Appeal No. 22-CV-298

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

JOSEPH MANCUSO, *et al.*,

Appellants,

v.

CHAPEL VALLEY LANDSCAPE COMPANY, *et al.*,

Appellees.

JOINT BRIEF OF APPELLEES CHAPEL VALLEY LANDSCAPE COMPANY, AND GRUNLEY CONSTRUCTION COMPANY, INC.

Howard R. Meinster, Esq.
D.C. Bar No. 388526
Budow and Noble, P.C.
12300 Twinbrook Parkway, Suite 540
Rockville, Maryland 20852
Attorney for Appellee,
Chapel Valley Landscape Company

Robert L. Ferguson, Jr., Esq.
D.C. Bar No. 388526
James K. Howard, Esq.*
D.C. Bar No. 1031484
Ferguson, Schetelich & Ballew, P.A.
100 S. Charles Street, Suite 1401
Baltimore, Maryland 21201
Attorneys for Appellee,
Grunley Construction Company, Inc.

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the Superior Court erred in granting Appellees' Motion for Partial Summary Judgment regarding Appellants' automobile damages that were covered by insurance.

2. Whether the Superior Court erred in granting Appellees' Motion for Partial Summary Judgment regarding Appellants' damages related to a reduction in parking space size.

STATEMENT OF THE CASE

This case involves property damage allegedly suffered by the Plaintiffs/Appellants, Joseph and Joan Mancuso (hereinafter, the "Appellants" or the "Mancusos"), arising out of or relating to a partial collapse of a plaza area and underground parking garage at the Watergate Complex in Washington, D.C. on May 1, 2015 (the "Collapse"). At the time of the Collapse, the Watergate Hotel was under construction as part of a large-scale renovation project (the "Project"). Defendant/Appellee Grunley Construction Company, Inc. ("Grunley") was serving as the general contractor for the Project. Defendant/Appellee Chapel Valley Landscape Company ("CVLC"),[1] per its subcontract with Grunley, provided landscaping services for the Project. In the days leading up to the Collapse, CVLC had performed soil excavation work near the plaza area.

Appellants, at the time of the Collapse, resided together within the Watergate Complex, and parked their vehicle in the underground garage. Due to the Collapse,

[1] Pursuant to Appellate Rule 28(d), Appellees Grunley and CVLC, collectively, will be referred to herein, typically, as the "Contractors" for ease of reference.

they allegedly suffered damage to their automobile, certain personal property within the automobile, and a reduction in the size of their parking space when the damaged area of the garage was reconstructed. Appellants filed an insurance claim with their automobile insurer, Progressive, who paid them for the totaled automobile and associated rental car costs.

In 2018, Appellants filed suit in the Superior Court of the District of Columbia against the Contractors, seeking monetary compensation for each of the above categories of damage. The Contractors prevailed on a Motion for Partial Summary Judgment to eliminate the reduction in parking space damages due to a lack of proximate causation. The case then proceeded into a pretrial posture, during which the Contractors filed a motion *in limine* to preclude evidence at trial of citations from Washington, D.C.'s Department of Consumer and Regulatory Affairs ("DCRA") arising out of the Collapse on the basis of hearsay, jury confusion, and unfair prejudice. The trial court addressed this motion at a hearing, but did not issue a final Order.

Due to COVID-19 and the Superior Court's moratorium on jury trials, the case was delayed, and the trial court held a judicial mediation, prior to which the court welcomed the parties to submit additional filings. The Contractors submitted another Motion for Partial Summary judgment, this time regarding the Appellants' automobile claim, arguing that language in their automobile insurance policy

prevented them from keeping any recovery they may win at trial for these damages, because they signed over their rights to their insurer up to the amount paid out by the insurer, and the insurer had no additional rights to recover from the Contractors. The trial court granted this dispositive motion, as well, entering final judgment in the Contractors' favor and closing the case.

This appeal followed. Appellants present their arguments in four sections, but the Appellees submit that the appeal can most succinctly be addressed by resolving two questions related to the trial court's summary judgment rulings:

1. Whether the Superior Court erred in granting Appellees' Motion for Partial Summary Judgment regarding the automobile damages.

2. Whether the Superior Court erred in granting Appellees' Motion for Partial Summary Judgment regarding the damages related to a reduction in the size of their parking space.

For the following reasons, the answer to both questions is no.

STATEMENT OF FACTS[2]

This action arises out of a partial collapse of a plaza area and underground parking garage at the Watergate Complex in Washington, D.C. on May 1, 2015 (an

[2] While Appellants provided a "Statement of Facts and Procedural Context," *see* App'nts' Brief pp. 1-4, and claim to adopt it primarily from the Superior Court's Orders, their section is rife with editorializing that is not appropriate for a statement of facts. It also makes several incorrect claims, such as that DCRA retained an engineer who determined both Grunley and CVLC violated D.C. regulations. *Id.* at p. 2. Tellingly, Appellants do not provide a citation for this statement, *see id.*, and this claim is inaccurate and misleading. Appellees have attempted to keep their Statement of Facts as succinct and as on-topic to the issues on appeal as possible.

event previously defined above as the "Collapse"). App. 39-40. Grunley was the general contractor of a major renovation of the Watergate Hotel, which is next to a plaza that sits over a portion of an underground parking garage in the Watergate Complex. App. 40-41. CVLC was the landscaping subcontractor for this project, performing soil excavation work around the time of the Collapse. App. 40-41. After the Collapse, both entities received a Notice of Infraction from DCRA. App. 103-04, 107-08. Both filed timely answers with pleas of "Deny," and then settled the disputes without a hearing, resulting in a dismissal with prejudice of the charges. App. 107-08.

At the time of the Collapse, Appellants resided at 2150 Virginia Avenue NW, Washington, D.C. 20037, a cooperative apartment building within the Watergate Complex. App. 40. On March 15, 2018, Appellants filed a Complaint for negligence against the Contractors, alleging that they suffered damage in the Collapse. *See generally* App. 39-44. Appellants attached a Schedule A to their Complaint, itemizing $47,969.47 in damages, including: (1) loss or damage to their vehicle; (2) loss of 8 inches width of the parking space at the Watergate Complex; (3) cost of a rental vehicle; and (4) loss or damage to personal property. App. 44.

At the time of the Collapse, Appellants were insured by Progressive Direct Insurance Company ("Progressive") under policy number 36433545 (the "Policy"). App. 69-87. Appellants filed a claim with Progressive for the damage to their

vehicle and were paid $28,097.00 for this claim. App. 100. They also filed a claim with Progressive for the costs of a rental vehicle and Progressive paid $639.94 to Enterprise for this claim. App. 101. Other claims were denied. App'nts' Brief p. 3.

The Policy states:

> **We** [Progressive] 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. 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. If an insured person recovers from another without **our** written consent, the insured person's right to payment under any affected coverage will no longer exist.

App. 85 (bold text in original).

After paying out the Appellants' totaled vehicle claim and rental car claim, Progressive attempted to recoup its payment by pursuing the Contractors. For the consideration of $6,599.92, Progressive released all claims against AMCO Insurance Company – a Nationwide Insurance company and Appellee CVLC's insurer – relating to Appellants' automobile. App. 88. Progressive brought an arbitration claim through Arbitration Forums, Inc. against Travelers (Appellee

Grunley's insurer), where it was determined that Progressive proved no liability as to Travelers' insured, Grunley. App. 89-95.

Regarding the Mancusos' alleged reduction in the size of their parking space after the impacted area of the garage was rebuilt, neither Appellee Grunley nor Appellee CVLC had any involvement in the design or repair of the parking garage or the Mancusos' parking space. Similarly, neither Appellee had any input or supervision over the redesign or rebuilding of the parking garage. App. 96-98.

The Contractors, on December 23, 2019, filed a Motion for Partial Summary Judgment regarding the parking space reduction damages. App. 27. The trial court issued an Order granting this motion on February 14, 2020. App. 27-38.

The Contractors then filed a Consolidated Motion *in Limine* on June 24, 2020, which addressed the DCRA Infractions discussed above. App. 10. The trial court held a hearing on July 15, 2020, at which time the Court indicated it was leaning towards excluding the Notices of Infractions at the future trial, but reserved on issuing a final ruling until the time of the Pretrial Conference. App. 143-162.

Finally, on January 12, 2022, the Contractors filed a Motion for Partial Summary Judgment on the Mancusos' automobile claim. App. 14. The trial court issued an Order granting this motion on March 22, 2022 and closing the case. App. 17-24. Since judgment was entered in the Contractors' favor prior to the Pretrial Conference, the trial court never issued a ruling on the DCRA Notices of Infraction.

As no final Order in this matter was ever issued, the motion *in limine* is not ripe to be heard by this Court on this appeal.

STANDARD OF REVIEW

The District of Columbia Court of Appeals reviews grants of summary judgment de novo and applies the same standard as the trial court: a party is entitled to summary judgment "only upon demonstrating that 'no genuine issue of material fact remains for trial' and that judgment is warranted 'as a matter of law.'" *MobilizeGreen, Inc. v. Cmty. Found for the Cap. Region*, 267 A.3d 1019, 1024 (D.C. 2022) (quoting *Phenix-Georgetown, Inc. v. Charles H. Tompkins Co.*, 477 A.2d 215, 221 (D.C. 1984)). Accordingly, the Court will reverse a grant of summary judgment if, but only if, "the record would permit a reasonable fact-finder to properly render a verdict in the non-moving party's favor." *Id.*

While the ultimate holding is reviewed de novo, the trial court's factual findings are treated as presumptively correct unless clearly erroneous or without foundation in the record. *Lawlor v. D.C.*, 758 A.2d 964, 974 (D.C. 2000).

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *Stone v. Alexander*, 6 A.3d 847, 851 (D.C. 2010). The appellate court's role in reviewing the exercise of discretion "is supervisory in nature and deferential in attitude." *Id.* As such, even if the appellate court "find[s] error, [it] may find that

the fact of error in the trial court's determination caused no significant prejudice and hold, therefore, that reversal is not required." *Id.*

SUMMARY OF ARGUMENT

The Superior Court correctly granted the Contractors' Motion for Partial Summary Judgment regarding Appellants' automobile damages that were covered by insurance. The Policy clearly sets forth that Progressive is entitled to the rights of recovery to the extent of its payment. This renders Appellants' automobile claim a subrogation claim on behalf of their insurer. Progressive, moreover, settled with CVLC's insurer and released future claims against it, and lost at arbitration to Grunley's insurer. Since Appellants contracted their recovery rights for the automobile damages to Progressive, and Appellants' automobile claim extends only as far as the rights of Progressive – which has no remaining right to recover – Appellants have no viable claim for these damages against the Contractors.

Second, the Superior Court correctly granted the Contractors' Motion for Partial Summary Judgment regarding the damages alleged to be the result of a reduction in parking space size. It is uncontroverted that the Contractors had no involvement in, input on, or control over the reconstruction and reconfiguration of the garage or the re-sizing and re-painting of parking spaces. Even assuming the Contractors have any liability for the Collapse, which the Contractors deny, the decisions made in the reconstruction of the garage as to parking space size are wholly

separate from the alleged negligence, and constitute an unforeseeable, superseding, and intervening cause that severs liability for these claimed damages.

Finally, the Superior Court did not issue a final Order on Appellees' motion *in limine* to preclude admission of the DCRA Notices of Infraction. Since no final Order was issued, the motion *in limine* is not ripe to be before this Court. Even if this Court does determine that the trial court did make a ruling on the motion *in limine* and the issue is ripe, the trial court's decision should not be disturbed on appeal for numerous other reasons that will be discussed.

ARGUMENT

I. The Superior Court did not err in granting Appellees' Motion for Partial Summary Judgment on Appellants' automobile damages that were covered by insurance.

The Superior Court correctly ruled in the Contractors' favor that Appellants' automobile damages, which were covered and paid by insurance, are not recoverable as a matter of law in this litigation.

a. *The collateral source rule is inapplicable to the issues on appeal here, and Appellants' insistence on its application is misguided.*

Appellants spend significant time in their Argument section addressing the collateral source doctrine. *See, e.g.*, App'nts' Brief pp. 7-10, 14-15. Indeed, Appellants go so far as to claim that the trial court "abrogated" the collateral source rule. *Id.* at p. 15. But, as the trial court properly noted, *see* App. 21, the issue presented in this case does not implicate the collateral source doctrine. Specifically,

the court correctly stated that the collateral source rule does not apply where a litigant has agreed to remit damages to its insurer. App. 21 (citing *Designers of Georgetown, Inc. v. E.C. Keys & Sons*, 436 A.2d 1280, 1282 (D.C. 1981)).

In *Designers*, the appellee Keys was found liable at trial for negligently pumping fuel oil into the basement of appellant Designers' store. 436 A.2d at 1281. Designers, on appeal, challenged the trial court's calculation of damages. *Id.* One issue raised by Designers was that the trial court impermissibly subtracted from its award an amount paid to Designers by its insurer for business interruption. *Id.* at 1282. This Court disagreed with Designers, noting that Designers' insurance policy had a standard subrogation clause whereby Designers surrendered to its insurer all rights it might have exercised against Keys with respect to the amounts paid by the insurer. *Id.* Designers argued that the collateral source rule should allow it to maintain an action for those damages, but this Court held that "[s]ince Designers has sacrificed its rights to that portion of its damages to [its insurer], the collateral source rule plainly does not apply." *Id.*

This is precisely what occurred with the Mancusos and Progressive in the subject matter. While they refuse to call it a subrogation clause, Appellants acknowledge that the clause in their contract with Progressive has the same effect as a subrogation clause, as they acknowledge their obligation to remit any recovery of monies they received from third parties for their totaled vehicle to Progressive, up

to the amount paid out by Progressive. *See* App'nts' Brief pp. 11-12. Since Progressive paid Appellants the amount they now claim in the instant litigation, Appellants are not entitled to retain any of the money they might recover in the instant action. The issue is not whether Appellants are legally allowed to file a lawsuit against the Contractors for these damages. Instead, the issue is whether, as a matter of law, there can be a recovery from the Contractors for these damages. Therefore, Appellants' insistence that the collateral source rule is somehow applicable or dispositive here is misguided.

b. The trial court correctly ruled that the Appellants' insurance contract with Progressive contains a subrogation clause that requires Appellants to reimburse Progressive to the extent of any payment made to them by Progressive.

By focusing on the collateral source rule, Appellants convolute what the Contractors' actual argument is on why their automobile claim is barred as a matter of law. The Contractors' overarching position is that due to the unique circumstances of this case, and the unique language in the Policy, Appellants cannot make a recovery against the Contractors. Indeed, the Contractors' argument is based on the plain language of the Policy, which reads:

> **We** [Progressive] 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. 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. If an insured person recovers from another without **our** written consent, the insured person's right to payment under any affected coverage will no longer exist.

App. 85 (bold text in original).

The Policy plainly states that while Progressive has the right to pursue recovery (and the insured person is required to cooperate in the exercise of that right), the Policy does not prohibit the insured person from seeking damages on their own. App. 85. The Policy, though, requires that if the insured person makes a recovery from another, the insured person must hold any recovery in trust for Progressive and reimburse it to Progressive to the extent of Progressive's payment. App. 85. Under the terms of the Policy, then, the Appellants were free to pursue third parties for damages sustained, but if Progressive made a payment to them for the same loss, Appellants assigned their rights of recovery to Progressive up to the amount of the payment made by Progressive. App. 85-86.

As the Court noted in its March 22, 2022 Order granting judgment in favor of the Contractors, Appellants' Policy with Progressive "expressly provides *more than just reimbursement* to Progressive of any amount recovered by Plaintiffs, it entitles Progressive to the underlying '***right***' that Plaintiffs have to recover damages to begin with." App. 19 (emphasis added). The Court correctly identified this to be a

subrogation clause,[3] vesting Progressive with all of Appellants' rights vis-à-vis the monies Progressive paid to Appellants for their totaled vehicle. As the trial court rightly opined, "the only reasonable interpretation of this language is to conclude that Progressive stands in the shoes of Plaintiffs with respect to their claims against the Defendants here." App. 19.

The clause cited above sets forth the rights and obligations of the parties should the insured obtain recovery directly from a third party ("the amount recovered *will* be held by the insured person in trust for **us** and *reimbursed to **us** to the extent of **our** payment*"). App. 85 (italics added). In the underlying lawsuit, Appellants' claim against the Contractors for damages for the totaled vehicle is identical to the claim for the vehicle paid to Appellants by Progressive.[4] While typically a plaintiff could make a claim to recover these damages from a tortfeasor pursuant to the collateral source rule, the Policy is clear that Appellants would owe the money to Progressive. Plainly, Appellants' claim is a subrogation claim on behalf of Progressive, and, as will be discussed, because Progressive has no right to recover

[3] Appellants in fact acknowledge the subrogation clause contained in the policy. App'nts' Brief pp. 11, 16.

[4] *See* App. 44 (Schedule A to Complaint claiming $29,097.04 for Mercedes Benz C300); App. 100 (Advice for Payment listing payment amount of $28,097.00 for Mercedes Benz C300, with a deductible of $1,000).

from either Appellee, Appellants cannot maintain their automobile damage claim against the Contractors.

c. The trial court correctly ruled that Progressive has no right to recover from Appellees, thus extinguishing Appellants' subrogation claim against Appellees for the automobile damages paid by Progressive.

The Superior Court correctly concluded that the plain language of the Policy bars Appellants' claim for their automobile damages against the Contractors, because Appellants are mandated to reimburse Progressive if Appellants recover from Appellees, but Progressive has no legal claim to the money. The reasons that Progressive's claim to the money is barred as a matter of law are that: (i) Appellee CVLC's insurer reached an agreement with Progressive whereby Progressive released CVLC's insurer from all claims relating to loss or damage to Appellants' vehicle in the Collapse (App. 88); and (ii) Progressive arbitrated with Appellee Grunley's insurer, and lost, precluding any additional claim by Progressive on *res judicata* grounds (App. 89-95).[5]

[5] Appellants do not advance any substantive argument in their brief that Progressive's release of Appellee CVLC's insurer or Progressive's loss at arbitration to Appellee Grunley's insurer should **not** act as a bar to Progressive's recovery against the Appellees. As such, the Contractors will not reassert their arguments herein, but adopt and incorporate by reference the arguments made on these points in Defendants' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment on Plaintiffs' Automobile Damages, filed January 12, 2022, pp. 2-13, and the Reply in Support thereof filed on February 15, 2022.

As the trial court noted, "contractual agreements should be interpreted in a sensible manner" and "should receive sensible and reasonable construction and no such construction as will lead to absurd consequences or unjust results." App. 20 (citations omitted). The trial court correctly determined that it certainly would be an absurd result to allow Appellants to proceed to trial, recover money for their damaged automobile, hold it in trust for Progressive, and then reimburse Progressive, who would then have to return the money to the Appellees. App. 20. Despite Appellants' clear intention to make a double recovery and keep the money owed to Progressive for themselves, the trial court was correct in noting that the reimbursement language in the Policy is mandatory. App. 20 at Footnote 2. The Policy cannot be enforced pursuant to its plain language and intended meaning if Appellants are permitted to keep any damage award for their vehicle that they may win at trial.

The best, simplest, and most equitable result – as identified by the trial court – is to bar the claim as a matter of law. Appellants have been made whole by Progressive for the totaled vehicle. Progressive then attempted to recoup its payments from the Contractors, and was able to settle with Appellee CVLC's insurer to obtain reimbursement for some of its payment, but lost at arbitration with Appellee Grunley's insurer. Appellants' insistence on further litigation on claims

that have already been resolved is a transparent attempt to make a double recovery that should be rejected.

Simply put, Appellants must, per the Policy, reimburse Progressive for any damages Appellants would be awarded at trial for their motor vehicle, but because Appellants' claim is a subrogation claim, their rights only extend as far as Progressive's. Progressive has no legal right to recover monies from Appellee CVLC due to release, or from Appellee Grunley due to *res judicata*. The trial court was correct in ruling that this is the only sensible outcome under these circumstances, and to determine otherwise would lead to a frustration of the intent of the Policy and additional absurd results.

d. Appellants' scattershot identification of and argument on additional "errors" made by the trial court must be rejected.

Finally, the Contractors will address several purported "errors" identified by Appellants that relate to the issues discussed above. App'nts' Brief pp. 13-14. First, Appellants imply that the trial court improperly made a ruling on the Policy when Progressive was not a party to the case. *Id.* at p. 13. However, Appellants cite no authority for the proposition that Progressive is required to be a party to this litigation for the Court to make rulings on the effect the Policy has on the instant litigation. If Appellants believed Progressive was a necessary party, they had several years to bring Progressive into the case. Similarly, Appellants cite to no authority that the trial court did not have the power to make a ruling regarding the Policy without

Progressive being present. The Policy clearly is relevant to the respective rights and obligations of Appellants vis-à-vis their claim for the totaled vehicle.

Next, Appellants seemingly argue that the trial court's ruling was in error because it somehow deprived them of a possible recovery in excess of the damaged vehicle, or that the payment made by Appellee CVLC's insurer would act as a credit in their favor. App'nts Brief pp. 13-14. As discussed above and set forth in Footnote 4, Appellants are making an identical claim for the vehicle damage against the Contractors as they made to Progressive pursuant to their Policy. Appellants' claim that they were somehow deprived of any excess amount is unsupported by the factual record. It is not clear what excess recovery Appellants believe they are entitled to, but they intimate that the reduction in parking space damages (discussed in Argument § II, *infra*) would somehow be factored in to these available excess damages. *See* App'nts' Brief p. 14, Footnote 5. The parking space reduction damages are wholly unrelated to the subrogation issue discussed in this section, as they were uninsured damages, and were excluded via summary judgment by the trial court in an earlier, unrelated ruling.

Appellants, moreover, cite no authority for their apparent position that any money Progressive received from one of the Contractors' insurers should have acted as a credit to their benefit. *Id.* at pp. 14-15. Indeed, the plain language of the Policy states that when "an insured person has been paid by us and also recovers from

another, the amount recovered…will be reimbursed to us to the extent of our payment." App. 85. The Policy therefore does not put a limit on what the insured must reimburse to Progressive or grant the insured a credit against anything Progressive may receive from another party – the insured must reimburse Progressive fully from its proceeds from a third party, up to the amount Progressive paid to the insured.[6]

Finally, on this last point, Appellants argue that "[n]o 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." App'nts' Brief p. 17. This is not the case. Pursuant to the Policy, it is clear that Progressive is entitled to any damages Appellants would recover at trial for their damaged automobile to the extent of its payment. If Appellants recovered for the vehicle the full amount that Progressive paid, they would owe Progressive that full amount. If they only recovered $10,000 for the totaled vehicle, for example, they would owe it all to Progressive, as it is less than the full amount. A trial does not need to occur for this to be established or known – it is clear from the plain language of the Policy.

[6] Appellants' "Error No. 3" essentially mirrors the initial two "errors" identified by Appellants, and thus fails for the same reasons. App'nts' Brief p. 14. "Error No. 4" focuses on the collateral source rule, *id.* at pp. 14-15, which has already been addressed by the Contractors in this brief.

For these reasons, Appellees respectfully submit that this Honorable Court must affirm the trial court's ruling on Appellees' Motion for Partial Summary Judgment as to Appellants' automobile damages that were covered by insurance.

II. The Superior Court did not err in granting Appellees' Joint Motion for Partial Summary Judgment on Appellants' damages related to a reduction in the size of their parking space.

a. The Collapse was not a proximate cause of the Appellants' reduction in size of their parking space and the damages allegedly resulting therefrom.

The Superior Court correctly ruled in the Contractors' favor that the Mancusos' claimed damages for the alleged 8-inch reduction in their parking space after the garage was reconstructed fails as a matter of law. This issue comes down to a question of law applied to the undisputed facts presented in the record. The Mancusos' basic position is that the Collapse destroyed part of the garage, including their parking space. During the repairs, the size of their rebuilt parking space was reduced by a total of eight inches. Since the Contractors caused the Collapse, the Mancusos argue, the Contractors must be responsible for this change in their parking space.

The Contractors' position, supported by the law and the facts (including uncontroverted affidavits), is that even assuming they caused the Collapse, which the Contractors deny, neither entity was involved in or had control over the reconstruction of the garage in general or any decision regarding the Mancusos'

parking space specifically, and thus cannot be held liable for these damages. Moreover, the loss of eight inches to the Mancusos' parking space was not a natural, probable, or foreseeable consequence of the Collapse.

In the District of Columbia, proximate cause is "that cause which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Powell v. D.C.*, 634 A.2d 403, 407 (D.C. 1993). An intervening negligent act breaks the chain of causation if it is not foreseeable. *See id.* The injury must be the "natural and probable consequence of the negligent or wrongful act, and ought to have been foreseen in the light of the attending circumstances." *Wagshal v. D.C.*, 216 A.2d 172, 175 (D.C 1966).

Proximate cause has two components: "cause-in-fact" and a "policy element[.]" *D.C. v. Carlson*, 793 A.2d 1285, 1288 (D.C. 2002). The "cause-in-fact" element requires that the defendant's negligent act or omission is the "substantial factor" of the plaintiff's injury. *Id.* The term "substantial" is used to "denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable persons to regard it as a cause." *Butts v. U.S.*, 822 A.2d 407, 417 (D.C. 2003) (quoting Res't (2d) Torts § 431, cmt. a (1965) (cleaned up)).

The "policy element" of proximate cause includes various factors that relieve a defendant of liability even when his actions were the cause-in-fact of the injury.

The Court has held that a defendant "may not be held liable for harm actually caused where the chain of events leading to the injury appears highly extraordinary in retrospect." *Morgan v. D.C.*, 468 A.2d 1306, 1318 (D.C. 1983). Further, proximate cause is the test of whether the injury is the natural and probable consequence of the negligent or wrongful act and ought to be foreseen in light of the circumstances. *See Dunn v. Marsh*, 393 F.2d 354, 357 (D.C. Cir. 1968); *Spar v. Obwoya*, 369 A.2d 173, 178 (D.C. 1977). If, after the initial negligent act, there is an intervening act that could not have been reasonably anticipated, the plaintiff may not look beyond the intervening act for his recovery. *McKethean v. WMATA*, 588 A.2d 708, 717-18 (D.C. 1991); *St. Paul Fire & Marine Ins. v. James G. Davis Constr. Corp.*, 350 A.2d 751, 752 (D.C. 1976).

In *St. Paul Fire*, a building was undergoing a remodeling, which led to the accumulation of paper, wood, and other building materials in an alley near an adjacent art shop. 350 A.2d at 752. The debris caught fire one night and caused damage to the art dealer's store and his merchandise. *Id.* The sole evidence offered at trial suggested that the fire was intentionally set by an unknown arsonist, and nothing contained in the debris itself was highly flammable or caused spontaneous combustion. *Id.* The art dealer sued Davis, the remodeling company, and Davis prevailed on a motion for directed verdict. *Id.* This Court affirmed the trial court, holding that the plaintiff failed to carry his burden on proximate causation. *Id.* at

753-54. Even assuming any negligence by the defendant in piling the debris, the intentional or negligent setting of the fire by an unknown, intervening actor severed liability for Davis because it was not reasonably foreseeable. *Id.*

Similarly, in *McKethean*, seven people died and two were injured when a driver, who was speeding on the wrong side of the road while intoxicated on drugs and alcohol, struck the victims at a bus stop. 588 A.2d at 710. The District of Columbia was named as a defendant based on allegations that the bus stop was negligently located and maintained. *Id.* at 710-11. The District succeeded on summary judgment for multiple reasons, including that the driver's criminal conduct was an unforeseeable intervening cause of the accident. *Id.* at 711.

On appeal, this Court affirmed the trial court's ruling as to the District, asserting that it could not have reasonably anticipated that the purportedly defective median at the subject bus stop "would cause the accident in the ***precise*** manner in which it occurred–through the criminal conduct of an impaired driver speeding down the wrong lane of traffic." *Id.* at 716-17 (emphasis added). The driver's intervening actions were not foreseeable and highly extraordinary in retrospect, severing any liability the District could have had for any underlying negligence. *Id.*

Another illustrative case can be found in the sister jurisdiction of Iowa. In *Virden v. Betts and Beer Constr. Co.*, 656 N.W.2d 805, 806 (Iowa 2003), a maintenance worker at a school was reinstalling an angle iron that had fallen from a

ceiling. In the process, the worker fell from his ladder and suffered injuries to his leg. *Id.* The worker then sued the builders who had previously installed the ceiling. *Id.* The trial court granted the builders' summary judgment motion, determining that their negligence, if any, was not the proximate cause of the injuries. *Id.*

Iowa's intermediate appellate court, the Court of Appeals, reversed the trial court, but the Supreme Court of Iowa vacated the intermediary appellate decision and affirmed the trial court. *Id.* In so doing, the high court conceded that the builders' failure to properly secure the angle iron posed a risk of serious harm to those using the room, and the fact that it fell likely meant the contractors were negligent. *Id.* at 808. The high court continued that, in viewing the facts in the light most favorable to the injured worker, he would survive but-for causation because if it were not for the faulty welding of the angle iron to the ceiling, he would not have been on top of the ladder attempting to fix it. *Id.*

However, his claim did not survive the second part of the proximate cause inquiry: proof that the negligence of the builders was a substantial factor in bringing about his injury. *Id.* This was because the plaintiff was not injured by the angle iron; instead, by his own admission, he was injured when the ladder he was standing on kicked out from under him. *Id.* As such, the builders' role in the "mishap [w]as remote rather than foreseeable." *Id.* The builders' duty to construct a proper ceiling does not extend to protecting "repairmen from perching on tall ladders" to fix that

ceiling. *Id.* at 809. The instrumentality causing the injury was the tipping ladder, not the defective angle iron. *Id.* at 808-09 (citing Res't (2d) Torts § 430 cmt. a) (where "the negligence of the act consists in its recognizable tendency to subject another to a particular hazard, the actor cannot be subject to liability for any harm occurring otherwise than by the other's exposure to that hazard").

The Supreme Court of Iowa also found support in one of its recent decisions, where it asserted:

> An injury that is the *natural* and *probable* consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen or reasonably anticipated as the *probable* result of an act of negligence is not actionable and such an act is either the remote cause, or no cause whatever, of the injury.

Virden, 656 N.W.2d at 808 (quoting *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 568-69 (Iowa 1997) (other citation omitted) (emphasis in original).

In sum, the worker falling off the ladder did not "fall naturally within the scope of the probable risk created by the defendants' failure to properly install the ceiling." *Virden*, 656 N.W.2d at 809. It therefore was not a reasonably foreseeable or probable consequence of *defendants'* negligence." *Id.* (emphasis in original).

Viewing the facts in the light most favorable to the Mancusos, they may have a case for but-for causation, *i.e.*, the Contractors caused the Collapse, and if the Collapse did not occur, they would still have the same parking space they had prior

to the Collapse. However, their claim fails as a matter of law on the proximate cause prong. In order to be a legal cause of a harm, it is not enough that the harm would not have occurred but for the negligence. Res't (2d) Torts § 431 cmt. a. In other words, the underlying negligence must be a cause of the harm in more than a "philosophic sense," meaning that while every event theoretically can be traced back to other preceding events, "the effect of many of them is so insignificant that no ordinary mind would think of them as causes." *Id.*

As established by uncontroverted affidavits, the Contractors did not redesign the garage after the Collapse. App. 96-98. The formulation of and responsibility for the decisions made in the redesign falls on the owners, architects, designers and engineers who, without input or participation of the Contractors, elected, for whatever reason, to do so in a way that allegedly led to the reduction in the size of the subject parking space. The record is absent of any explanation for why these persons or entities made the decisions that they did. The planning, design, and reconstruction that necessarily went into rebuilding the damaged garage were intervening acts that sever the causal connection between the Contractors' alleged negligence and the damages for which the Mancusos seek compensation. While the garage redesign was not a criminal act, the analysis is substantially similar to that in *St. Paul Fire* and *McKeathan*, discussed above.

Moreover, the Mancusos adduced no evidence in discovery and cite to no evidence in the record that those who did redesign the garage had no choice but to make their parking space smaller. There, similarly, is no evidence that the happening of the Collapse somehow forced the garage to be redesigned in a certain way that negatively affected the Mancusos. As stated, proximate cause requires that the injury be a natural and ***probable*** consequence of the negligence and is foreseeable in light of the circumstances. *See Dunn*, *supra*, 393 F.2d at 357; *Spar*, *supra*, 369 A.2d at 178. While common sense dictates that it is natural and probable that the Mancusos could have lost the use of their space for a certain amount of time during make-safe and reconstruction, they have not cited to anything in the record to support that it was natural and probable they would lose eight inches of the size in their parking space during reconstruction.

They also do not set forth any evidence of whether all parking spaces in the garage were reduced, or just some spaces, or just theirs, and why exactly theirs was reduced. They had the chance in discovery to subpoena records from or depose any person or entity affiliated with the reconstruction to attempt to answer these questions and develop evidence on why their parking space was impacted, but they did not. Discovery has long been closed, so if the case is remanded on this issue, Appellants will not obtain any new evidence that could possibly support their proximate causation argument.

The Mancusos point to Restatement (Second) of Torts § 443 as the best support for their position, arguing that the Contractors were a substantial factor in bringing about the harm, and the rebuilding of the garage is a "normal" consequence of the Collapse. *See* App'nts' Brief pp. 20-21. They similarly argue that it was foreseeable that the garage would not be recreated as a perfect replica. *Id.* at p. 20.[7] However, these arguments are easily distinguished because the Mancusos are attempting to equate their discrete, eight-inch loss of size in their space to the reconstruction of the garage as a whole.

The *Virden* case from Iowa discussed above is directly on point here. There, but for the contractors' negligence, the maintenance worker would not have been on a ladder fixing their faulty work. *Virden*, *supra*, 656 N.W.2d at 808-09. However, the legal cause of his injury was that he fell off his ladder, not that the defective angle iron fell on him. *Id.* Here, while the Contractors may have a duty to safely conduct construction operations, and may be liable for any harm that is the natural and probable result of negligence during those operations, the re-sizing and re-painting

[7] The Mancusos also dedicate the majority of their space in this section to a high-concept discussion of the duty to mitigate damages. *Id.* at pp. 17-20. Candidly, Appellees are not entirely sure what the Mancusos are attempting to argue on this point, but Appellees are not arguing, and have never argued, that the Mancusos should have done something to prevent or avoid the Collapse. The Mancusos seem to argue that they, as the injured parties, became responsible for restoration of the garage, *see* App'nts' Brief pp. 19-20, but they cite to no factual support for this proposition, and Appellees fail to see how this is relevant to the issue presented.

of parking spaces that led to a reduction of eight inches in the Mancusos' space is not a probable result of those construction operations, and is not within the sphere of particular harms to which the construction operations exposed others. *See* Res't (2d) Torts § 430 cmt. a, c.

The Contractors do not dispute that post-Collapse, it would be expected, and thus not extraordinary, to reconstruct the garage. But it is not reasonably foreseeable and could not have been anticipated that when the Contractors were conducting construction operations above or near an underground parking garage, and those activities allegedly posed a risk of the Collapse, the Mancusos would lose eight inches of a parking space when the garage was reconstructed, especially when the Contractors had no control over the reconfiguration of the garage as a whole or the parking spaces specifically. Put another way, the ***precise*** nature of the resulting harm – the hyper-specific claim of a loss of eight inches to an individual parking space – could not have been reasonably anticipated. *See McKethean*, *supra*, 588 A.2d at 716-17. On this record, any issue that the Mancusos have with respect to such loss of space would lie with those responsible for rebuilding the garage and for changing the layout spaces, which, indisputably, were not the Contractors.

Simply put, the redesign and reconfiguration of the garage is an intervening, superseding cause breaking the chain of causation from those who caused the Collapse (alleged here to be the Contractors) and the alleged parking space damages.

While reconstruction in general may be expected after a collapse event, the individual, hyper-specific impact the redesign (over which the Contractors had no control) purportedly had on the Mancusos is not a probable or foreseeable result.

b. Even if the trial court was incorrect on the law regarding proximate cause, the Mancusos lack the requisite expert witness testimony to present the reduced parking space size damages to a jury.

For another compelling reason, even assuming *arguendo* the trial court erred on the law, this Court still should not reverse and remand because the Mancusos did not identify any experts who are qualified to opine on the value of the loss of eight inches to their parking space.

As this Court has explained, "some issues necessarily 'require scientific or specialized knowledge or experience in order to be properly understood, and . . . cannot be determined intelligently merely from the deductions made and inferences drawn on the basis of ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life.'" *Lowrey v. Glassman*, 908 A.2d 30, 36 (D.C. 2006) (quoting *McNeil Pharmaceutical v. Hawkins*, 686 A.2d 567, 582 (D.C.1996)).

It is well-settled that the measure of damages for injury to property is repair costs if the property can be restored, or loss of fair market value if the property cannot be restored. *Wentworth v. Air Line Pilots Ass'n*, 336 A.2d 542, 543-44 (D.C. 1975). This Court has stated that while it is true "[t]he owner of . . . land . . . is generally held to be qualified to express his opinion of its value merely by virtue of

his ownership," the owner may "not testify as to the link between any alleged actions of the Defendants and the change in value," where the "link" requires specialized knowledge or experience. *Lowrey*, 908 A.2d at 37 (citations omitted); *see Johnston v. Hundley*, 987 A.2d 1123, 1130 n.11 (D.C. 2010) (explaining that, "where a special expertise is required to estimate the value, testimony respecting the owner's opinion, without more, does not provide an adequate basis for a reasonable estimate of value.") (citation omitted) (cleaned up).

In *Lowrey*, the plaintiff claimed his property lost value because the neighboring veterinary clinic reconfigured its parking lot such that it "increased the level of noise, pollution, and physical disturbance around his home, thereby creating a private nuisance." *Id.* at 32. This Court held that the plaintiff was not qualified to testify on the subject of nuisance, which requires specialized knowledge. *Id.* at 37. Therefore, the Court affirmed the entry of summary judgment in favor of the defendants based on the plaintiff's failure to identify appraisal and engineering experts, among others. *Id.*

The Mancusos claim that the reduced size of their parking space is worth $15,000. App. 44. The Mancusos make no assertion that property could be or should be restored, which necessarily means that recovery for these damages would have to be based on actual loss of market value. *Wentworth*, *supra*, 336 A.2d at 543-44. In order for the Mancusos to prove that they suffered harm as a result of having a

smaller parking space, they would need to present admissible evidence of the value of the parking space pre- and post-collapse. Here, as in *Lowrey*, the link between the Contractors' actions and the alleged diminution in value requires expert testimony. The Mancusos themselves, though, do not have the requisite specialized knowledge or skill in parking garage reconstruction, structural engineering, property management, real property appraisal, or any other relevant field to testify as to such loss of value. *See Johnston, supra*, 987 A.2d at 1130 n.11; *see also Romer v. D.C.*, 449 A.2d 1097, 1100 (D.C. 1982) (stating that while "damages are not required to be prove with mathematical certainty, there must be some reasonable basis on which to estimate damages") (citations omitted).

Accordingly, while the trial court did not factor this issue into its summary judgment ruling, *see* App. 35 at Footnote 1, it provides another basis for this Court affirming the trial court's ruling. *See Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 559-60 (D.C. 2001) (stating that an "appellate court has discretion to uphold a summary judgment under a legal theory different from that applied by the trial court, and rest affirmance on any ground that it finds support in the record….") (citation omitted) (internal quotation marks omitted). Even assuming that the trial court was wrong on the law regarding proximate causation, it would be fruitless to remand on this issue because Appellants do not have the requisite expert testimony or evidence to present this claim to a jury.

c. Public policy favors limiting liability for mere negligent acts when the tortfeasors are not responsible for the injured party's economic expectations and not in a special relationship with the injured party.

Finally, the Contractors submit that this category of damages also may be barred as a matter of law by the economic loss doctrine, which this Court adopted in *Aguilar v. RP MRP Wash. Harbour, LLC*, 98 A.3d 979 (D.C. 2014). While not perfectly analogous, because the matter *sub judice* did involve some property damage allegedly suffered by Appellants, the rationale of *Aguilar* nonetheless should apply with full force under these facts.

Aguilar involved a negligence claim against the owners and managers of a waterfront retail complex by employees of various businesses within the complex after the adjacent Potomac River surged, causing "ten to twelve feet of water [to] flood the ground-level businesses." *Id.* The employees alleged that the defendants negligently failed to raise the flood walls during the surge, causing them to suffer lost wages as their businesses were forced to close for several weeks in some cases. *Id.* at 981.

The *Aguilar* Court explained that, "under the 'economic loss' rule, a plaintiff who suffers only a pecuniary injury as a result of the conduct of another cannot recover those losses in tort." *Id.* at 982 (quoting *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 479 (9th Cir. 1995)). The test is not foreseeability of the harm, but whether public policy favors providing a remedy to everyone who is harmed versus

enforcing a cut-off for tort liability which, if unchecked, would be virtually limitless. *See Aguilar*, 98 A.3d 982-83. The rationale underlying the rule is that

> a line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit, and a recognition that legal liability does not always extend to all of the foreseeable consequences of an accident. More importantly, as a matter of longstanding policy in courts around the country, where pure economic loss is at issue, not connected with any injury to one's body or property, the reach of legal liability is quite limited.

Id. at 983 (internal citations, brackets, and quotations omitted).

In ultimately affirming the trial court's grant of a motion to dismiss and holding that the employees could not make a purely economic damage claim against the owner of the commercial property, this Court emphasized the existence of "strong public policy considerations against imposing virtually infinite liability for conduct that is merely negligent." *Id.* at 983-86 (citations omitted) (internal quotations omitted).

Turning to the matter at hand, Appellants seemingly conjure their parking space damage valuation of $15,000 out of thin air. In Schedule A to the Complaint, they state that the loss of width "now precludes most full size and larger passenger cars, SUVs, Minivan's [sic] and larger because of the reduced turning ratio." App. 44. Yet, as mentioned, they have no expert witness testimony or other evidence to support this figure. While the Mancusos' parking space damages are tangentially

linked to property damage caused by the Collapse (*i.e.*, the Collapse necessitated reconstruction, which allegedly impacted their space), their unsupported valuation of $15,000 based on an apparent inability to fit certain cars into the space presents as a purely economic loss, as it is not based on any evidence of actual cost of repair or loss of fair market value.[8] *See Wentworth*, *supra*, 336 A.2d at 543-44.

Appellants' parking space reduction damages therefore may properly be treated as purely economic damages. Based on the rationale in *Aguilar*, then, Appellants should address their parking space grievance with their apartment's property management, or with the entities that actually redesigned and reconstructed the garage. Just as in *Aguilar* where the employees who claimed lost wages were in a direct relationship with their employers, not with the commercial landowner who was leasing the commercial space to the employers, 98 A.3d at 985, the Mancusos are not in a special relationship with the Contractors that would make the Contractors responsible for the Mancusos' specific parking space. The Contractors' only connection to the Mancusos is that they were performing construction operations near the garage in which the Mancusos parked their car. Even if the Contractors are responsible for the Collapse, which they deny, this does not create a special

[8] In fact, in opposing this summary judgment motion, the Mancusos attempted to rebrand this category of damage as not property damage but instead a loss of use of the space, *i.e.*, an inability to park their vehicle. App. 35. The trial court rejected this re-categorization of the damages because it was pled in the Complaint as purely a loss in size of the space, not a loss of use of the space. App. 35.

relationship whereby the Contractors became responsible for every future action that occurs related to the Mancusos' parking space.

Indeed, Appellants' logic behind their parking' space reduction claim would lead to absurd results if allowed to proceed. For example, if the owner of the garage suffered a loss of income from the Collapse due to tenants vacating, resulting in a loss of garage revenue, and then decided to increase parking rates, Appellants could try to justify a claim against the Contractors to compensate them for this increase in monthly parking expenses because the Collapse set these events in motion. Extending this out further, office workers who had to evacuate adjacent buildings or commuters who missed time from work due to traffic jams caused by the Collapse could make a claim against the Contractors for loss of income.

This is exactly what the economic loss doctrine is intended to prevent. The law is not intended to compensate injuries that, even if foreseeable in some way, are attenuated from the initial event and disconnected by unrelated intervening acts, or that are not directly linked to property damage. Otherwise, the potential for liability would be virtually infinite, and persons and entities who cause property damage by simple negligence would be at the mercy of the imagination of inventive lawyers seeking to create new causes of action and theories of liability that have a tenuous factual basis but technically would be permitted if there is no limit to potential culpability for basic negligence.

Simply put, Appellants' claim, if allowed to proceed, sets a dangerous precedent for construction contractors who could face virtually infinite liability from individuals and businesses who happen to be near construction sites, and it would fly in the face of the public policy favoring limitation of liability for merely negligent conduct.

For these reasons, Grunley and CVLC respectfully submit that this Honorable Court must affirm the trial court's ruling on their Motion for Partial Summary Judgment as to the Mancusos' alleged damages relating to a reduction in the size of their parking space.

III. The Superior Court did not issue a final Order on Appellees' Motions *in Limine* regarding DCRA Notices of Infractions, but even if it did, its decision should not be disturbed on appeal.

After the Collapse, both Appellees Grunley and CVLC received Notices of Infractions from DCRA. App. 103-04, 107-08. The Contractors then denied the charges against them, and both were dismissed with prejudice prior to the scheduled hearing after all issues were settled. App. 107-08. During the subject lawsuit, the Contractors filed a joint motion *in limine* to exclude evidence of these Notices of Infraction. *See* Defendants' Opposed Consolidated Motions *in Limine*, filed June 24, 2020, pp. 5-8. The trial court addressed the motion regarding DCRA at a hearing, and indicated that such evidence would invade the province of the jury because it would present to the jury a final conclusion of a violation, without giving the jury

the full context, and thus risk jury confusion. App. 149-53, 157-58. However, the trial court never issued a final ruling regarding this motion *in limine*.

As the Contractors set forth above, the Superior Court was correct as a matter of law on its rulings on the dispositive motions and in entering judgment in the Contractors' favor. Any issue presented by the Mancusos regarding a motion *in limine* therefore is moot, because this matter should not be remanded for a trial, and judgment for the Contractors should be affirmed.

To the extent this Court is inclined to reverse the trial court on the summary judgment motions, and determines the trial court did make a final ruling on the DCRA motion *in limine*, the Contractors note that rulings on evidentiary issues are reviewed on appeal for abuse of discretion. *Stone*, *supra*, 6 A.3d at 851. The Mancusos, however, only attempt to rehash the legal arguments purportedly supporting their position rather than argue the trial court actually abused its discretion. *See* App'nts Brief pp. 21-24. Indeed, the Mancusos' Standard of Review section does not contain any reference to an abuse of discretion standard. *Id.* at p. 6. Since Appellants make no demonstration of – and indeed make no attempt at a demonstration of – an abuse of discretion, their argument should be rejected outright.

Next, if the trial court did rule on the motion *in limine* in Appellees' favor, the trial court was correct on the law and certainly did not abuse its discretion. *See Duk Hea Oh v. Nat'l Capital Revitalization Corp.*, 7 A.3d 997, 1010-11 (D.C. 2010)

(discussing a trial court's large discretion to exclude evidence that is unfairly prejudicial or involves confusion of the issues). However, the Contractors will not dedicate time or space in this brief to re-argue the legal principles supporting the exclusion of this evidence. This is because Appellants' argument on this issue can be rejected for a simpler reason: the appeal of a motion *in limine* prior to trial is premature.

This Court has stated that: "Rulings on motions *in limine* normally are considered provisional, in the sense that the trial court may revisit its pre-trial evidentiary rulings." *Jung v. George Wash. Univ.*, 875 A.2d 95, 102-03 (D.C. 2005). Importantly, this Court, when finding support for treating motions *in limine* as interlocutory orders in courts across the country, specifically cited to *State v. Cole*, 71 S.W.3d 163, 175 (Mo. 2002) (en banc), where the Supreme Court of Missouri held that a ruling *in limine* is interlocutory, subject to change during trial, and thus requires an attempt to present the evidence in question to preserve the issue for appeal.

Since a trial never occurred in this matter due to the summary judgment orders in Appellees favor, the Mancusos never attempted to present the DCRA evidence at trial. This issue therefore is not ripe for appeal. As recognized in *Jung* and the cases it cites, the trial court, even if it grants or denies a motion *in limine* prior to trial, is welcome to reconsider its ruling and indeed may be "bound to consider the issue

anew in light of the evidence presented at trial." 875 A.2d at 105; *see also* D.C. Code § 11-721 (stating that the Court of Appeals has jurisdiction over final orders and judgments, as well as listing several exceptions for certain interlocutory orders of the Superior Court, none of which apply here); D.C. Super. Ct. Civ. R. 54(b) (stating that any order or decision that does not adjudicate all of the claims in the case does not end the case and may be revised at any time before the entry of a final judgment). The Mancusos' appeal of a discrete evidentiary issue presented in a motion *in limine* is therefore premature, at best.

For a related reason, even assuming *arguendo* the trial court abused its discretion by ruling in Appellees' favor on this issue, there was no prejudice to the Mancusos from the trial court's grant of the motion *in limine*, because the case never went before a jury. Appellants were not deprived of a fair trial because there was no trial. If and until there is a trial and the trial court actually – and with finality – excludes this evidence, this issue should not be before an appellate court.

For these reasons, Appellees Grunley and CVLC respectfully submit that the subject motion *in limine* is not ripe for appeal, but even if it were ripe and the trial court did make a ruling, this Honorable Court must not disturb that ruling.

CONCLUSION

For the foregoing reasons, the summary judgment rulings of the Superior Court in favor of the Defendants/Appellees Grunley Construction Company, Inc.

and Chapel Valley Landscape Company must be affirmed, and the trial court's handling of the motion *in limine*, to the extent it was a final ruling, must not be disturbed because it is moot if the summary judgment rulings are affirmed, and, in any event, it is not ripe for appeal.

FERGUSON, SCHETELICH & BALLEW, P.A.

By: */s/ James K. Howard*
Robert L. Ferguson, Jr., #388526
James K. Howard, # 1031484
100 S. Charles Street, Suite 1401
Baltimore, MD 21201-2725
(410) 837-2200
(410) 837-1188 (fax)
rferguson@fsb-law.com
jhoward@fsb-law.com
Attorneys for Appellee, Grunley Construction Company, Inc.

BUDOW & NOBLE, P.C.

By: */s Howard R. Meinster*
Howard R. Meinster, #978851
Twinbrook Metro Plaza
12300 Twinbrook Parkway
Suite 540
Rockville, Maryland 20852
(301) 654-0896
(301) 907-9591 (fax)
hmeinster@budownoble.com
Attorney for Appellee, Chapel Valley Landscape Company

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.

/s/ James K. Howard
Signature

22-CV-298
Case Number(s)

James K. Howard
Name

September 6, 2022
Date

jhoward@fsb-law.com
Email Address

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2022, a copy of the foregoing Joint Brief of Appellees Chapel Valley Landscape Company and Grunley Construction Company, Inc. was served on the following via the D.C. Court of Appeals' electronic e-filing system:

Frederic W. Schwartz, Jr., Esq.
1701 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006
FWS888@aol.com
Attorney for Appellants,
Joseph and Joan Mancuso

/s/ James K. Howard
James K. Howard
Attorney for Appellee,
Grunley Construction Company, Inc.