CASE NOS. 13-CV-679, 13-CV-693, 13-CV-694

In The
District of Columbia
Court of Appeals

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

Plaintiffs – Appellants,

v.

CHILDREN'S NATIONAL MEDICAL CENTER and COLONIAL PARKING, INC.,

Defendants – Appellees.

ON APPEAL FROM CIVIL ACTION NO. 2010 CA 1935 B IN THE DISTRICT OF COLUMBIA SUPERIOR COURT, CIVIL DIVISION, THE HONORABLE ANITA JOSEY-HERRING, JUDGE PRESIDING

REPLY BRIEF OF CROSS-APPELLANT COLONIAL PARKING, INC. TO APPELLANTS' / CROSS-APPELLEES' BRIEF RESPONDING TO COLONIAL PARKING'S CROSS-APPEAL

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Plaintiffs' Reply fails to justify the trial court's denial of Defendant Colonial's Motion for Judgment Notwithstanding the Verdict ("JNOV") because, as set forth below: (I) Colonial's Contract for providing certain parking-related services to Defendant Children's National Medical Center ("CNMC") did not entail for Colonial any common-law duty to protect customers from defects in the Hospital's structure and (II) Plaintiffs failed to offer expert evidence at trial establishing any cognizable standard of care that Colonial would have had to meet if the Contract somehow entailed any duty to Plaintiffs under the circumstances at issue here.

I. In Light of the Terms of Its Contractual Responsibilities to CNMC, Colonial Did Not Have a Duty to Protect Plaintiffs from the Hospital's Hidden Air Shaft.

A. Governing Precedent Supports Colonial's Position That the Contract Clearly Circumscribed Colonial's Common-Law Duties to the Public.

For this issue, Plaintiffs' Response (at 8-13) relies almost entirely on the arguments proffered by CNMC in its "Reply" to Colonial's initial Brief, which it adopts by reference. Colonial likewise adopts and incorporates by reference its Sur-Reply to CNMC's Reply, and accordingly this Reply Brief will not repeat Colonial's previous discussion of the terms of the CNMC-Colonial Contract. Instead, in this subsection, Colonial responds to references within Plaintiffs' Response (at 8-13) to precedents addressing the scope-of-contract issue.[1]

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[1] Plaintiffs argue that the trial court repeatedly rejected Colonial's lack-of-duty argument, but this issue is a question of law for *de novo* review, so no deference is due to the trial court's ruling, how ever often it was addressed below. *WMATA v. Jeanty*, 718 A.2d 172, 174 (D.C. 1988). Furthermore, the trial court never directly addressed the issue, as shown below.

The motions judge determined that the existence of a "common law duty" served simply as the threshold issue in the analysis as to Colonial's duty. (JA.341.) Persuaded by this Court's opinion in *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 888 (D.C. 2011), that judge ruled that it was prudent to evaluate the Contract between Colonial and CNMC as a next step. (JA.342-43.) Next, that judge held that the Contract did not obligate Colonial to maintain or repair structural elements of the premises, just perform general housekeeping within the garage, leaving open whether the vent cover and air shaft were structural elements or housekeeping items. (JA.345-46.)

Colonial's lack-of-duty argument relies on three precedents, two from this Court (*Presley* and *Haynesworth*) and one from the local federal District Court (*Frederick*). (*See* Colonial's Brief, at 35-37 & 39-42.) Plaintiffs' Response Brief (at 9-10 & n.9 and 11-12) briefly discusses each case, but fails to undermine their controlling relevance here.

The *Haynesworth* Case. Plaintiff's Response (at 9 & n.9) purports to rely on *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095 n.1 & 1099 (D.C. 1994), for the proposition that a "property management" company "for a building" may be held liable for its failure to inspect and detect a foreseeable hazard to pedestrians walking by the property. That *dictum* from *Haynesworth* may accurately state D.C. law as to parties who assume the full duties of managing an entire property, but that principle is just one "boundary condition," which informs but does not control the result here. That is, Colonial is not a "property manager" for the Hospital – instead CNMC manages its own property[2] – and the questions here are (a) whether Colonial

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Although the trial judge held a pre-trial evidentiary hearing on the Contract issue, she noted in the JNOV Order that she had not "expressly" construed the Contract before trial. Indeed, during trial, the judge stated: "I deemed [Colonial] in my previous order to have a duty as a possessor of land. I don't think they're a possessor in the sense of, is the best analogy I can come up with as a tenant whereby they'd have the same responsibilities as the owner, but certainly they had a general duty of care to maintain safe premises in the parking garage given their role there." (JA.1227, 4/15/13 morning Trial Tr., at 37:10-16.) Later during trial, she stated: "I do think your status . . . is not that of a possessor. . . . [but] there's a duty here because you're there . . . ." (JA.1222, *id*. at 14:14-24.) In other words, the trial judge repeatedly avoided analyzing of the Contract, as if *Haynesworth* and *Presley* did not exist, and instead relied on cases like *Becker*.

The trial judge charged the jury that Colonial was an independent contractor (JA.1270-71, 4/15/13 afternoon Trial Tr., at 86:9 - 87:25 & 88:1 - 89:11; JA.2077, ¶14(b); & JA.1208, 4/12/13 afternoon Trial Tr., at 17:2-16), and that Code violations by CNMC did not show negligence by Colonial. (JA.1207, *id*. at 12:15 - 15:5; JA.1269, *id*. at 83:8 - 84:1.) However, the trial judge failed to tell the jury how to consider the limited scope of Colonial's contractual responsibilities.

Even in the JNOV Order, that the trial judge continued to contrast Colonial with the contractor in *Presley* on the theory that Colonial was a "possessor" of premises (JA.476-77), just as it was in *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969), and never squarely confronted the "contractually limited responsibility" issue.

[2] According to its Vice President of Operations, Roberta Alessi, and its Operations Manager for

had a legal duty to the public to protect them from the hidden hazard[3] in CNMC's building presented by the unguarded air shaft and (b) whether Colonial had actual notice of that hazard.[4] In other words, the relevant question is whether the line drawn by the *Haynesworth* opinion between the legal duty of the actual property manager and the absence of duty for the plumbing contractor – even though it arguably had actual notice of the hazard from water continuing to flow from the building – also eliminates a Colonial duty here, or at least informs the decision to that effect. Indeed the Director of Safety and Emergency Management for CNMC, Patricia Needham, testified that she did not train Colonial about the air shafts in the garage prior to the incident and did not think it was important for them to know that a shaft existed behind a wall where the wall is intact. (JA.2288, Needham Dep. Tr., at 216:2 - 217:20.)

Furthermore, *Haynesworth* is significant in showing that D.C. law for over 20 years now has taken seriously the potential importance of contractual relationships on the extent to which the contractor assumes the property owner's duties to the public. *See id*. at 1098-99 (contrasting

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Engineering Department, David Varle, CNMC was responsible for maintaining, repairing and cleaning the ventilation systems in the garage. (*See* Colonial's Surreply Brief, at 2.) Mr. Varle managed the day-to-day operations of the facilities and supervised the control room for calls and monitoring of the facility and its critical functions (*see id*. at 2, n.2), which included the garage. (JA.580, *id*. at 111:17-22.) CNMC's Director of Facilities, Robert Beckwith, testified that only the CNMC mechanical team was authorized to remove the ventilation cover, that Colonial was not authorized to remove the vent cover. (*See* SJA.2997, Beckwith Dep. Tr., at 165:2-9 & JA.2108-2109, at 316:18 - 317:5.)

[3] Ms. Alessi testified that Colonial was never trained on the structural integrity of the garage. (JA.590-591, *id*. at 153:6 - 154:4.) Mr. Varle testified that his staff monitored and inspected the "serviceable parts" of the ventilation shaft" (JA.581, *id*. at 113:14 - 114:12), and that he never asked Colonial to check vent covers. (JA.580, *id.* at 111:7-10.) CNMC's Director of Safety, Patricia Needham, testified that the CNMC Engineering Department was responsible for the interior of the ventilation system and she never provided any related training to Colonial. (JA.2276, Needham Dep. Tr., at 84:5-22 & SJA.2999, *id*. at 110:2-21.)

[4] Mr. Beckwith testified that the vent covers did not require maintenance because they were a fixed asset. (JA.1134, *id.* at 78:5-11.) Mr. Varle testified that there is no reason to ever remove the ventilation covers because there is no serviceable part in the shaft. (JA.584, *id*. at 127:20-25.) Thus, Colonial had no reason to be concerned with vent covers or structures behind them.

the even earlier *Long* (1987) and *Munson* (1979) cases addressing the dependence of a tort duty on the extent of responsibility transferred in a contract). Thus, Plaintiffs' Response (at 8-13) is incorrect in suggesting that earlier precedents involving injury to parking patrons are still controlling here, especially those cases where no owner was a defendant and no parking-services contract was at issue. *See id.*

The *Frederick* Case. Plaintiffs' Response (at 10 n.9) attempts to distinguish *Frederick v. TPG Hospitality, Inc.*, 56 F. Supp. 2d 76, 78-81 (D.D.C. 1999), which relied on *Haynesworth* in holding that – unlike the hotel's property manager called TPG – its security services subcontractor Intersec did not have a duty to protect hotel customers from the criminal attack inflicted on Mr. Frederick by an unidentified assailant. After TPG settled with the plaintiff, Intersec sought summary judgment on claims for negligence and breach of contract. *Id.* at 78-79. The plaintiff's theory was that "TPG had a duty to protect the hotel guests and that Intersec assumed that duty from TPG by entering into a contract with TPG to provide security services for the hotel." *Id.* The *Frederick* court held that the existence of any Intersec duty to the public turned entirely on the terms of its contract with TPG, that under that contract the property manager TPG had the right to determine and control the duties of the guards supplied by Intersec, and that the contract did not include any duty to advise TPG about security risks. *Id.* at 79-80. In that regard, the *Frederick* court (*id.* at 80) distinguished *Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 992-93 (D.C. Cir. 1980), where an independent contractor was held liable in tort to an injured party because it was under contract to provide "safety engineering services" to the owner.

According to Plaintiffs' Response (at 10 nn. 9 & 10), Colonial's situation is different, asserting that Colonial "appears" to "contract" directly with each parking customer, who takes a Colonial ticket from a Colonial ticket dispenser, enters a Colonial operated garage, and pays a

fee to a Colonial employee wearing a Colonial uniform in a Colonial labeled booth on the way out. Regarding the "appearance" issue, uniformed security guards customarily wear "company" uniforms, not "customer" uniforms, and the *Frederick* court decided that case without considering the use of Intersec uniforms or other vendor trade dress.

Regarding the "contract" issue, the fact that the parking transaction is documented with a Colonial ticket does not necessarily create a contract between Colonial and hospital visitors, let alone establish any terms for such a "contract" beyond what the ticket actually says. For example, where the plaintiff parked and locked his car and did not leave the keys, the use of a parking-lot ticket would create a license arrangement but not a bailment. *See 1420 Park Road Parking, Inc. v. Consolidated Mutual Ins. Co.*, 168 A.2d 900, 901 (D.C. 1961) (ticket was just convenient device for billing customer, setting forth only time of arrival and a disclaimer of liability). Just as in that case, where the key issue was "control" over the car whose windshield was broken by an unknown cause, the key issue here is "control" over the vent cover and hidden air shaft. The motions judge correctly found that the parking ticket proffered by Plaintiffs at the summary judgment stage – a ticket that was procured subsequent to the accident and not the actual ticket, allegedly, obtained by Plaintiff – did not explicitly consider general premises liability. (JA.340.) The terms of the disclaimer on the random parking ticket dealt with bailee liability, just as in *PMI v. Gilder*, 343 A.2d 51, 52-55 (D.C. 1975),[5] which Plaintiffs cite in their Reply. In contrast, nothing here on the Colonial parking ticket, uniforms, signage or anything else is relevant to the issue of control over the hidden air shaft, and instead the terms of the CNMC-Colonial Contract are better evidence in this regard. Notably, CNMC and not Colonial

[5] In *Gilder*, the Plaintiff's purse was stolen from the car after she parked the car herself. What is useful from *Gilder* was that the court found it critical "to examine the nature of the parking operation." *Gilder*, 343 A.2d at 52. This case is discussed in more detail below.

got the daily gross receipts of the parking operation (*see* JA.265, ¶4), and paid Colonial a service-based fee. (*See* JA.258, ¶2.)

The *Presley* Case. Plaintiff's Response (at 11-12) attempts to distinguish *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 888-91 (D.C. 2011), on the grounds that the plaintiff there had no personal contact or contractual relationship with the defendant without the duty to that plaintiff. However, Colonial relies on *Presley* mainly for its legal analysis of the contract issue, and addresses the relationship between Colonial and Plaintiffs separately. (*See* pages 8-9, *infra*.) As the Court said in *Presley*, the "contract nevertheless remains central to our analysis of duty, as it defines the scope of the undertaking" by Colonial and "the services rendered by" Colonial. *See id*. at 889. Notably, in *Presley*, the court focused on whether the defendant subcontractor "assumed a duty to exercise reasonable care in carrying out **its** contractual obligations [to the owners and/or general contractor] that extended to workers such as Presley on the site." *Id*. The *Presley* court concluded that the subcontractor did not have any express or implied duties to the plaintiff worker whatsoever. Under the Contract here, Colonial acquired duties for parking automobiles and related general housekeeping, but that did not impose upon Colonial a duty to protect parking customers from latent hazards in the owner's building that were not Colonial's contractual responsibility to inspect, maintain, repair or report.

The *Presley* court's reliance on scope-limiting contract provisions is directly analogous here (*id.*, 25 A.3d at 878):

> **[**CRSS] is not responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures; safety programs or procedures; or for acts or omissions of other contractors, agents or employees, or any other persons performing any of the work.
>
> * * *
>
> Nothing in this contract shall be construed to mean that [CRSS] assumes any of the contractual responsibilities or duties of the architect-engineer or construction contractors. The construction contractor is solely responsible for construction

> means, methods, sequences and procedures used in the construction of the project, and for related performance in accordance with its contract with the Government.

That is, like Colonial, the *Presley* contractor was on the premises, but, like Colonial, was not responsible for the hazard that caused the plaintiff's injury. *See id*.

While not identical to the *Presley* contract disclaimers, the CNMC-Colonial Contract disclaimers here are no less clear. They plainly state that Colonial is to do nothing more than park and store vehicles and provide general housekeeping maintenance, and that Colonial is not responsible for maintaining or repairing the building structure. (JA.2077, ¶14(b).) The latter disclaimer is emphasized in the terms expressly prohibiting Colonial from dealing with the structural feature at issue in this matter (JA.2065, ¶¶3(b)(iv) (emphasis added)):

> Notwithstanding anything herein contained to the contrary, all costs to repair and/or maintain major structural items and Building-related equipment shall be the responsibility of the Owner, and such costs shall not be considered operating expenses hereunder. For purposes of the preceding paragraph, major structural items and Building-related equipment shall include, but not be limited to, the ***air handling systems***, the maintenance of green space, sewer systems, sump pumps, traps and drains, ***HVAC systems***, plumbing, ***all concrete surfaces*** and other major structural elements including the main garage helix, sprinkler and fire systems and electrical and lighting fixture, including the replacement of bulbs and tubes.

The *Presley* court emphasized the importance of deciding whether the consulting contractor should have recognized that its contractual undertakings were necessary for the protection of the plaintiff there and, if so, to what extent. *Id.*, 25 A.2d at 889. The *Presley* court, however, was not "persuaded that any evidence shows [that the contractor] should have foreseen that its obligations under the . . . contract to 'anticipate problems' and to 'monitor' safety compliance was 'necessary for the protection' of Presley, and therefore found no legal duty."[6] *Id.* The same is particularly true, in the instant case, where CNMC's Patricia Needham

[6] That was the *Presley* court's conclusion even though the defendant's key employees testified: (a) that, "[i]f a CRSS person saw somebody up on that cooling tower that was in imminent

testified that she personally performed garage inspections and led a team of CNMC departments during the annual inspection (JA.1047, 4/8/13 Trial Tr., at 40:12 - 41:24), in which Colonial did not participate. (*Id.* at 41:25 - 42:2.) In turn, CNMC's Vice President of Operations, Ms. Alessi, relied on Ms. Needham to conduct such inspections, because CNMC was not relying on Colonial to take care of that hospital responsibility. (JA.591 Evidentiary Hearing Tr., at 154:5-16.)

Similarly, CNMC's Director of Facilities, Robert Beckwith, testified that he was in charge of the garage at the time of the incident and that he never authorized Colonial to maintain or repair the vent cover at issue. (JA.1135-1136, 4/10/13 morning Trial Tr., at 84:15 - 85:2.) Indeed, CNMC's own expert opined that the vent cover was removed by unknown persons (*see* (JA.1118, Apr. 10, 2013, morning Trial Tr., at 13:20-23), which created an unforeseeable condition that Colonial had no responsibility to prevent, given the above-cited testimony of CNMC's key managers. The trial judge therefore should have followed the reasoning in *Presley* and held that Colonial, as the independent parking contractor, did not have a duty to protect Plaintiffs from the hidden air-shaft hazard. Instead, the trial judge here effectively ignored the binding methodological precedent of *Presley* in favor of the over-simplified *Becker* methodology, and thereby erred as a matter of law in denying JNOV.

B. Plaintiffs' Response Relies on Outdated Cases and Fail to Show Any Other Basis for Imposing a Duty of Care on Colonial Here.

In addition to adopting the positions set forth in the CNMC Brief, Plaintiffs oppose Colonial's Cross-Appeal on four grounds unrelated to the terms of the CNMC-Colonial Contract:

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danger of falling . . . they should intervene because our company policy is to do just that" (*id.* at 881); (b) that it was their duty to "monitor compliance with safety codes and regulations" (*id*.); and (c) that, if they saw "something that was wrong," they would report it to the general contractor, which would respond to correct the matter. *Id*. The *Presley* court correctly recognized that such testimony regarding internal standards or aspirations was not relevant, especially where the contract did not involve such obligations to the owner, and the same rule must apply to similar testimony from Colonial personnel that Plaintiffs cite here.

(1) Plaintiffs had a direct contract with Colonial creating a general duty of care on its part; (2) under such a "contract," ordinary premises liability standards embodied in cases like *Becker*, *Daisey*, *Morley* and *Gilder* apply to Colonial despite any scope-of-responsibility limitations in the Contract with the building owner, CNMC; (3) the D.C. Building Code and the Superior Court's Standard Jury Instructions regarding Premises Liability support Plaintiffs' view; (4) Colonial's internal perceptions, aspirations and standards may be used to show a legal duty; (5) Colonial's subsequent remedial measures may be used to show a legal duty; and (6) the arguments of Colonial's defense counsel before trial somehow admitted a duty on the part of Colonial. None of those arguments actually address the issue that the trial court acknowledged was properly raised by the motions judge – to what extent does the Contract impact any duty owed by Colonial to Plaintiffs under the specific circumstances of the case. (*See* JA.477.) Thus, Plaintiffs arguments are merely a concerted effort to avoid the real issue under current D.C. Court of Appeals case law. In any event, as shown below, none of those arguments has merit.

1. Plaintiffs Did Not Have a Direct Contract with Colonial.

Without citing the *Gilder* case, Plaintiffs' Response (at 10 n.10 & 11-12) asserts that Plaintiffs had a direct contract with Colonial embodied in the parking ticket. However, the motions judge correctly found that the parking ticket proffered by Plaintiffs at the summary judgment stage – a purported exemplar that Plaintiffs procured after the accident and not the actual ticket – did not address any relevant aspect of general premises liability. (JA.340.) Again, the only relevant wording on the exemplar parking ticket was a disclaimer of bailee liability like that in *Gilder*, 343 A.2d at 52-55. Notably, despite Plaintiffs' proffer of an exemplar ticket, the motions judge relied on tort principles in opining that the standard of care (assuming a duty) was reasonable care under the circumstances. (JA.340.) In other words, Colonial's use of a parking

ticket to collect a fee did not create any tort duty here, and it would be unreasonable here to hold that the absence of any disclaimer of non-bailment duties was evidence that Colonial had such duties. *See Gilder*, 343 A.2d at 54-55. Therefore, Colonial's use of a disclaimer-bearing ticket to facilitate collecting parking fees does not support the trial court's JNOV decision.

Plaintiffs' Response (at 9-10) cites *Gilder* for the proposition that "[i]t is the *operator*, not the car owner, who is in a position to have superior knowledge," but in *Gilder* the court was talking about superior knowledge of a vandalism risk around the parking lot. The *Gilder* court found a duty "to exercise reasonable care to avoid malicious mischief" to the patron's vehicle while parked on the premises, but that is not a relevant duty here. *Id*. The instant case is different in at least two material ways: (i) the hazard in question was an air shaft ordinarily hidden behind a vent cover/grille, and the nature of the hazard – the risk of a serious fall – arose from the fact that CNMC's building did not have fall protection in the air shaft at each floor; and (ii) maintaining and repairing the air shaft and its vent cover was CNMC's sole responsibility under the Contract. In *Gilder*, the hotel owner was not a defendant, and the court there was not presented with any contractual scope-of-responsibility issue. *See id*.

2. Property Owners and Their Independent Contractors Need Not Have the Same Scope of Premises Liability.

While the facts here are different from those in *Presley*, those differences are not material. In contrast, the facts here are materially distinguishable from those in *Becker*, because the pertinent law has changed significantly since *Becker* was decided. The trial court found *Presley* distinguishable because: (a) the consultant contractor in *Presley* had a different role from Colonial's role here; (b) Colonial "operated" CNMC's garage for many years, whereas the *Presley* defendant mainly "consulted" about construction-contract administration; (c) the *Presley* consultant was in no sense a "possessor" of the owner's premises; and (d) the

consulting contract was substantially different from the CNMC-Colonial Contract. (JA.477.) However, as shown below, such reasons cannot justify the denial of JNOV here.

It is recent cases like *Presley*, *Haynesworth* and *Frederick* – and not the much older cases like *Becker* – that control this action. Significantly, there is no information in the *Becker* opinion as to whether Colonial was an owner/operator as opposed to an independent contractor for a premises owner, and the *Becker* opinion does not mention any contract or the terms thereof. *See Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969). Thus, the *Becker* court's decision does not reflect consideration of the key circumstances of the instant case.[7]

In addition, the circumstances of *Becker* were quite different, because the cause of injury there was a moving car and not a recessed structural element of the owner's building. As a result, *Becker* clearly involved the ordinary responsibilities of a parking lot operator – the manner of parking and retrieving cars and related customer safety issues. *See id.*, 409 F.2d at 1132-33. In marked contrast, the hazard here was an unprotected air shaft behind a vent cover that was CNMC's duty to maintain and repair. (JA.578, Evid. Hearing Tr., at 104:18-20; JA. 591, *id.* at 154:5-16; & JA.1135-1136, 4/10/13, morning Trial Tr., at 84:15 - 85:2.)

Indeed, the trial court found that Colonial did not have a duty to know that a vertical air shaft existed behind the hole. (JA.1228, 4/15/13 morning Trial Tr., at 38:3-16.) Thus, the real issue is whether Colonial could have a duty to inspect, maintain and repair the vent cover that was missing from the building's air shaft on the day of the incident, especially in light of the evidence from CNMC's team managers.[8] In contrast, the *Becker* holding simply was that "[a]

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[7] *See United States v. Debruhl*, 38 A.3d 293, 298 (D.C. 2012) (prior cases are not binding precedent unless they address and dispose of the precise issue later presented); *In re Ellipsat, Inc. v. Castiel*, 2012 Bankr. LEXIS 5527, at *14 (U.S. Bktcy. D.C. 2012) ("lower courts are not bound to follow a higher court's dictum" when new issues are presented in the later case).

[8] On more than one occasion before the JNOV hearing, the trial court admitted that Colonial was

parking lot operator, like other ***possessors*** of business premises, though not an insurer of the safety of his customers, does owe [parking customers] a duty of reasonable care." 409 F.2d at 1134. Those words have no binding significance, however, beyond the context of the facts that provoked them. Plaintiffs and the trial court therefore erred in treating those words as if they were an immutable legal burden for the parking industry. Therefore, at the outset, the question is whether, in light of Colonial's explicit contractual arrangement with CNMC and the related legal developments, the *Becker* case provides either a suitable analogy or the proper rules of law here.

The same is true of the other D.C. Circuit opinions cited in Plaintiffs' Response (at 8-9), because none of them addresses the issue of Colonial's duty to a third party where a contract exists expressly limiting its obligations to the owner with respect to the inspection, maintenance, or repair of the structure that caused the injury.[9] Such cases thus are not like the instant matter, and therefore not controlling here.

3. Neither the Building Code nor Standard Jury Instructions for Premises Liability Cases Governs the Result Here.

In apparent reliance on the *Haynesworth* case, Plaintiffs' Response (at 9 & n.8) argues

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not a possessor (*see* note 5, *supra*), and therefore was different from its status in *Becker*. For example, the trial court cogently observed that "they don't have to go behind the walls as a parking management company and inspect the wiring to see whether there are things behind the wall" (JA.1244 4/15/13 morning Trial Tr., at 102:22-24), and the building's hidden ventilation shafts are no different in that regard. Instead, the trial court agreed that "[Colonial] is not a possessor of land, but they're a management company who has a contract with Children's [Hospital] . . . ." (JA.1244, *id*, at 103:15-20.) Thus, as the trial court repeatedly conceded, the role of Colonial here is quite distinct from its position in the *Becker* case. As a result, in treating Colonial as a possessor for JNOV purposes, the trial judge effectively ignored the Contract, or re-wrote it. (JA.2077, ¶14(b).)

[9] For example, *Daisey v. Colonial Parking, Inc.*, 331 F.2d 777, 780 (D.C. Cir. 1963), involved the duty owed to a trespasser, did not discuss whether Colonial was an owner/operator as opposed to an independent contractor, and did not reveal the existence of terms of any relevant contract. Similarly, *Colonial Parking, Inc. v. Morley*, 391 F.2d 989, 990-91 (D.C. Cir. 1968), turned on the issue of proximate cause where there was an intervening car theft from the parking lot, and once again there is no information about whether Colonial was an independent contractor or, if so, what the contract provided.

that the D.C. Building Code imposes on "operators of businesses" a requirement to ensure that "their premises" are safe for "their customers." In that regard, the trial court correctly instructed the jury in this case not to consider against Colonial any of the testimony Plaintiffs and their expert offered against CNMC about its violations of the Building Code. Notably, in that regard, the City building inspectors cited only CNMC for violations. As the record makes clear, the cited violation was failure to provide fall protection for the four-level parking garage exhaust shafts, and that failure was solely CNMC's responsibility. (JA.2558.) Therefore, this Court should disregard arguments against Colonial based on a violation of a Building Code provision.

Plaintiffs' Response (at 9) also argues that the Court should ignore contracts between premises owners and independent contractors in deciding whether the contractors have assumed all the owner's duties of care to the public, on the premise that *D.C. Standardized Jury Instructions* such as 10-3 and 10-4 reflect the universal principles of premises liability law.[10] Instead, the cited instructions are just basic principles for typical cases where injured parties sue owners or tenants over injury arising in the space "occupied" or "possessed" by the defendant. (*See* Instruction 10-4.) In light of the terms of the CNMC-Colonial Contract, the key issue here is whether there is any standard jury instruction explaining those terms for cases where a defendant is an independent contractor of the owner. As the Preface to the *Instructions* explains, the chief goal of the "standardized" instructions is to ensure that they say what the law they

[10] The Preface to the current version of those *Instructions* explains that "[t]he materials in this book provide starting points for drafting the fact-specific instructions which are necessary in most cases," and goes on to explain the "features and limitations" of the book and its contents. (*See id*., 1998 Preface, at vi.) Therefore, "standardized" jury instructions are not warranted for sufficiency in all cases, and courts and litigants frequently modify them and/or adopt supplemental jury instructions for particular cases. Finally, the Preface states that "[a]ny book purporting to state current law is necessarily a work in progress," (*id*. at vii), just as the principles set forth therein reflect the current "working hypothesis." *See generally English Private Law*, ch.1, "Sources of Law," p. 11 (Oxford Univ. Press 2013), *quoting Goff, L.J., "The Future of the Common Law,"* 46 ICLQ 745, 753 (Cambridge Univ. Press 1997).

address means in plain words, without supposing or assuring that they will mean what needs to be said to the jury about all the law in every case.

4. Plaintiffs Are Not Entitled to Use Colonial's Internal Opinions, Aspirations or Standards to Show a Duty, Just as Such Evidence Is Inadmissible to Establish a Standard of Care.

Plaintiffs' Response (at 10, 11, 16 & *passim*) repeatedly refers to internal perceptions, opinions, and standards of Colonial or its employees, for the purpose of trying to show a duty or establish a standard of care. Just as such internal information about the defendant is inadmissible to establish a standard of care (*see* Colonial's Brief, at 44-47 & n.48) or even serve as "some evidence" in that regard (*see* Colonial's Sur-Reply to CNMC's Cross-Claim Reply, at 9-10 & n.21), such information cannot possibly establish a common-law legal duty. Furthermore, such evidence is generally misleading, because it does not address the line drawn by current D.C. law between responsibilities assumed by the contractor and those retained by the building owner. (*See* Section, I.A, *supra*.) Such assertions[11] simply ignore whether, and to what extent, Colonial contractually assumed responsibility for the specific hidden-fall hazard here. (*See id*.) Instead, Plaintiffs' Response (at 8-13) argues that no such contract should protect Colonial here, even though Plaintiffs have a secure judgment for the same damages against CNMC.

5. Plaintiffs Are Not Entitled to Use Colonial's Subsequent Remedial Measures to Show a Duty or Any Other Element of Liability.

Plaintiffs' Response (at 10, 11 & *passim*) also repeatedly refers to subsequent remedial measures as evidence of liability, which is expressly forbidden by Federal Evidence Rule 407

[11] Plaintiffs' Response (at 11) also cites a Colonial May 6, 2006 e-mail characterized as "warning" all its managers that "mandated inspections" must be conducted and that, if they were not, Colonial could be held liable for any injuries to customers." There is no dispute that Colonial had certain internal procedures for walk-around assessments, but the cited e-mail does not mention air shafts or vent covers, and therefore is not probative here. (*See* JA.2898.) Once again, Colonial's internal standards cannot be used to establish liability, whether in the form of a "duty of care" or a "standard of care." *See Phillips v. District of Columbia*, 714 A.2d 768, 775 (D.C. 1998) (internal standard "is not a standard of care and may not be relied on as such").

and equivalent cases under D.C. law.[12] This Rule applies to exclude evidence of subsequent changes in business procedures, including the discharge, transfer or other action against employees involved in injurious incident.[13] Rule 407 therefore forbids consideration of either the disciplinary measures Colonial took against its former Project Manager, Isaac Song, or the reasons for those measures arising from his conduct in connection with Plaintiffs' incident. Such arguments are just as improper before judges as they are before a jury, and the Court must disregard them, as the trial judge properly did in the instant action. (JA.386-388 & JA.1058, 4/8/13 afternoon Trial Tr., at 10:6 - 11:4.)

6. An Assumption for Argument's Sake about the Existence of Mere Negligence, Made during Colloquy with the Trial Judge about the Punitive Damages Issue, Is Not an Admission or Evidence of Liability.

Next in the litany of improper evidentiary arguments by Plaintiffs is the assertion in Plaintiffs' Response (at 10-11 & n.11) that Colonial's counsel, Mr. Hassell, made an evidentiary admission – during the pre-trial argument that led to the decision to strike the punitive-damages claim – to the effect that Colonial's parking attendants acted negligently in failing to report the hole in the wall into which Plaintiff G.I. later fell. Despite the fact that Colonial anticipated this issue in its main Brief (at 25, ¶(f)), Plaintiffs' Response does not offer any precedential support

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[12] *See* Colonial's Brief, at 25-26 & n.30, *citing Graae & Fitzpatrick, Law of Evidence in the District of Columbia*, at IV-81-82 (1995 ed.), *citing Avery v. S. Kann Sons Co.*, 91 F.2d 248, 250 (D.C. Cir. 1937); *Altemus v. Talmadge*, 58 F.2d 875, 878 (D.C. Cir.), *cert. denied*, 287 U.S. 614 (1932); *also see Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U.S. 202, 206-07 (1892) ("the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant").

[13] *See Ray v. American National Red Cross*, 696 A.2d 399, 408 (D.C. 1997) (excluding evidence of post-incident change in procedures for asking blood donors about potential HIV exposure); *Woodard & Lothrop v. Hillary*, 598 A.2d 1142, 1152-53 (D.C. 1991) (trial court in false-arrest case erred in allowing plaintiff question guard about his removal from defendant's workforce to determine if it was due to his conduct in arresting the plaintiff for shoplifting).

or other legal basis for treating such a statement as a judicial admission or otherwise as "evidence" of negligence. In addition, Plaintiffs did not make this argument in the trial court – during trial or otherwise – and therefore the argument should be deemed waived on appeal.

7. Public Policy Does Not Require That Premises Liability Law Be Frozen As of the Date of the *Becker* Case, the *Gilder* Case, or Any Other Precedent, and Instead Premises Liability Law Should Evolve Along with Other Legal Principles in Light of Societal Experience.

In a last-ditch effort to avoid appellate imposition of JNOV here, Plaintiffs' Response (at 12-13) argues that granting JNOV here would "reverse [this Court's] long-standing body of premises liability law," and "create havoc" in the District by "mak[ing] shopping, parking, eating in a restaurant, or conducting any other type of business a high risk, potentially dangerous undertaking," especially having "to walk through stores, garages – particularly a garage in a Children's Hospital – as if they were walking through 'a mine field'." In fact, however, the sky is not falling, nor even a single star. Plaintiffs have an enforceable judgment against the premises owner, CNMC itself.

II. Colonial Is Entitled to JNOV Because Plaintiffs Failed to Offer Expert Evidence of Some Relevant Standard of Care.

A. The Fact of Actual or Constructive Notice Here Would Not Alter Plaintiffs' Responsibility to Present Evidence about a Relevant Standard of Care.

Plaintiffs argue (Response, at 13-14) that they did not need expert testimony on the standard of care because Colonial had actual or constructive notice of the hole in the wall. Plaintiffs' Response, however, fails to cite any authority for the illogical proposition that notice of the allegedly injurious hazard on the premises dispenses with the need for expert testimony about standard of care. Indeed, it appears that Plaintiffs' Response (at 13-18) repeatedly conflates the element of "notice" with the elements of "duty" and breach, and thus confuses the need for proof of notice with the need to prove a standard of care and its breach.

B. The Fact That Plaintiffs Did Not Offer Expert Evidence of Standard of Care in Cases Like *Becker* Does Not Mean Such Evidence Was Not Needed Here.

Every premises liability case is potentially different, and the need for expert testimony regarding the standard of care depends on the circumstances and the nature of the claims. (*See* Surreply to CNMC's Response, at 7-10.) Something as simple as standard of care for floor mats on a potentially slippery floor, or lighting standards for a subway entrance, can require expert testimony.[14] Expert testimony likewise was required here: (a) to explain the scope of the CNMC-Colonial Contract[15] or (b) to show any related custom and practice in the parking industry (*see* Colonial's Brief, at 32-33 & n.40), and (c) to elucidate a relevant standard of care for meeting the Contract requirements.[16]

In this general regard, the parking-lot cases from the 1960s and 1970s cited in Plaintiffs' Response (at 13 & 15) are either distinguishable on their facts or simply do not reflect any awareness by counsel or the court of a potential expert-testimony issue regarding duty of care.[17] As shown in Colonial's main Brief (at 44 & n.47 and 46-47 & n.49), the law about expert testimony on standards of care has evolved greatly since 1975, when *Gilder* was decided.

No one disputes "[a] kid fell into a hole that shouldn't have been a hole" (*see* Plaintiffs' Response, at 14), but the trial judge here correctly concluded that it <u>was not</u> Colonial's specific

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[14] *See Briggs v. WMATA*, 481 F.3d 839, 845 (D.C. Cir. 2007), *Frazza v. United States*, 529 F. Supp. 2d 61, 69-70 (D.D.C. 2008), and others cited in Colonial's main Brief (at 46-47 & n.49).

[15] *See Capitol Sprinkler Systems, Inc. v. Guest Services, Inc.*, 630 F.3d 217, 224-25 (D.C. Cir. 2011); *Sherman v. Adoption Center of Washington, Inc.*, 741 A.2d 1031, 1036 n.11 (D.C. 1999).

[16] *See Capitol Sprinkler* and *Sherman*, *supra*; *also see Caldwell v. Bechtel, Inc.*, 631 F.2d 989, 997 (D.C. Cir. 1980) (typical contract supplies only duty of care, not standard of care).

[17] *See Gilder*, 343 A.2d at 53-54 (negligence in failing to protect car and its contents from vandals and thieves); *Becker*, 409 F.2d at 1133-34 (negligence in using just one attendant to manage a busy lot); *Morley*, 391 F.2d at 990-91 (negligence in failing to secure car from thief who subsequently injured another driver, where the only disputed issue was superseding cause); *Daisey*, 331 F.2d at 780 (negligence in failing to warn uses of nearby streets and walkways).

"duty" to know that a dangerous vertical air shaft existed behind the hole (JA.1228, 4/9/13 afternoon Trial Tr., at 38:3-17), even if it had a duty "to make sure the premises are safe" in some regards.[18] (JA.1227, *id*. at 36:8 - 38.2.) One crucial piece of non-expert evidence potentially filling the gap here was the Contract, but the trial court did not give any detailed jury instructions about construing or applying its terms. Indeed, the trial judge held that she was not going to explain what specific action should have been taken during argument on jury instructions. Instead, after considering and rejecting various proposed wordings of Colonial's purported standard of care (*e.g*., duty to take "reasonable steps," etc.), the trial court decided to avoid getting "into that fray" and instead gave a general jury instruction that would allow the parties to argue to the jury about what was reasonable. (JA.1231-32, 4/15/13 morning Trial Tr., at 52:13 - 53:25 & 54: *see id*. at 54:1-23.)

Ultimately, the trial court decided: "Rather than being specific, I will say they had a duty as I've indicated before to insure that the premises are reasonably safe or to maintain a reasonably safe environment for its customers, and I will let you argue based on what the evidence is in the case." (*Id.*) As a result, the jury was left unable to properly evaluate the Contract's significance. Moreover, even if the trial court properly could have concluded that Colonial had a duty of care here, ordinary lay jurors would have had to speculate about the applicable standard of care (*e.g*., regarding inspection, maintenance, notice, warning, or repair by Colonial rather than CNMC), and experts in parking management or building inspection could have greatly aided the jury.[19] The discovery judge repeatedly warned Plaintiffs about the need

[18] Plaintiffs' Response (at 14) cites to the docket and a page number from the August 2010 hearing transcript, which is not apart of the original Joint Appendix.

[19] Plaintiffs' Response (at 8, 14 & *passim*) repeatedly adverts to Colonial's corporate status as a large and "wealthy" parking company, going so far as to suggest that Colonial "can hire" purported "experts" "by the dozens" to burden injured plaintiffs with "unnecessary expenses" for

for expert testimony, and Plaintiffs' counsel repeatedly spurned the warnings. (*See* SJA.3007-17, 12/10/2010 Tr., at 103:5 - 107:8 & 109:1 - 114:11; SJA.3019-44, 1/19/2011 Tr., at 3:12 - 6:13, 12:20 - 19:6 & 28:2 - 41:12.)

Without any expert testimony against Colonial here, Plaintiffs were asking the jury to speculate in their favor about what Colonial would have had to do. Furthermore, the trial court's statement that there would have been a need for expert testimony if Colonial had done something, but not where it did nothing is either a concession that expert testimony was needed in any event, or proof that the trial judge had confused the issue of duty with the standard-of-care issue. Either way, Plaintiffs' case against Colonial required expert testimony, and none was proffered below. (*See* Surreply to CNMC's Response, at 7-10.)

C. The Judgment against Colonial Must Be Reversed If There Was No National Training Standard or Other Standard of Care for Garage Management.

Plaintiffs' Response (at 15-17) cannot advance their cause in arguing that "there is no established certification for a 'national expert' in garage management or a 'national safety training standard' specific to garage management." Indeed, if expert testimony is required, but experts will not attest to any relevant standard of care, the case must be dismissed.

Plaintiffs' Response (at 15) asserts that there is no "professional standard," or a "nationally recognized standard," for air-shaft safety apart from the local Building Code "that all commercial establishments must meet." If that were true, Plaintiffs surely would have needed to present expert testimony that Colonial – apart from the building owner – violated a standard of

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"experts" to "state the obvious." Plaintiffs' perjorative attack rings hollow, however, because they presented expert testimony against CNMC, but not against Colonial. The issue here is whether, assuming *arguendo* that Colonial had a duty of care under the facts of this case, what standard of care should apply. (*See* Section II.B, *supra*.) The trial judge obviously was uncomfortable in this regard, and rightly so, especially in the presence of a contractual cut-off point for duty. Indeed, the trial court might not have been able to resolve the duty issue itself without expert testimony.

care embodied in the Code, but they did not do so. Moreover, the fact that Plaintiffs offered some such evidence against CNMC, does not allow this court to consider that evidence against Colonial, as the trial court recognized.[20] (JA.1243-1244, 4/15/13 morning Trial Tr., at 101:4 - 102:25 & 103:24.)

Unwittingly conceding the complexity of the problem presented by the "duty" that the trial court decided to impose on Colonial without expert testimony on the standard of care, Plaintiffs' Response (at 15) sets forth numerous factors that might be considered into deciding what standard of care should be imposed on a parking-services manager like Colonial, depending on the nature of the owner's building or other property, as well as the terms of the contractual engagement. It is unreasonable for Plaintiffs to argue that lay jurors will be able to sort out the potential impact of all those variables – contractual and otherwise – without assistance from expert testimony.[21] Therefore, the Plaintiffs failed to carry their burden of coming forward at trial with expert evidence of a relevant standard of care, and the jury verdict cannot stand.[22]

CONCLUSION

WHEREFORE, for all the reasons set forth above, in its Main Brief, and in its Surreply to CNMC's special Response, Defendant Colonial Parking, Inc. respectfully asks that the Court grant Defendant Colonial's cross-appeal in its entirety and deny Plaintiffs' appeal in its entirety.

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[20] *See Capitol Sprinkler Inspection*, 630 F.3d at 225 (no proper reliance on a party's expert, whose designation did not address contract interpretation).

[21] In an effort to support the contention that no standard-of-care expert is required here, Plaintiffs' Response (at 16-17) launches a scathing personal attack on Colonial's president, Andrew Blair, who has never actually worked in any garage – for Colonial or otherwise, and has never been in the CNMC garage. (*Id*. at 16 & n,14.) Absurd as it may seem, Plaintiffs' contention is that no experts in parking management exist because Colonial's president is a business administrator. The fact that Mr. Blair lacks technical expertise simply means (a) that neither party here would call Mr. Blair as a standard-of-care expert and (b) lay jurors would have even less technical competence than Mr. Blair.

[22] Colonial hereby adopts herein by reference Section III of CNMC's Cross-Appeal Reply, regarding Plaintiff's V.I.'s judgment below.

DATED: October 27, 2014

Respectfully submitted,

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RULE 32(a)(5) CERTIFICATE

Undersigned counsel for Appellee / Cross-Appellant Colonial Parking, Inc. hereby certify that the foregoing was prepared in 12 point Times New Roman font.

_____

Andrew Butz

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served *via* electronic filing and U.S. Mail postage prepaid, this 27th day of October 2014, upon:

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