Appeal Nos. 13-CV-679, 13-CV-693, & 13-CV-694

In the

District of Columbia Court of Appeals

WENDY PAOLA DESTEFANO and ENRIQUE IBANEZ,
as parents and natural guardians of minor children G. I. and V. I.,

Plaintiffs-Appellees/Cross-Appellees,

v.

CHILDREN'S NATIONAL MEDICAL CENTER, *et al.*,

Defendants-Appellees/Cross-Appellants.

On Appeals from the Superior Court of the District of Columbia,
Civil Division No. CAB1935-10 (Hon. Anita Josey-Herring, Judge)

REPLY BRIEF OF THE CROSS-APPELLANT CHILDREN'S NATIONAL MEDICAL CENTER

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ARGUMENT

I. The Trial Court Abused its Discretion in Refusing to Exclude the Surprise Opinions of Eric Woods

It may be conceded that a Rule 26(b)(4) disclosure cannot set forth every nuance of an expert's opinions. An expert disclosure must, however, at least provide "the subject matter on which the expert is expected to testify, . . . the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." SUP. CT. CIV. R. 26(b)(4)(A)(i); *Sowell v. Walker*, 755 A.2d 438, 445 (D.C. 2000); *Macleod v. Georgetown Univ. Med. Ctr.*, 736 A.2d 977, 978 n.1 (D.C. 1999). Woods' expert designation merely provided that "many vents were loose and screws were rusted, missing and apparently had fallen out over time." (JA 1365-66) Despite being eight pages in length, nothing therein indicated that he would testify that the screw holes on the grille collar had been "overtorqued" and that the retaining screws for the same had been stripped.

The record is clear that these new theories were disclosed neither in Plaintiffs' March 18, 2011 Rule 26(b)(4) Statement (JA 1360), nor in Woods' two depositions. Woods testified for the first time *on direct examination* at trial--and over CNMC's objection as being outside the scope of his expert disclosure and deposition[1]--that the screw holes appeared to be "overtorqued," that overtorquing could have stripped the screw threads, and that the screws had worked themselves out over time from building oscillation and vibration. (JA 675-76, Tr.166-67; 679, Tr.180-182; 684, Tr.201) At trial, Plaintiffs' counsel admitted that Woods had not expressed these opinions in his depositions. (JA 693, Tr.27; 694, Tr.32)

[1] Plaintiffs erroneously claim in their October 4, 2014 Response/Reply Brief (p.3 n.2) that *defense counsel* elicited Mr. Woods' objectionable testimony. In fact, Woods offered his "overtorquing" testimony in response to *Ms. Martin's* direct examination, which began on March 27, 2013 and did not conclude until the following morning. (JA 637, Tr.132-33 & JA 697, Tr. 46)

Depositions provide the opportunity to determine the extent and details of an expert's opinions. The importance of deposition discovery of experts, and the function of Rule 26(b)(4) to make such depositions "meaningful," is well-established. *Mizrahi v. Schwarzmann*, 741 A.2d 399, 404 (D.C. 1999) ("It is hardly necessary to expound here on the present understanding in modern litigation of depositions as a critical tool in preparing for the examination of witnesses"); *District of Columbia v. Kora & Williams Corp.*, 743 A.2d 682, 689 (D.C. 1999). Woods clearly stated in his expert deposition that he was not going to express an opinion regarding how the grille came to be off the wall, i.e., whether it was jarred loose or removed (JA 2704, Tr.177), and did not disclose such an opinion at the conclusion of his July 7, 2011 expert deposition, despite being offered an opportunity to do so. (JA 2713, Tr.212) In that deposition Woods also agreed to notify counsel in the event he developed any new opinions, so that CNMC would have an opportunity to re-depose him (JA 2713, Tr.212-13); however, Plaintiffs never supplemented his designation to disclose his "overtorquing" theories, as required by SUP. CT. CIV. R. 26(f)(1)(A).

In addition to their failure to disclose Woods' testimony, Plaintiffs now concede that they elicited opinions from him that were speculative.[2] Inasmuch as Plaintiffs seek to affirm G.I.'s judgment (Response/Reply Brf., at 49), this concession is curious indeed, given that expert testimony must be offered to a reasonable degree of professional certainty or probability to be admissible. *Cardenas v. Muangman*, 998 A.2d 303, 306-07 (D.C. 2010); *Sponaugle v. Pre-Term, Inc.*, 411 A.2d 366, 367 (D.C. 1980). In fact, the very purpose of expert opinion testimony is to avoid jury findings based on speculation or conjecture; testimony that is not offered with reasonable professional certainty has the opposite effect, because it tends to mislead the jury.

[2] Response/Reply Brf., at 1-3 ("Mr. Woods did not specify this *possible* reason--among others--for the vent cover to have become detached from the wall. . . . The "overtorquing" *possibility* was not inconsistent with his deposition testimony; moreover, he *did not* testify that the screws *were* overtorqued, but only that they '*might* have been overtorqued.'" (emphasis in original)).

Hughes v. District of Columbia, 425 A.2d 1299, 1303 (D.C.1981); *District of Columbia v. Davis*, 386 A.2d 1195, 1201 (D.C.1978); *Lansburgh v. Wimsatt*, 7 App. D.C. 271, 274 (D.C. 1895).

Yet, Plaintiffs ask the Court to overlook these serious flaws in the admission of Woods' testimony and affirm the judgment on essentially one argument: that the error in admitting the new and speculative testimony was harmless because the verdict form did not ask the jury to decide "why or how the vent cover became dislodged." (Response/Reply Brf., at 2) This argument overlooks the fact that this assignment of error in CNMC's cross-appeal is a "protective," in that CNMC seeks review of the Trial Court's ruling only in the event that this Court determines to grant one or more of the Plaintiffs a new trial as to CNMC. (CNMC Opening Brf. at 1 & n.1)

It is well-settled that although a party generally need not cross-appeal if he seeks only to sustain the lower court's decision, it will not be permitted to enlarge its rights on appeal absent a cross-appeal. *Hartman v. Duffey*, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1465 (D.C. Cir. 1994) *aff'd* 88 F. 3d 1232 (D.C. Cir. 1996); *Stutsman v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc*., 546 A.2d 367, 370-71 (D.C. 1988). As explained by the United States Court of Appeals for the District of Columbia Circuit,

> "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."
>
> Cross-appeals, on the other hand, are not so limited. While some cross-appeals are simply direct appeals by another name, *i.e.*, both parties are equally dissatisfied with the judgment, others are purely protective. In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well.

Hartman, 305 U.S. App. D.C. 256, 19 F.3d at 1465. Thus, "[a]n otherwise nonfinal order may become cross-appealable upon the entry of a final order. Nor does it lack cross-appealability because the final order from which the direct appeal was taken was entirely favorable to cross-appellants. *The risk that they might become aggrieved upon reversal* on the direct appeal is sufficient." *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975) ((citations omitted, emphasis added)). The failure to note a cross-appeal "creates 'law of the case' that generally binds subsequent proceedings." *Hartman*, 19 F.3d at 1465 n.3.

In their appeal, Plaintiffs seek, *inter alia*, remand for a new trial on punitive damages. (Response/Reply Brf., at 50) On November 20, 2012, the Trial Court ordered a bifurcation of punitive damages by first trying the claims for compensatory damages with evidence that could support punitive damages. (Supp. Appx. 3058-3059) If the jury returned verdicts for compensatory damages and the evidence supporting punitives was found sufficient to survive Defendants' Rule 50 motions, the Court intended to proceed to a hearing on net worth. *Id*. As the Trial Court explained on April 15, 2013:

> In terms of the issue of punitive damages, this is my intent. I am going to provide the jury with a verdict form that has the issue of liability and damages on it. In terms of the issue of punitive damages I'm going to have that segregated, which means if there's a determination, which is consistent with the case law, if there's a determination of liability, then if there is a punitive damages phase, the argument regarding punitive damages and net worth will be done together. Meaning I will give them another, let them hear testimony and argument related there to punitive damages and net worth and give them a verdict form on those issues. So we'll see whether we get that far. I've been rereading all of the cases and I'll hear from all of you, but we don't need to get bogged down in that this morning because we'll have an opportunity to do that while the jury is out looking at compensatory damage and liability and damages issues.

(JA 1219, Tr.4:3-14; *see also* JA 1216, Tr.50:9 - Tr.51:15)

To this end, the Trial Court did not include special interrogatories regarding the punitive damages claim in the verdict form. (JA 178-182) Because the Trial Court dismissed the punitive

damages claim on April 22, 2013, immediately before the jury returned its verdict, a verdict form with special interrogatories for the punitive damages claim proved unnecessary, and was neither argued nor tendered to the jury. Similarly, dismissal of punitives foreclosed the need to finalize a set of jury instructions relating to the same. Thus, although the jury was not asked to determine "why the grille came off" for purposes of determining the minor plaintiffs' right to compensatory damages, that does not mean that CNMC would not be prejudiced by Woods' novel "overtorquing" theory in the event the question of punitive damages is returned to the Trial Court for jury consideration. Under such circumstances, CNMC is not barred from raising the question in its protective cross-appeal. *C.f. Nimetz v. Cappadona*, 596 A.2d 603, 606-608 (D.C. 1991).

II. The Trial Court Abused its Discretion in Admitting Evidence Regarding the Condition of Other Garage Ventilation Grilles

In their Response/Reply Brief, Plaintiffs once again make the unsupported argument that the examination of Lawrence Dinoff, CNMC's architectural expert, violated the Trial Court's pretrial order excluding evidence relating to the condition of grilles other than the one involved in the accident. (Response/Reply Brf., at 4) The trial record is quite clear, however, that *Plaintiffs* were the first to elicit such testimony from their expert, Eric Woods, who referred to the grille mounted on the opposite wall of the shaft interior in response to questioning by Plaintiffs' counsel:

> Q. I show you Exhibit 11-12 [JA 2925] and ask you if that photograph accurately depicts what you saw when you inspected?
>
> A. Yes, you can see the -- *there was a grill on the opposite side of the shaft* that is a familiar landmark, so to speak for this shaft, it shows that it was the shaft that I looked at.
>
> Q. And *did that view of the air shaft contribute in any way to your opinion about how or why the grill may have come off the wall?*
>
> A. *Well, yes, when looking at the shaft through the one side, you can see the backside of the identical shaft on the wall and I was able to get a full view of the collar that wrapped around the opening from the backside of that opening on the*

other side. And it spoke to how that collar was attached and *led me to conclude that some of the broken concrete that was in the bottom of the shaft may have come up from around the collar in this opening here*.

. . .

BY MS. MARTIN:

Q. I give you Exhibit 11-13 [JA 2926] and ask you if that's a view of the air shaft that you saw --

THE COURT: I'm sorry, I think the interpreter can't hear you.

BY MS. MARTIN:

Q. 11-13, I ask you, is that a view of the air shaft that you saw on the day of the inspection?

A. Yes, for the same reasons that I gave for the previous picture.

(JA 676, Tr.167:18 - Tr.168:10; Tr.168:21 - 25 (emphasis added)

Q. I'll show you 11-27 [JA 2940] and ask you if this is a photograph that you've ever seen before?

A. Yes.

Q. And in what context did you see this photograph?

A. I saw this as a photograph after I was designated as the plaintiff's expert in the case.

Q. And did you form any professional opinions about the -- how the accident occurred upon seeing this photograph?

A. Yes, I --

Q. I'm sorry, let me rephrase that.

A. I'm sorry, I think I understood the question.

Q. Yeah, I agree. *Was there anything about this photograph* that factored into any opinion or opinions that you reached *about how or why the grill came off the air shaft?*

A. Yes, there is.

Q. Okay. Would you please explain?

A. There's a -- there's an abundance of broken concrete in the shaft, and the question is the origination of the concrete. *And there was an analysis of the collars and the masonry of the -- of the air shaft, which led me to believe that the concrete originated from around the structures associated with the air shaft and possibly from around the metal collars associated with the grill collars*.

(JA 678, Tr.175:7 - 176:6 (emphasis added))

The foregoing establishes that the Plaintiffs, not CNMC, were the first parties to make reference to another grille. Having done so, they were hardly in a position to assert that they were entitled to a remedial order because Dinoff's opinions--offered to rebut the clear import of Woods' speculative claim that deteriorated concrete substrate around the grille contributed to the accident--"opened the door" to evidence about all of the other grilles in the garage. *C.f. Mercer v. United States*, 724 A.2d 1176, 1192 (D.C. 1999), *cert. denied***,** 543 U.S. 1188 (2005) (curative admissibility "provides that in certain circumstances the prosecution may inquire into evidence otherwise inadmissible, but only after *the defense* has "opened the door" with regard to this evidence" (emphasis added)).[3]

Nevertheless, this is precisely what was argued, and the Trial Court, over CNMC's objection, allowed Plaintiffs' counsel to present irrelevant evidence regarding the condition of unidentified grilles elsewhere in the garage by quoting from Woods' Violation Notice in her examination of defense witnesses, and reading it to the jury in closing--despite the fact that Woods was never able to state which grilles were substandard. (JA 1129, Tr.60:10-24; 1138, Tr.96:2 - 20; 1288, Tr.62:1 - 11) The Court's *in limine* orders were further gutted when Plaintiffs were allowed to elicit evidence regarding subsequent remedial measures that CNMC undertook. (JA 532; 1131, Tr.66:9 -23; 1138-39, Tr.96-97)

The prejudicial effect of the Trial Court's decision to allow the admission of this evidence cannot be overstated. It effectively transformed a trial about why or how a single grille came to be off the wall into a trial about the condition of other grilles, the number and location of which could not be determined because Woods was unable to recall this information, and was

[3] Dinoff based his opinion on the appearance of grille collar, mounting screws, and concrete surfaces inside the airshaft, particularly the grille directly opposite the opening involved in fall. He did not rely on evidence regarding grilles in other garage locations. (JA 1106, Tr.52:12 - Tr.53:4; JA 1109, Tr.62:8 - Tr.64:2)

unable to recover field notes he had made during his investigation. (JA 364 n.1; 1625; 1627; 2621-22, Tr.86:2 - 87:2; 2649-50, Tr. 224:6 - Tr.225:16) This evidence bolstered both Plaintiffs' common-law claims and their claim of regulatory violations, which required proof of "deteriorated, unsafe… or... otherwise dangerous" structures, and the failure to maintain safeguards "in good working order." 12A D.C.M.R. § 115.1; PROPERTY MAINTENANCE CODE § 102.2; *see* JA 425. In the event that the Court determines to reverse the judgment of the Trial Court with respect to punitive damages and orders a new trial, testimony and evidence of the condition of other grilles from Woods' "Notice of Violation and Notice to Abate" should be excluded.

III. The Trial Court Erred in Submitting V.I.'s Claim for Negligent Infliction of Emotional Distress to the Jury

The critical question to be resolved regarding the sufficiency of Plaintiff V.I.'s evidence is whether there was any evidence to support the jury's finding that she reasonably feared for her own safety at the time of G.I.'s fall. *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 796-97 (D.C. 2011); *Williams v. Baker*, 572 A.2d 1062, 1066 (D.C. 1990) (en banc). Recovery is not permitted for mental distress from merely observing harm or danger to a third person, 572 A.2d at 1069; nor may a plaintiff recover if she does not experience fear that is contemporaneous with her presence in the zone of danger. *Jones v. Howard Univ., Inc.*, 589 A.2d 419, 423 (D.C. 1991). This issue being a question of law to be resolved upon *de novo* review, no deference is due to the Trial Court's ruling, regardless of the number of times it was addressed. *Washington Metro. Area Transit Auth. v. Jeanty*, 718 A.2d 172, 174 (D.C. 1998).

Plaintiffs contend that the element of contemporaneous fear for safety may be inferred from five sources: the Pat Johnson e-mail, a hospital surveillance video, and the testimony of Dr. Parr, Ms. Destefano, and Debra Jenkins. (Response/Reply Brf. at 5-7) When evaluating this

evidence, it is important to note Plaintiffs' concession that V.I. experienced emotional distress "because she witnessed her brother actually fall into [the shaft] and suffer serious injuries," and further, that she "experienced feelings of guilt, blaming herself for the accident because she let go of G.I.'s hand just before he fell." *Id*. at 7. Because of these complicating emotional factors, the jury could not reasonably have concluded from the evidence that V.I. suffered emotional distress because she also feared for her own safety at the time of G.I.'s fall.

Dr. Parr was asked whether V.I.'s comment, "I died," to Pat Johnson, as related in the latter's April 10, 2009 e-mail (JA 2565), "indicate[d] to you whether she had any fears for her--herself and her own life as well as for her brother?" Dr. Parr answered, "Yes. I mean, it indicated that she was worried about death and dying." (JA 886, Tr.52:21-25) Plaintiffs' counsel never asked Dr. Parr to clarify whether, in her professional opinion as a treating psychiatrist, V.I. had been fearful for her life at the time of G.I.'s accident, when she was present with him and Ms. Destefano at the ventilation opening. Nor does the e-mail itself, reflecting a comment made almost a month after the incident, shed any light on whether V.I. was reporting feelings of distress at the time G.I. was at the hospital for EEG monitoring, or whether she was attempting to describe her emotional response when she was in the garage.

Neither the hospital surveillance video, which shows a few seconds of G.I. and V.I. holding hands shortly before the accident,[4] nor Ms. Destefano's related testimony of hand-holding (JA 765, Tr.102:21-22), is probative of whether V.I. experienced fear for her safety when G.I.'s accident occurred. This is particularly true in light of Debra Jenkins' testimony that years later, V.I. reported letting go of G.I.'s hand before he fell, causing her to experience feelings of guilt about what had occurred. (JA 902, Tr.119:13-14; 903, Tr.120:7-21; 907,

[4] The video, Plaintiffs' Trial Exhibit 29-6 entitled "fam vid P1 EAST walking.avi," was played to the jury during Ms. Destefano's rebuttal testimony on April 12, 2013. (JA 1201, Tr.50:6-15)

Tr.136:15-18; 794, Tr.28:16 - 29:1) Thus, there was no evidence to support Plaintiffs' contention that when G.I. fell, V.I. was "attached to her brother, such that she was in danger of falling in with him." (Response/Reply Brf., at 6)[5] Moreover, Ms. Destefano, the only person with personal knowledge who testified about the event itself, stated only that (1) G.I. was to her right, and V.I. was to G.I.'s right, the last time she saw G.I. before the incident (JA 805, Tr.71:13-24); and (2) she turned around after hearing V.I.'s exclamatory report that G.I. was gone. (JA 765, Tr.103:11-13) There was nothing before the jury which described V.I. being so close to the opening that she was at risk for falling, or that she perceived that she might fall herself.

Finally, like Dr. Parr, Debra Jenkins did not provide factual testimony or render an opinion that would have permitted the jury to conclude, without speculating, that V.I. feared for her own safety at the time of the accident. Jenkins testified that V.I. related dreams which "involved her brother and her swimming and her mom swimming and also that they were dead or drowning"; that "there was other certain times when it was the mom that had died, and repeatedly there was G.I. who had died in her dreams"; that she was fearful of "going into enclosed places, a parking lot"; and that she "was afraid of the dark and that is something she had not experienced before." (JA 903 at 121:1-122:18) Jenkins was never asked, however, whether she could opine with reasonable professional certainty from this information that V.I. feared for her own safety at the time of the fall, rather than having such experiences as a result of seeing G.I. fall and witnessing her mother's reaction to the same. (JA 902, Tr.119:2-20)

[5] It is revealing that Plaintiffs cite their own counsel's argument opposing the Defendants' motions for judgment--*not* Jenkins' actual testimony--to support this contention. (Response/Reply Brf., at 6; JA 1088-89 at 76:15-78:1). Of course, it is axiomatic that counsel's recollection of the trial record is of no value in deciding a motion for judgment as a matter of law.

CONCLUSION

For the foregoing reasons, CNMC prays that the judgment in favor of V.I. be reversed, and that final judgment be entered against V.I. and in favor of CNMC with costs; and in the event this Court reverses or modifies the judgment in 13-CV-679 as to CNMC and awards Plaintiffs a new trial, that the judgment of the Trial Court be reversed or modified in accordance with CNMC's protective cross-appeal issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by McCandlish & Lillard, P.C., Counsel for Appellee/Cross-Appellant, Children's National Medical Center to print this document. I am an employee of Counsel Press.

On the **27th Day of October, 2014**, I served the within **REPLY BRIEF OF THE CROSS-APPELLANT CHILDREN'S NATIONAL MEDICAL CENTER** upon:

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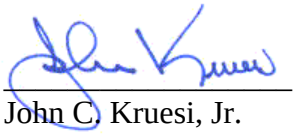
October 27, 2014



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