes of Mr. and Mrs. Mancuso and pursue a recovery in their stead. Rather it presupposed, but did not require, that Mr. and Mrs Mancuso would sue (as they did) and contractually set out how the recovery would be divided among them.

D. The Superior Court erroneously reversed its prior decision.

In its prior Order, as noted above, the Superior Court found that the Policy Agreement between Plaintiffs and Progressive did not act to "prohibit the insured person from seeking damages on their own. The only restriction placed on the insured person is that if the insured person recovers damages, the insured person is liable to Progressive to reimburse the amount Progressive disbursed in relation to the case." App. 37 In subsequently contradicting itself, the Superior Court made the following errors.

Error No. 1. In so ruling, the Superior Court considered the contract between Mr. and Mrs. Mancuso and Progressive to be before it even though Progressive had not been third-partied in nor had Progressive entered an appearance.

Error No. 2 The Superior Court next concluded that the contractual language was plain and that it could determine in the event of a subsequent proceeding that Progressive would required Mr. and Mrs. Mancuso to pay over to it whatever they recovered. In the Superior Court's view (without considering or even seeking Progressive's view) this included any additional amount in excess of the amount Progressive had paid them without deducting, for example, the amount Progressive had received from Chapel Valley in settlement or any of the other set

offs.[5] The subordination recovery was limited to making Progressive whole. The Superior Court's ruling deprived Mr. And Mrs. Mancuso of these entitlements.

Error No. 3 Sensing the thin ice in her position, the Superior Court then created a remarkable new legal principal. The Superior Court concluded that if Mr. and Mrs. Mancuso were subrogated to Progressive, and, *arguendo*, Progressive had already exercised its right of subrogation, Mr. and Mrs. Mancuso also lost their right to sue and recover any damages from Grunley and Chapel Valley regardless of whether or not the amount exceeded the amount Progressive could have recovered under its right of subrogation.

Error No. 4 At best the Superior Court confused subrogation with assignment. One can "assign" a chose in action--even if prohibited by an insurance policy–giving the assignee all rights to and in the chose in action. *Antal's Restaurant v. Lumbermen's Mut. Cas. Co*., 680 A.2d 1386 D.C. 1996) Subrogation is not an assignment, however, as discussed above. It gives the holder of the right of subrogation the right to seek to recover what it paid out after adjustments and not a penny more. It is not a right to the chose in action itself and is not an exclusive right to sue.

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[5] While this excess amount was approximately $9,000.00 it would be substantially increased if the claim relating to Mr. and Mrs. Mancuso's garage space is restored as discussed below and after Mr. and Mrs. Mancuso's costs of litigation was included..

If the Superior Court was correct there would be no need for the Collateral Source Rule since the injured party, as subrogatee, would have no right to sue the tortfeasor since that exclusive right had been transferred to the subrogator by contract or Common Law. The conclusion advanced and articulated by the Superior Court was that injured parties had no right to sue a tortfeasor for any damages collaterally reimbursed or not because he or she had no right to be in court in the first place.

This surprising abrogation of two centuries of the Common Law and precedent in this Court and elsewhere requires a rationale far stronger than that offered by the Superior Court. There is, of course, under certain circumstances a tension between the legal and contractual principles involved here but it is not for this Court on this record to resolve that tension. Indeed, as the Superior Court initially found, the course of action here is to resolve the suit at hand and determine damages if any. It is then in separate litigation involving Mr. and Mrs. Mancuso and Progressive (with Grunley and Chapel Valley intervening if they choose) that the respective rights and recoveries of each are are determined.[6]

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[6]These are not issues to be resolved on summary judgment with only some of the involved parties being before the Court. For example, the Superior Court cites *Designers of Georgetown, Inc. v. E.C. Keys & Sons*, 436 A.2d 1280, 1282 (D.C. 1981) as her only authority for the proposition that the collateral source rule does not apply where there is a subordination yet *Designers* cites *Motors Ins.*

III. The all encompassing Superior Court error.

The Superior Court made a good start, but them ran to the wrong goal posts. The Superior Court and the parties agree that the Mancuso's Progressive Policy contains the equivalent of a subrogation clause:

> **OUR RIGHTS TO RECOVER PAYMENTS**
>
> **We** are entitled to the rights of recovery that the insured person to whom payment was made has against another, to the extent of **our** payment. That insured person may be required to sign documents related to the recovery and must do whatever else **we** require to help **us** exercise those recovery rights, and do nothing after an accident or loss to prejudice those rights. (Emphasis in original)

In this case Progressive as Mr. and Mrs. Mancuso's carrier sought reimbursement for the payment it made to Mr. and Mrs. Mancuso from the tortfeasors' carriers. [7]

The tortfeasors argued, and the Superior Court finally agreed, that the second relevant paragraph in Mr. And Mrs. Mancuso's policy precluded them from retaining any recovery from their suit against the tortfeasors. As the Superior

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Corp. v. Home Indem. Co., 284 A.2d 58, 60 (D.C.) as authority even though it also held that since the insured "was not a party to the release [by the insurance carrier] executed by Motors, she was not bound by it."

[7]The nature and terms of the arbitration is uncertain although it appears to have been a mechanism set up between insurance carriers. Its nature is not relevant here except to note that there is no indication it was either judicial or under judicial sponsorship. (It also resolved the wrong issue.)

Court put it, "interpreting the contract to permit Plaintiffs the opportunity to obtain a recovery which would then be required to be held in trust for Progressive, which Progressive would then be required to return to Defendants (and their insurers), would make no sense." Therefore the Mancuso's case should be dismissed in its view.

Assuming *arguendo*, and leaving aside the Superior Court's lack of jurisdiction over the resolution of Mr. and Mrs. Mancuso's contractual obligation to Progressive and the failure of Progressive to intervene, the math doesn't work. No one would have any way of knowing what Progressive would be entitled to under the policy until after the suit against the tortfeasors was resolved. Under the Superior Court's view, although contrary to the policy's language, Mr. and Mrs. Mancuso would be deprived of that entitlement.

IV. The tortfeasors were the proximate cause of the damage resulting from the reduction of the size of Mr. and Mrs. Mancuso's parking space.

The Superior Court committed error when it ignored the obligation of mitigation imposed on injured parties. Indeed, both Grunley and Chapel Valley set out a failure to mitigate as a defense. App. 50, 59 The Michigan Supreme Court in *Shiffer v. Board of Education,* 224 N.W. 2d 255, 258 (Mich. 1974) enthusiastically but accurately put it this way:

> The principle of mitigation is a thread permeating the entire jurisprudence. It is not solely a "breach of contract" or "commercial" doctrine; it is part of the much broader principle of "avoidable consequences".
>
> Professor McCormick's statement of the general principle of avoidable consequences is unqualified in its application: "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided."
>
> The rights protected by the mitigation doctrine are not just those of contracting parties, commercial litigants, tort victims or tortfeasors but, rather, the rights of all society: "Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice, but to protect and conserve the economic welfare and prosperity of the whole community."
>
> Mitigation of damages is, thus, the "machinery by which the law seeks to encourage the avoidance of loss."
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> The Restatement (Second) of Torts was somewhat more staid:
>
> § 918 Avoidable Consequences
>
> (1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.
>
> (2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.

See also Restatement (Second) of Contracts § 350 (1981) ("damages are not

recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation"); *District Concrete Co. v. Bernstein Concrete Corp*., 418 A.2d 1030, 1037 (D.C. 1980); P. Brunner & P. O'Connor , Brunner and O'Connor on Construction Law § 19.20 (2012 Ed.), and even in employment cases. See *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219, 234 (1982)

Throwing aside the clearly settled law mandating reasonable mitigation by an injured parts, the Superior Court first states that " Defendants did not have anything to do with the redesign or reconstruction of the parking garage or Plaintiffs' parking space." App. 34 Thus, in the Superior Court's view " there is nothing to suggest that the parking space had to be redesigned because of the collapse. App. 34 Rather, the actions of those redesigning the garage and reconfiguring Plaintiffs' parking space are akin to 'superseding cause' which breaks the chain of causation and relieves the first tortfeasor of liability to the injured party." App.34

In this regard it is not the injured party's obligation to prove remediation was reasonable. It is the responsibility of the tort feasor to demonstrate it was not. It was alleged (and for the purposes of the tortfeasors' motion must be accepted) that the tortious conduct of Grunley and Chapel Valley obliterated the Mancuso's

parking space and the garage around it. It was, as the carriers say, a total loss. It then became the obligation of the injured parties to reasonably restore the garage and the parking spaces therein. There is nothing in the Record to suggest that the restoration was unreasonable or that their remedial efforts were unusual. There is nothing in the realm of common sense to suggest that an inability to reconstruct from a pile of rubble a perfect replica of the original three story garage was not foreseeable. Even more remarkable, the Superior Court cites t*McKethean v. WMATA,* 588 A.2d 708, 716 n.9 (D.C. 1991) for the proposition that reconstructing the garage and reconfiguring Plaintiffs' parking space are akin to "a superseding cause which breaks the chain of causation and relieves the first tortfeasor of liability to the injured party." Mr. and Mrs. Mancuso's attorney was on the appellant's brief in *McKethean* and there is nothing in the Superior Court's citation which advances its argument. Footnote 9 merely cites Restatement (Second) of Torts § 440 to the effect that a superceding cause is a superceding cause. It then in subsequent sections defines the circumstances in which a superceding cause negates the tortfeasor's liability. The most apropos provision is Restatement (Second) of Torts 443, Normal Intervening Force: "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been

a substantial factor in bringing about." The rebuilding of the garage, as described above, is not only a normal consequence of its destruction as a result of the negligence of the tortfeasors, but the failure to do so would be extraordinary.

Under the circumstances it is for the jury to decide whether the negligent acts of the tortfeasors resulted in Mr. and Mrs. Mancuso's damages and, if so, what they were. *District Concrete Co. v. Bernstein Concrete Corp*., 418 A.2d 1030 (D.C. 1980).

V. The investigation of the incident by the Department of Consumer Affairs and the Notices of Infractions which resulted are admissible.

As set out above, the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) retained an Engineer to determine whether any District of Columbia regulations had been violated in the garage collapse and, if so, by whom. The Engineer determined that both Grunley and Chapel had violated DC regulations. Consequently DCRA issued Notices of Infractions in this regard against both Grunley and Chapel Valley with associated fines. Rec.

Both Chapel Valley and Grunley filed appeals with the D.C. Office of Administrative Appeals. Prior to the hearing the parties agreed to dismiss the appeal "because they have settled all issues." There was no hearing or dismissal "on the merits." App. 107-108

At a status conference on July 15, 2020, the Superior Court considered the admissibility of the DCRA action. App. 143. The Court ruled that although the regulations were admissible, the findings of the DCRA were not because the appeal to the OAA had been dismissed. This was error.

In *Ceco Corp. v. Coleman*, 441 A.2d 940 (D.C. 1982), the decision often cited for the principle, this Court said:

> The "general rule" in this jurisdiction is that "where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent the type of accident that occurred, and the plaintiff can establish his relationship to the statute, unexplained violation of that standard renders the defendant negligent as a matter of law." *Richardson v. Gregory*, 108 U.S.App.D.C. 263, 266, 281 F.2d 626, 629 (1960) (emphasis added). See generally W. PROSSER, THE LAW OF TORTS § 36 (4th ed. 1971); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 17.6 (1956). If a party charged with statutory or regulatory negligence produces competent evidence tending to explain or excuse his or her violation of the statutory or regulatory standard, the jury is properly instructed, upon proper request of the party, that the violation is evidence of negligence, but not negligence as a matter of law. *See Hecht Co. v. McLaughlin*, 93 U.S.App.D.C. 382, 385-86, 214 F.2d 212, 215-16 (1954). See also *Karlow v. Fitzgerald*, 110 U.S.App.D.C. 9, 13, 288 F.2d 411, 415 (1961); *Whetzel v. Jess Fisher Management Co.*, 108 U.S.App.D.C. 385, 392, 282 F.2d 943, 950 (1960).

Id. at 945; *Cf. Tillery v. District of Columbia*, 227 A. 3d 447, 152 (D.C. 2020) (Police Officer could be found negligent in violating two rather specific traffic regulations.)

Thus the issuance by DCRA of the Notice of Infraction was clearly relevant. Grunley and Chapel Valley appealed to the Office of Administrative Appeal, an independent agency acting independently from the DCRA. If Grunley and/or Chapel Valley had succeeded in their OAA appeal, and DCRA had chosen not to appeal to this Court, the supposed regulatory violation could not be introduced or argued. If Grunley and/or Chapel Valley had persuaded DCRA to dismiss the Notices of Infraction on the merits, and said so in the Motion to Dismiss, the supposed regulatory violation could not be introduced or argued. Neither occurred, however, for strategic reasons or because they could not obtain the consent of DCRA.

These circumstances would be no different than if the parties to an appeal in this Court moved to dismiss the appeal as settled without indicating why. The Court would almost certainly grant the request. The appellant could not then preclude *res judicata* effect of the Superior Court or Agency decision because there was no contrary determination by this Court on the merits. *Shin v. Portal Confederation Corp*., 728 A.2d 615, 618 (D.C. 1999)

Consequently the activities of DCRA up to and including the final determination on the merits–the issuance of the Notice of Infraction--is admissible. Which is not to say that Grunley and Chapel Valley are precluded

from arguing that they appealed the Notices of Infractions. They are only precluded from saying the Notices of Infraction were dismissed or that they succeeded in their appeal since neither were determinations on the merits.

CONCLUSION

This matter should be remanded to the Superior Court for trial with instructions to reverse its holdings as discussed above.

Respectfully submitted,

/s/ Frederic W. Schwartz, Jr.
Frederic W. Schwartz, Jr.
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 463-0880 197137
FWS888@aol.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was transmitted to counsel of record this 27th day of July 2022 utilizing this Court's electronic filing system in accordance with the Rules of this Court.

s/ Frederic W. Schwartz, Jr.

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM
22-CV-298

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.

/Frederic W. Schwartz, Jr./

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July 27, 2022

FWS888@aol,com