IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Wendy Paola Destefano, *et. al*.	)	Docket Nos. 13-CV 679
Appellant,	)	13-CV-693
v.	)	13-CV-694
Children's National Medical Center	)	
and	)	DCSC No. 2010 CA 001935 B
Colonial Parking, Inc.	)	
Defendants.	)	
	)	

BRIEF FOR APPELLANTS WENDY PAOLA DESTEFANO, IN HER INDIVIDUAL CAPACITY, AND WENDY PAOLA DESTEFANO AND ENRIQUE IBANEZ, AS PARENTS OF MINOR APPELLANTS G.I. AND V.I., REQUESTING REVERSAL OF: 1) DISMISSAL OF MS. DESTEFANO'S CLAIM; 2) PRECLUDED FUTURE DAMAGES FOR G.I. FOR POST CONCUSSIVE SYNDROME; 3) DISMISSAL OF PUNITIVE DAMAGES CLAIM; 4) CERTAIN COSTS; AND 5) EVIDENTIARY ISSUES ON REMAND

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2) Did the Trial Court commit reversible error, as a matter of law, under *Hedgepeth*, by dismissing Ms. Destefano's claim of negligent infliction of emotional distress, holding that Defendants did not have a special duty to protect Ms. Destefano in the hospital's garage, as would an innkeeper for a guest, although she was a customer of Colonial Parking and a parent of a patient at Children's National Medical Center?

II. **Minor Plaintiff G.I.'s Appeal, Only**

1) Did the Trial Court commit reversible error, under *Underwood v. National Credit Union,* by precluding the jury from awarding any damages to minor Plaintiff G.I. for future pain and suffering from post concussive syndrome resulting from his two-story fall down the open air shaft?

III. **Appeal of Minor Plaintiffs' G.I. and V.I, and Ms. Destefano**

1) Did the Trial Court commit reversible error, under *McGaughey v. District of Columbia*, by dismissing plaintiffs' claim for punitive damages for Defendants' reckless

[1] Previous appeals, 2012 CV 956, and 13-CV-447, were both dismissed, without prejudice, as premature, most recently, on June 18, 2013.

disregard for the safety of their patients/customers, resulting in an open air shaft in a wall adjacent to a designated parking space?

2) Did the trial Court err, as a matter of law, by Precluding Plaintiffs' Argument that Defendants Conducted a "Sham" Investigation of the Accident?

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13) Did the Trial Court err by interrupting Plaintiffs' counsel during both Opening Statements and Closing Arguments, where counsel said nothing improper, and failing to interrupt Defendants' counsel, despite improper arguments and statements?

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16) Did the Trial Court Err by, *sua sponte*, changing the date from which post judgment interest accrues until fourths months after the Judgment?

THE PARTIES AND NATURE OF THE APPEAL

Plaintiffs, Wendy Paola Destefano, in her individual capacity, and Wendy Paola Destefano and Enrique Ibanez, in their capacity as parents and legal guardians of minor Plaintiffs G.I. and V.I. (hereinafter, "the Destefano-Ibanez family," or "the family") are hereby appealing numerous orders of the Civil Court, although the Jury Verdict and Judgment in this civil, personal injury action, were in favor of the minor Plaintiffs, G.I. and V.I., for **$1,560,000.00** and **$26,000.00**, respectively, jointly and severally, against Defendants Children's National Medical Center ("CNMC") and Colonial Parking, Inc. ("Colonial"). (JA 178, April 22, 2013 Verdict)

G.I. is an 11 year old boy who was 6 years old at the time that he fell down the open air shaft in the parking garage at CNMC, where he was a patient for long-standing neurological issues, including epilepsy. He was standing next to his mother in the hospital's garage as she bent to open the car door and fell backwards into a three foot wide by 2 foot tall hole in the wall that opened into a 24 foot drop down an air shaft, to a concrete bottom -- where he was trapped for 15 minutes and suffered numerous physical and emotional injuries, including fractured bones, bruises, cuts, injured muscles, scalp lacerations, a concussion, post concussive syndrome and post-traumatic stress disorder. The jury found in favor of G.I. against both Colonial and CNMC, for their negligent maintenance of the garage, which caused the air shaft to be open.

V.I. is G.I.'s 9 year old sister, who was 4 years old at the time of the March 11, 2009 accident. She was standing next to her brother, holding his hand, just before he fell down the air shaft. She suffered post traumatic stress disorder as a result of witnessing

the accident and being in the "zone of danger" herself. The jury therefore found in V.I.'s favor on her claim of negligent infliction of emotional distress.

Ms. Destefano is the mother of G.I. and V.I. She was standing next to her children, trying to open her car door, in a designated parking space, when her son fell backwards into a hole in the adjacent wall that led to a 24-foot drop down an air shaft. The trial court, *via* Judge Edelman, dismissed her individual claim of negligent infliction of emotional distress based on its factual determination that she was not in the "zone of danger," or in danger of falling through the air shaft, because she could not fit through the hole in the wall (JA 349-350) -- although adults much larger than Ms. Destefano easily fit through it and had to hold the surrounding wall when looking into the hole to avoid falling into it. (JA 2908, 2909, 2975, 2974, 2967, 2968, 2879-2880 ¶ 26, Sanchez Aff., JA 674, Woods at 159:16-20; JA 1406[2] ¶ 39, relying on, *inter alia,* Dkt. 331, Ex. W, Woods I depo at 242:14-243:2)

Mr. Ibanez is the father of G.I. and V.I. He was not present at the hospital when the accident occurred, but he arrived shortly thereafter in response to Ms. Destefano's call informing him of it. Mr. Ibanez is not a party to this litigation in his individual capacity, but only as a representative of his children and a witness to their injuries.

CNMC is a nationally, if not internationally, acclaimed hospital specializing in the care of sick children. CNMC is the owner of the property and premises located at 111 Michigan Ave., N.W., Washington, D.C. 20010, including a four level, underground parking garage where the March 11, 2009 accident occurred. (JA 239 ¶ 4, 55; JA 282

[2] *Plaintiffs'* 3/29/12 *Statement of Undisputed Material Facts*, in support of *Plaintiffs' Motion for Summary Judgment*, in docket as Dkt. 331, cites affidavits, deposition, medical records and other evidence attached to the Motion as exhibits, by exhibit number, for each factual statement.

239 ¶ 4, 55) CNMC shares in the profits received from paying customers parking in the garage. (JA 265-267, JA 2862 Blair depo at 303:9-304:6)

Colonial is a private parking company operates at least 240 parking facilities in which more than 100,000 people park each day. http://www.ecolonial.com/parkers/.

At the time of the March 11, 2009 accident, CNMC and Colonial jointly maintained exclusive control of the parking garage and were jointly responsible for detecting dangerous conditions in the garage, including structural hazards.[3] During the term of the contract between the Defendants, the hospital delegated to Colonial its responsibility for daily inspecting, assessing, monitoring and/or informing hospital personnel of safety hazards in the garage.

STATEMENT OF THE CASE

The jury's verdict (JA 178) actually represent *four* separate judgments:

1) $1,560, 000 G.I.'s judgment against CNMC
2) $1,560, 000 G.I.'s judgment against Colonial
3) $26,000 V.I.'s judgment against CNMC; and
4) $26,000 V.I.'s judgment against Colonial.

Pursuant to the principals of joint and several liability, Plaintiffs G.I. and V.I. are entitled to collect the entire amount of the judgment from *either* Defendant, or to collect part of the judgment from each Defendant, as long as they do not "double collect," or collect more than the amount of the judgment from them collectively. *See Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986 (D.C. 1980). The Destefano-Ibanez family members

[3] Dkt. # 331 Ex. I, Alessi depo at 123:9-126:22, 148:14-151:9. 167:15-202:14; Ex. J, Needham depo at 208:6-22, 65:5-208:19; JA 260-261, 267-268, Ex. H, *Confidential Document*, filed under seal, Isaac Song's Personnel File at Bates Stamped pages 45-47; JA 1831-1842, 2/21/13 Hearing testimony of Pelz, Wainwright, Song and Paris; JA 257-274, Contract between CNMC and Colonial; JA 2566, Colonial's *Manager's Daily Facilities Check Sheets*.

certainly do not appeal the finding of Defendants' joint liability on the claims of Minor Plaintiffs G.I. and V.I. or the judgment awarded to G.I. for his past pain and suffering for the undisputed injuries that he sustained -- fractured wrists, scalp split open, cuts and bruises throughout his body, soft muscle tissue damage to his neck, knee, hip and leg, emotional distress from being trapped in the air shaft for 15 minutes, injured and bleeding and the continued emotional distress he suffered, up to the date of the jury verdict. G.I. does appeal the trial court's jury instructions prohibiting the jury from awarding damages for Minor Plaintiff G.I.'s *future* physical pain and suffering for his most severe injury -- post concussive syndrome -- which was life-changing and is ongoing. (JA 724-734 and 1075, Woodruff at 150:5-189:10 and 24:12-25:1)

Ms. Destefano appeals the dismissal of her claim, for negligent infliction of emotional distress, which dismissed her as a party, in her individual capacity.

V.I. appeals the amount of her award (only $26,000) on her claim of negligent infliction of emotional distress, based on the trial court's allocation of witnesses and time, which precluded her from presenting the full evidence of the lasting effects of her diagnosed post traumatic stress disorder.

The family appeals the dismissal of punitive damages and evidentiary rulings and management of the case that would create reversible error on those issues on remand, if the dismissed claims and precluded damages are tried on remand.

If Plaintiff/Appellants prevail on appeal, it would only increase the award to the Plaintiffs by permitting awards for: 1) Ms. Destefano's own claim of negligent infliction of emotional distress as a bystander to her son's accident, in the zone of danger; 2) G.I.'s future pain and suffering from post concussive syndrome; 3) an increase in the award for

V.I., based on additional evidence of her emotional distress that was excluded; and 4) punitive damages against CNMC and/or Colonial.

STATEMENT OF FACTS GIVING RISE TO THE CLAIMS

On March 11, 2009, Paola Destefano took her 6 year old son, "G.I.," to Children's National Medical Center (CNMC) for his regular neurologist appointment, accompanied by her 4 year old daughter, "V.I.," and a toddler whom she was babysitting, "E/R." (JA 1403, Facts ¶¶ 14-20; see fn. 2) Ms. Destefano entered the parking garage, which was operated and managed by Colonial Parking, Inc. ("Colonial"). A Colonial employee or contractor, under the control of Colonial, directed her to the area where there was an empty parking space and she parked. JA 1403, Facts ¶¶ 18)

Ms. Destefano took G.I. to his doctor's appointment and returned to her car with the children. (JA 1404, Facts ¶ 20) The car was parked in the last space in a row, bordered by a wall on the left side and a car on the right side. (JA 1404, Facts ¶ 19) G.I. was standing in the parking space, with his mother on his left and his sister, V.I., on his right. (JA 1404, Facts¶¶ 25-26) G.I. and V.I. were holding hands, as their mother had instructed them to do when they exited the hospital elevator and entered the garage. (JA 2914; JA 1404, ¶¶ 21, 25) Ms. Destefano asked G.I. and V.I. to back up in the space between the car and the wall so that she would have room to open the car door. (JA 2758-2759, Destefano at 105:20-108:11; JA 1405 ¶ 26) When they backed up, there was no wall behind G.I.'s back or head; instead, there was a three foot wide by two foot tall hole in the wall that opened into an air shaft with a 24 foot drop. (JA 1405, Facts¶¶ 26-28) G.I. fell backwards through the hole in the wall. (JA 2877, Sanchez Aff. ¶ 9; JA 1405 ¶ 32) V.I. saw her brother disappear into the wall and screamed that her brother was gone. (JA 2758-2759, Destefano depo at 105:20-106:17; JA 1405, ¶ 33)

Ms. Destefano instantly turned around, looking toward her daughter and saw the hole for the first time. (JA 2757-2758, at 101:12-102:3; JA 1405-1406 ¶ 34) Realizing that her son had fallen into the hole, Ms. Destefano instinctively bent down and reached into it, trying to grab G.I., but she could not see or reach or see him in the dark hole. (JA 1405 ¶ 35) Ms. Destefano did not realize that, behind the hole, there was an air shaft with a two story drop behind it, rather than having a floor one foot off the ground, as it was outside of the hole. (JA 1406 ¶ 36) As Ms. Destefano reached into the air shaft for her son and almost fell into the hole herself, but V.I. grabbed her and helped her keep her balance. (JA 1406 ¶ ¶ 37-38) Ms. Destefano heard G.I. crying and calling her. (JA 1406 ¶ 40) Ms. Destefano's screams brought the attention of personnel of the hospital and/or Colonial Parking. (JA 1407 ¶ 49) Freddy Sanchez, a Colonial Parking contractor working as a parking attendant witnessed the accident. (JA 1407 ¶ 45) Mr. Sanchez immediately ran for help. (JA 1404 ¶ 50) He used the emergency phone to call hospital security, asking that security call 9-11. (JA 1404 ¶¶ 26-32)

The air shaft *should* have been covered with a metal grille, which *should* have been screwed to the wall; however, the cover was leaning against the wall, several feet away, toward the front of Ms. Destefano's car. (JA 1419-1420 ¶¶ 143, 148-153, 155-158) This left a gaping hole in the wall, at least 3 feet wide by 2 feet high, beginning 1 foot up from the ground. (JA 1405 ¶ 28) The vent cover was missing all of its screws and was rusted. (JA 1420 ¶ 145) The hole in the wall was so large that an adult could have fallen through it if he/she were bending down and looking into the hole as Ms. Destefano was doing. (JA 1407 ¶ 50) Because the area was dark and the hole ended three feet up from the ground, it was not readily visible when standing next to it, but was readily visible from a distance. (JA 1405 ¶ 30-31, 209-211) In order to look into the hole, an adult had to bend down or kneel. (JA 1405, 1432 ¶ 30, 210)

Trash, food, a decomposing dead rat (JA 2940), upper right hand corner; JA 1408, 1410 ¶ 58, 77, 78) and other debris at the concrete bottom of the air shaft (*Id*.) indicate that the air shaft was open for a significant amount of time.

The D.C. Metropolitan Police Department and Fire Department responded to this emergency. (JA 1410 ¶ 74) Within hours of the accident, the D.C. Department of Consumer and Regulatory Affairs (DCRA) Code Compliance and Inspection Division, via then D.C. Inspector Eric Woods, issued a *Notice of Violation* and *Notice to Abate* to Children's National Medical Center ("the hospital") for violating 12A D.C. Municipal Regulation 115.1, *failure to remedy dangerous conditions or remove hazardous materials*. (JA 1420 ¶¶ 148-153, 158-159, 162-163) Additional vent covers throughout the garage were loose, missing screws and rusted. (JA 1420-1421, 1423 ¶¶149, 159) During the DCRA Inspection, at least one vent cover was so loose that it became dislodged in Inspector Woods' hands and he had to push it back into place. (JA 1426 ¶ 175) DCRA required repairs within 24 hours to alleviate the immediate danger that another vent might fall off and another person fall into an air shaft (JA 1427 ¶¶ 182-183) and to follow up with a long range plan. (*Id.* ¶ 183)

CNMC owns the garage and is responsible for maintaining its structure. (JA 1402-1403, 1420, 1422 ¶ 4-9, 147, 154) Colonial Parking, Inc. ("Colonial") operates and manages the garage and is responsible for inspecting it for safety hazards in the garage, notifying CNMC of the safety hazards and blocking off the hazardous area from the public until CNMC repairs it. (JA 1403, 1433-1435, 1437-1438 ¶¶ 5-9, 216-231, 241, 243) Pursuant to Colonial's contract with CNMC and Colonial's own internal written policies for all of the garages that it manages, Colonial Shift Managers were charged with

the task of inspecting the garage *three times per day*, using a *Manager's Daily Facility Check Sheet*, to detect, report and contain dangerous conditions to avoid injuries to persons and property. (JA 1433 ¶¶ 216, 229-230) The inspecting manager was obligated to report any conditions that needed corrective action, including notifying the Colonial Manager and the hospital and providing a "temporary fix." (JA 1434 ¶ 221)

Colonial's own lead counsel admitted, in open court, that the parking attendants who saw the hole in the wall before the accident should have reported it so that it could be repaired. (JA 1337 at 22:13-19) Within hours of the accident, Colonial managers falsified at least the previous two months of Check Sheets, to indicate that its employee, Belete Belete, conducted inspections of the garage, which he had not conducted. (JA 817-824 April 1, 2013 PM Transcript at 122:3-148:16) Colonial's Site Manager, Isaac Song, and Assistant Manager, Mussi Mengeste, tried to coerce Mr. Belete into signing the falsified reports, but he refused and found another job. (*Id*.) Colonial managers then forged Mr. Belete's name to the Check Sheets to cover up the fact that Colonial had not conducted the required inspections to detect dangerous conditions in the garage.

CNMC's then Executive Director of Operations (now Vice President of Operations), Roberta Alessi, was responsible for implementing CNMC's contract with Colonial and monitoring its operation of the garage. (Dkt. 331, Ex. I, Alessi depo at 38:13-48:19) She Ms. Alessi received Colonial's *Managers' Daily Facilities Check Sheets*, but made no effort to understand how the inspections were conducted, whether they were conducted or how the forms were -- or should be -- completed. (*Id*. at 289:15-22, 158:3-159:16, 172:17-202:7, 186:10-199:19) Although she received the forms periodically, Ms. Alessi did not even check to see if there were obvious "blanks" on the

form, in the most basic respects, such as identifying the "Shift Manager" or delegee, who performed the inspection(s) (*Id*. at 172:17-195:15) Ms. Alessi testified that, prior to the accident, she regularly received copies of the *Manager's Daily Facilities Check Sheets* and put them in a folder, then threw them away periodically. (*Id*.)

Had Ms. Alessi been reviewing the Check Sheets, or designated someone to do so, she would have known that the inspections were not being conducted for weeks, if not months, prior to the March 11, 2009 accident. Ms. Alessi also supervised and assigned the Director of Safety, Patty Needham, to conduct inspections of the hospital at least once per year; however, no one ever trained or instructed Ms. Needham on the structure of the garage or its ventilation system so that she would understand the dangers of an open vent cover. Prior to the March 11, 2009 accident, Ms. Needham *did not even know that there was a 24 foot drop behind the air shaft vent covers*. (JA 1426 ¶ 179, Dkt. 331 Ex. J, Needham depo at 12:6-16, 40:3-219:19)

G.I. suffered serious injuries as a result of this 24 foot fall onto concrete, some of which are "ongoing," even five years after the accident, and are likely to be permanent. (JA 724-734, Woodruff at 150:5-189:10; JA 1075; JA 1411-1418 ¶ 85-132) Ms. Destefano and V.I. suffered severe emotional distress. V.I. was diagnosed by Defendant CNMC's own doctors, as well as additional medical experts, as suffering from post traumatic stress disorder (PTSD) as a result of the accident. (JA 1418 ¶¶ 133-136)

ARGUMENT

I. Judge Edelman Erred, as a Matter of Fact and Law, in Dismissing Ms. Destefano's Claim of Negligent Infliction of Emotional Distress

A. The Standard of Review

This Court reviews the grant of summary judgment by the D.C. Superior Court *de*

novo. Guildford Transp. Industries, Inc. v. Wilner, 760 A.2d 580, 591 (D.C. 2000).

B. **The Hole in the Wall was Clearly Big Enough so that Ms. Destefano Could have Fallen Through it, along with her Son**

The most glaring error made by the trial court in this case is Judge Edelman's s June 1, 2012 Order (JA 329) and supporting June 12, 2012 *Memorandum Opinion* (JA 332) at 18-19 (JA 349-350), to the extent that it granted summary judgment to Defendants on her claim of negligent infliction of emotional distress. Judge Edelman concluded that Ms. Destefano did not fall under the definition of a "bystander," within the meaning of *Williams v. v. Baker*, 572 A.2d 1062, 1067 (D.C. 1990) -- based solely on *a glaring mistake of fact.* His *Opinion* (JA 350, fn. 8), concluded that:

> the only possible way that Destefano could have fallen into the air shaft would have been had she pushed herself into it while attempting to reach Plaintiff G, and it is far from clear she could have fit into the shaft even then...

Judge Edelman ignored the dimensions of the 3 foot wide by 2 foot high hole (JA 233 ¶ 17, JA 284 ¶ 17), the photos of the hole that were available at the time and submitted as exhibits to *Plaintiffs' Motion for Summary Judgment* and *Oppositions to Defendants' Motions for Summary Judgment* (JA 275, 2908-2945) and sworn witness statements of adult men who said that they had to hold on to the surrounding wall when looking into the hole so that they would not fall into the hole themselves. One of the photos provided by Plaintiffs even pictured two women kneeling on the ground and bending at their waists to peer into the hole (JA 275, 2908-2909), showing that both of these adult women could have fit through the hole together, if someone had come up behind them and pushed them. *See also* JA 2908, 2915,-2917, 1919-2925.

Judge Edelman adopted Defendants' mis-statement of fact even though Plaintiffs addressed this false claim in their *Opposition to Defendants' Motion for Summary Judgment on Negligent Infliction of Emotional Distress Claims* at 13-14 (Dkt. 362).

> Ms. Destefano certainly was not saying that she could not *fit* through the 2 foot high by 3 foot long hole in the wall. Clearly, Ms. Destefano, a petite woman, could fit into the hole. This can be clearly seen in the photograph of the two women who were kneeling and peering into the hole. (G's Ex. M-1, M-2 and M-3, photos from scene) Indeed, both of those adults could have fit through the hole at once if they rolled in head first or jumped; that is certainly not the point. The point is that she could not enter the air shaft *safely*. When she realized that she could not enter the hole without falling and injuring or killing herself -- and perhaps further injuring or killing her son by falling on top of him -- she began screaming for help to get him out of the air shaft. Clearly, this entire *undisputed* description of events demonstrates that Ms. Destefano was in the zone of danger and reasonably feared that she would fall into the hole herself -- because she almost did.

Ms. Destefano could not enter the hole because *there was no floor for her to stand on the other side of the hole*. Obviously, she could not walk onto *air*. She actually testified that she *could* have stumbled and fallen into the hole. (JA 2765-2766 Destefano depo at 133:15-134:15). Photographs of the scene, the testimony of D.C. Building inspector Eric Woods, the affidavit of parking attendant Freddie Sanchez (JA 2879-2879, ¶ 20) demonstrate that adults larger than Ms. Destefano fit through the hole and even had to brace themselves not to fall into the air shaft. DCRA inspector Eric Woods had to hold onto the wall above the hole while looking in to stop himself from falling. (JA 674, Woods at 159:16-20; JA 1406 ¶ 39, Dkt. 331, Ex. W, Woods I depo at 242:14-243:2)

On August 23, 2012, the attorneys for all parties measured the portions of the scene of the accident together, with the vent cover removed, revealing that the shaft had

been modified to include a protective grate between each level.[4] These photos (JA 2950-2989) show CNMC's own counsel, Adam Smith, who is over 6 feet tall, and Ms. Martin's paralegal, Miguel Gallardo, who is 5'10" tall, moving easily in and out of the air shaft (JA 2974, 2975, 2966, 2967, 2983) through the very hole that Judge Edelman held Ms. Destefano could not fit through -- although she is barely over 5 feet tall and petite.

Plaintiffs' counsel, Ms. Martin, stood next to the hole (JA 2984) and leaned into the hole (JA 2985), as Ms. Destefano did when she reached for her son, demonstrating that she would easily fall through the air shaft herself if there were no grates between the floors, as there were not on the day of the accident. (JA 2968) Ms. Destefano is smaller than Ms. Martin and could have easily fit through the hole.

Surely, CNMC's counsel, Mr. Smith, having personally stepped in an out of the hole himself -- and photographed doing so (JA 2974, 2975) -- cannot ethically argue, on appeal, that Judge Edelman's conclusion that Ms. Destefano could not fit through the very same hole was correct. Surely, Colonial's counsel, Ms. Singleton, who was present while Mr. Smith and Mr. Gallardo easily moved in and out of the hole, cannot ethnically make this argument either. In fact, this argument was never ethical, or genuine. To allow this mistake of fact to stand as truth -- and as the basis for the dismissal of Ms. Destefano's valid claim for her injury -- would be to allow the Defendants to prevail based by making blatantly false representations to the court -- or fraud. A dismissal based on fraud cannot stand, in the interest of justice or the integrity of the judicial system.

Defendants should pay for their fraudulent representations to the Court and for their continued refusal to withdraw their fraudulent claim or to stipulate, on appeal, to the

[4] This was actually a modification suggested by Plaintiffs' counsel. (JA 66)

fact that Ms. Destefano could fit through the hole in the wall, despite Judge Edelman's acceptance of their representations to the contrary.[5]

C. **The Court Erroneously Held that Ms. Destefano and her Counsel, Submitted a Post-Deposition "Sham" Affidavit to Redeem her Deposition Testimony**

Judge Edelman's *Memorandum Opinion* states that Ms. Destefano submitted an affidavit *after* her deposition, which "modified" her description of events in her deposition. (JA 350) He therefore concluded that Ms. Destefano's affidavit should be deemed a "sham" and her "subsequent claims" -- or account of the accident -- should be excluded (JA 350, fn. 7). Ms. Destefano's affidavit was not a "sham" -- nor was it completed "subsequent" to her deposition. Her **September 7, 2010 Affidavit** was written and *filed with the trial court more than two months before her November 16, 2010 deposition.*[6] During her November 16, 2010 deposition, defense counsel thoroughly questioned Ms. Destefano about her September 7, 2010 affidavit and her Complaint. JA 2735, 2756, 2759, 2770. Judge Edelman's *Memorandum Opinion* unfairly casts Ms. Destefano as a liar and the undersigned as an unethical attorney who perpetrated a fraud

[5] At a minimum, this question is within the province of a jury, which should not have been usurped by the Judge Edelman. Summary judgment should only be granted where, based on the evidence of record, including affidavits and exhibits, no reasonable juror could have concluded that Ms. Destefano was in danger of falling through the air shaft herself. *Ferrell v. Rosenbaum, M.D.*, 691 A.2d 641 (D.C. App. 1997). Surely, a reasonable juror could have concluded that Ms. Destefano was at risk for falling into the hole herself. Ms. Destefano's claim must therefore be restored.

[6] In fact, Ms. Destefano's September 7, 2010 Affidavit was Exhibit # 1 of her November 16, 2010 deposition (JA 233) at 5, and mirrored Plaintiffs' March 25, 2010 Complaint nearly *verbatum*. (JA 230) Plaintiffs filed a *Motion for Reconsideration*, pointing out the errors in the June 12th Opinion; however, Judge Edelman refused to correct the misrepresentations in his *Opinion* stating that his comments did not create a "professional catastrophe" for Plaintiffs' counsel. July 11, 2012 Order at 2 (JA 355, fn. 1)

upon the Court. The *Opinion* unjustifiably disparages Ms. Martin's professional reputation within the legal and other communities.

D. **The Trial Court Misinterpreted *Hedgepeth v. Whiteman Walker Clinic***

Even if Ms. Destefano had not been at risk of personal harm, the "zone of danger" theory should not preclude her from obtaining a remedy for the Defendants' negligent infliction of emotional distress upon her. The *Memorandum Opinion*, at 18 (JA 349), quotes this Court's opinion in *Hedgepeth v. Whiteman Walker Clinic*, 22 A.3d 789, 800 (D.C. App. 2011), the controlling case in negligent infliction of emotional distress cases.

> Because *Williams* limits recovery to "direct" victims of the tortfeasor's negligence, i.e., those who are distressed by "fear for his [or her] own safety as opposed to the safety of a third party," we have subsequently denied claims brought by bystanders who witnessed harm to another, but did not fear for their own safety.

The decision continues, however, from pages 804 through 808, discussing the *shortcomings* of the "zone of danger rule" and the injustice of some of the Court's own prior holdings applying the rule. This Court *expressly rejected* the restrictive view of *Williams.* This Court explained that the "zone of danger" rule should not be rigidly applied to deny plaintiffs' claims simply because there was no risk of physical injury. This Court therefore applied general principles of foreseeability to determine whether a defendant owed a duty to a plaintiff sufficient to justify a claim of negligent infliction of emotional distress where that duty is breached. 22 A.3d at 793-794.

> We therefore adopt a rule -- itself a limited one -- that supplements the zone of physical danger test. We hold that a duty to avoid negligent infliction of serious emotional distress will be recognized only where the defendant has an obligation to care for the plaintiffs' emotional well-being or the plaintiffs' emotional well-being is necessarily implicated by the nature of the defendant's undertaking to or the relationship with the plaintiff, and serious emotional distress is especially likely to be caused by the defendant's negligence.

22 A.3d at 792.

Hedgepeth provided examples of relationships that involve a special duty and a higher standard of care than the general foreseeability standard include a common carrier's duty to its passengers, *citing Washington Metro Area Transit Auth. v. O'Neill*, 633 A.2d 834, 840 (D.C. 1993) and a landlord to its tenants, citing *Graham v. M & J Corp.*, 424 A.2d 103, 105 (D.C. 1980). 22 A.3d at 794. Additional examples of relationships created a special relationship included the following:

> (1) carrier-passenger, (2) innkeeper-guest, (3) invitor-invitee or possessor of land open to the public and one lawfully upon the premises; (4) employer-employee, (5) school-student, (6) landlord-tenant, and (7) custodian-ward"); *Vassiliades*, 492 A.2d at 591-92 (noting that fiduciaries have a duty to "scrupulously honor the trust and confidence reposed in them because" of fiduciary relationship); *District of Columbia v. Royal*, 465 A.2d 367, 369 (D.C. 1983) (recognizing the District's duty of care for the protection of school children in its schools); *Smith v. Safeway Stores, Inc*., 298 A.2d 214, 216 (D.C. 1972) (recognizing duty of care owed by business invitor to invitee); *Graham*, 424 A.2d at 105 (recognizing duty of reasonable care owed by landlord to tenants with respect to a building's common areas); *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 141 U.S. A-D.C. 370, 439 F.2d 477 (1970) (recognizing duty of innkeeper to guest). 22 A.3d at 813, particularly fn. 39.

Judge Edelman mischaracterized Ms. Destefano as a "stranger" to each of the Defendants, and therefore not owed any special duty of care; however, Ms. Destefano, was not a "stranger" to either Defendant. She was a parent of a minor patient with an appointment with his doctor at the hospital, as well as a paying customer of Colonial Parking, Inc. She was owed a special duty of care by Colonial, as a customer, and by the hospital, due to its doctor-patient relationship with her minor child.

Both Colonial and CNMC stand in the shoes of a carrier of passengers, a landlord to its tenants, a school to its students, and absolutely is business invitor to business invitees. They jointly and severally control the environment in which the customer must

travel and be physically present to enter the hospital. The garage is the gateway for *sick and disabled children* and their parents to get to the hospital; accordingly, its customers are particularly vulnerable and in need of even greater protection than the general public.[7]

The hospital has a doctor-patient relationship with G.I. -- clearly a special relationship which requires a higher duty of care to him and his family to protect their health and safety from unreasonable risks. She witnessed the accident of an immediate family member -- her son. She therefore did not even have to prove that she was personally in physical danger to prevail on a claim of negligent infliction of emotional distress. Even if she had not been at risk of personal harm, the "zone of danger" theory should not preclude her from obtaining a remedy for the severe emotional harm to her caused by the Defendants' negligence. The dismissal of her claim was therefore reversible error, as a matter of law.

E. Evidence that Should be Admitted on Remand of Ms. Destefano's Claim

1. The Photograph of G.I. in the Emergency Room

Ms. Destefano appeals the Court's November 20, 2012 Order (JA 362) excluding a photograph of Minor Plaintiff G.I. as he appeared when he was taken out of the air shaft, crying, with his face covered in blood and cuts. (JA 365-366) The Court held that the photo was "inflammatory" and more "prejudicial" to the Defendants than it was

[7] Judge Edelman's *Memorandum Opinion*, at 17, fn. 6 (JA 348), stated that Plaintiffs did *not* argue that Defendants had a special relationship with Plaintiffs; however, Plaintiffs *did* make precisely this argument; however, Plaintiffs first raised these arguments in their April 4, 2012 *Opposition to Colonial Parking, Inc.'s Motion for Summary Judgment on Claims of V and Ms. Destefano, for Negligent Infliction of Emotional Distress* (Dkt. 362) and next in Plaintiffs' August 19, 2012 *Motion in Limine to Preclude Defendants from Misrepresenting Hedgepeth v. Whitman Walker Clinic.* (Dkt. 478) and thereafter.

"probative" -- although it was undisputed that the photo accurately reflected how G.I. actually looked at the time. Photographs and videos depicting the plaintiff's injuries have long been used to assist juries in understanding the pain and suffering of the plaintiff.[8]

In a trial on the issue of Ms. Destefano's claims of negligent infliction of emotional distress, the photograph her son, as she saw him immediately after he was rescued from the air shaft, is directly related to her emotional distress caused by the accident -- both in terms of the emotional distress that she experienced at the time of the accident and also the picture of her son in her head that continues to haunt her as part of her memory of the accident, even now and into the future.

2. **CNMC'S Surveillance Videos of Ms. Destefano and her Children**

If Ms. Destefano's claim is restored, Defendants will certainly resurrect the contributory negligence claim that they asserted when Ms. Destefano was still a Plaintiff. She should be permitted to use all of the 6 short videos that the hospital produced to show that she acted responsibly and reasonably to protect her children and to keep them walking with her in an orderly fashion, both through the hospital and through the garage, up to a minute before the accident. The videos show the children well-behaved, under her watchful supervision, holding hands and/or holding the stroller that she pushed. Ms. Destefano therefore appeals the Court's April 18, 2013 Order excluding the Defendants hospital's own 6 short surveillance videos (less than 30 seconds each) of her, G.I., V.I. walking through the hospital and garage, during the twenty minutes prior to the accident,

[8] *Waldorf v. Shuta,* 3 F.3d 705 (3rd Cir. 1993); *Saladino v. Stewart and Stevenson Services, Inc*., 2011 U.S. Dist. LEXIS 7566 at *30-31 (E.D.N.Y. 2011); *LaFarge v. Kyker*, 2011 U.S. Dist. LEXIS 48498 (N.D. Miss. 2011); *McCloud v. Goodyear*, 2008 U.S. Dist. LEXIS 43265 (C.D. Ill. 2008); *Colon v. Rinaldi*, 2006 U.S. Dist. LEXIS 86418 (D.C.P.R. 2006).

up to one minute before the accident.[9] Particularly since both Defendants attempted to cast blame for the accident on Ms. Destefano and were only precluded from making a contributory negligence defense because she was dismissed as a party, Defendants will, no doubt, revive this argument and argue that she did not properly supervise her children. The videos completely dispel this thought; accordingly, the videos should be admitted.

II. **Contrary to the D.C. Model Jury Instruction on Future Damages, the Trial Court Erroneously Prohibited the Jury from Awarding G.I. Future Damages for the Post-Concussive Syndrome he Continues to Suffer from the Accident --**

Plaintiffs appeal the Court's April 17th, 2012 Jury Instruction at pages 16-17, # 13.01(4) and (7) (JA 429-430), prohibiting the jury from awarding any damages to minor Plaintiff G.I. for "ongoing," or permanent, post concussive syndrome. On April 15, 2013, Judge Josey-Herring initially selected jury D.C. Standard Jury Instruction #13-2.

> PERMANENT INJURY ABSENT MEDICAL TESTIMONY
> G.I. has offered evidence that the Defendants' negligence caused him to suffer personal injury and that the effects of that injury still exist today, more than four years after the incident. Although no physician or other expert testified about how long the effects of the injury might last, you may still conclude from the facts and circumstances of the case and from the nature and duration of the injury, that G.I. has suffered a permanent injury and award damages accordingly.

[9] Plaintiffs sought to admit these videos to rebut the testimony of the hospital's PTSD expert, Dr. Antell, who testified that G.I. was so mentally deficient that the sight of his own blood splattered on the wall and in puddles beneath him, as well as the trash, dead rat and his physical injuries (his scalp split open and cuts, bruises, soft muscle tissue damage through his body), while he was trapped in the air shaft. (JA 993-1003) Plaintiffs also sought to rebut the "eleventh hour" claims of CNMC's receptionist, Luz Almodovar, who surprisingly testified that Ms. Destefano told her that G.I. was "hyper" just before the accident, with Ms. Almodovar "guess[ing]" that he was "running around." (JA 1151-1159 at 28:9-62:17, particularly 58:6-24) Judge Josey-Herring held that all videos except one were "highly prejudicial" to the Defendants (JA 1195 at 29:16-22; *see also* JA 1199 at 42:18-22), discussed at JA 1194-1200 (25:3-47:5); however, Defendants could not be prejudiced by their own surveillance videos showing G.I.'s demeanor through the hospital for the twenty minutes he was in the hospital prior to the accident.

After giving all of the jury instructions, however, Judge Josey-Herring issued an Order**,** on the night of April 15th, 2013, stating that she was reconsidering her own instruction and required all counsel to, once again, provide her with legal authority and arguments on this issue, *via* e-mail, over the "holiday" of Emancipation Day, April 16, 2013. (JA 412-413) Plaintiffs *cited, inter alia*, the controlling case of *Underwood v. National Credit Union*, 665 A.2d 621, 654 (D.C. App. 1995), holding that the jury can *infer* permanent injury where the condition has been ongoing for years -- *even without medical testimony that the condition is permanent.* See also *International Sec. Corp. of Virginia v. McQueen*, 497 A.2d 1076, 1080 (D.C. 1985) and *American Marietta Co. v. Griffin*, 203 A.2d 710, 712 (D.C. 1964).

Defendants cited no case that contradicted these cases. They only cited cases that held that expert testimony is needed to establish *causation* where a layperson could not reasonably infer that the plaintiff's injury was caused by the defendant's conduct. (JA 356-357) Judge Josey-Herring acknowledged that Plaintiffs' expert, pediatric neurologist, Dr. Woodruff, had established causation "*for sure*" (JA 1263, April 15, 2013 PM Transcript at 57:12-14; *see also* 51:20-52:3; 50:10-58:9). The cases cited by Defendants therefore do not apply to this case.

Plaintiffs' expert, Dr. Woodruff, testified extensively about G.I.'s "ongoing" post concussive syndrome -- which was life-changing. (JA 724-734 and 1075, Woodruff at 150:5-189:10 and 24:12-25:1) His opinion was based, in part, on the medical records of CNMC's own doctors, Drs. Parr and Gaillard, who diagnosed G.I. with post-concussive syndrome caused by the accident. Dr. Woodruff also discussed the medical records of CNCM's Director of the Concussion Clinic, Dr. Goia (Phd., not M.D.), who recorded

G.I.'s symptoms as indicative of post concussive syndrome and the written report of Colonial's expert, Dr. Novello, who concurred in this diagnosis.

Despite the controlling case law and the testimony, on the morning of April 17, 2013, Judge Josey-Herring deleted the Standard Jury Instruction that she had proposed herself and read to the jury and replaced it with the language urged by Colonial:

> You may award damages for any of the following items that you find the defendants' actions proximately caused:
>
> ....
>
> (4) any emotional distress that G.I. may suffer in the future, except you may not award future damages for permanent Post-Concussive Syndrome;
>
> ....
>
> (7) any inconvenience that G.I. may experience in the future, except you may not award future damages for permanent Post-Concussive Syndrome;

In reversing her own decision, Judge Josey-Herring claimed that Plaintiffs' counsel *did not ask* Dr. Woodruff the question of permanence (JA 1273 at 4:5-12, 10:11-19); however, when confronted with transcript of Dr. Woodruff's testimony on the previous trial day, Judge Josey-Herring admitted that Plaintiffs' counsel *did ask* the question and that Dr. Woodruff's answer, that the condition "continued" and was "ongoing," constituted an answer that indicated permanence, although he did not use the word "permanent." (JA 1263, 1261-1262, April 15, 2013 PM at 56:17-58:9, 50:12-52:4)

Judge Josey-Herring's final instruction on this issue is the *polar opposite* of the Standard D.C. Jury Instruction that she had actually selected as appropriate before being pressured by Defendants to change it. This deviation from the standard D.C. Instruction and violation of the controlling D.C. case law eliminated G.I.'s most compelling claim and permanent injury, which has changed his life forever, due to violent outbursts resulting from the post concussive syndrome. This case should be remanded to try the

issue of G.I.'s future damages from post concussive syndrome so that he can receive appropriate compensation for his "ongoing" injuries -- likely to last the rest of his life.

III. **The Punitive Damages Claim Should have Proceeded to a Jury**

A. **D.C. Courts Award Punitive Damages to Deter Conduct that Constitutes Reckless Disregard for the Safety of Others**

"'Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition.'" *Howard University v. Wilkins*, 22 A.3d 774 (D.C. App. 2011), *quoting BMW v. Gore*, 517 U.S. 559 (1996). The U.S. Supreme Court has stressed the importance of permitting juries to award punitive damages in the interest of deterring conduct constituting reckless disregard for safety and/or for the rights of others. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (U.S. 2008). The high Court held that punitive damages were properly awarded against Exxon for the reckless conduct of the captain of the Exxon Valdez who left the bridge during the disastrous 1989 Alaskan oil spill and had been drinking vodka that evening. *Id*. The Court found that the ship's captain, though not an officer of the corporation, acted in a "managerial capacity," such that the corporation could be held liable for his reckless conduct. The Court noted the particular importance of deterrent punitive damages where the particular acts of the defendant are difficult to ascertain and/or where compensatory damages are difficult to assess -- as in the case at bar. *Exxon*, 128 S. Ct. at 2621. Corporations have been similarly held liable for punitive damages for their managers' reckless indifference to their employees' rights, such as statutory rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), *et seq*. *See Daka, Inc. v. McCrae*, 839 A.2d 682, 696-697 (D.C. App. 2003). At trial, both Plaintiffs' expert, Mr. Woods, and CNMC's expert witness, Mr. Dinoff, testified that the open air shaft violated

the D.C. Building Code and created a serious safety hazard for customers and other persons in the garage. (JA 732-736, Woods at 184:23-196:14; JA 1097, 1111, Dinoff April 10, 2013 AM Trial testimony at 15:22-17:14, 72:24-73:25). The jury should have been permitted to assess punitive damages against Colonial to deter it – and other parking facilities – from reckless disregard for deadly hazards in parking garages.[10]

In *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 164 (D.C. Cir. 2007), the D.C. Circuit held that the plaintiff's son, Kenneth, was entrusted to a facility, Re-Direct, contracted with by the state, "charged by Court Order with sole legal custody and responsibility for" Kenneth. The jury found that Re-Direct "acted with deliberate indifference" to his "right to safe conditions and security from physical harm," when it allowed him to leave the facility, without the designated supervision. On his own, Kenneth returned to the neighborhood where he was previously assaulted and was beaten to death. The plaintiff never alleged that anyone at Re-Direct ever intended that Kenneth be killed or physically harmed. The court instructed the jury that it could award such damages only if it found that "the conduct of Re-Direct . . . was maliciously, or wantonly, or oppressively done." 493 F.3d at 166**.** The jury found that Re-Direct was "at the very least" reckless -- which the Court found sufficient for punitive damages.

The Court found that "the jury had ample evidence" to conclude that Re-Direct was 'deliberately indifferent' to Kenneth's safety and that this indifference was part of a 'custom' or 'practice'" of the Defendant corporation. *Id*. The jury heard testimony that Re-Direct failed to maintain proper records on whether Kenneth had received his

[10] *See* Plaintiffs' 4-19-12 *Opposition to Colonial's Motion for Summary Judgment on Claims of Punitive Damages*; Plaintiffs' April 27, 2012 *Opposition to Children's National Medical Center's Motion for Summary Judgment on Claims of Punitive Damages*; *Plaintiffs' June 18, 2012 Motion for Clarification on the Issue of Punitive Damages.*

medications and falsely represented that it was providing services to Kenneth that it did not provide. *Id.* Similarly, the jury in the present case heard evidence that it was the "custom" and "practice" of Colonial to fail to inspect the garage for safety hazards and to falsify records claiming that it did perform the inspections.

In *Rogers v. Ingersoll-Rand Co*., 971 F. Supp. 4, 13 (D.D.C. 1997), the jury awarded a road crew worker $10,200,000 in compensatory damages and $6,500,000 in punitive damages on her negligence and strict products liability claim against the manufacturer for injuries sustained when a milling machine ran her over.[11]

D.C. juries have awarded punitive damages against landlords for conduct that constituted reckless disregard for the safety of others, even though there was no malice or intent to harm. *Perry ex rel. Perry v. Frederick Inv. Corp*., 509 F.Supp.2d 11, 12 **(**D.D.C. 2007), is a case with analogous relationships to the case at bar, between the plaintiffs and the co-Defendants. In *Perry*, a landlord and property management company could be held liable for not only compensatory, but also punitive damages, where a child suffered lead poisoning from chipped paint in one of the apartments in the building owned by the landlord and managed by the managing company. The Court found that the Defendants' failure to properly inspect and to educate themselves regarding their duties under the housing code constituted reckless disregard for the safety of others, particularly since they knew or should have known that a child under the age of 8 years old lived in the apartment. *Perry* relied, in part on *Childs v. Purll*, 882 A.2d 227, 240 (D.C. App 2005), a

[11] The plaintiff's injuries included the amputation of her leg and additional injuries to her abdomen, bladder and uterus. The jury found that the milling machine manufacturer knew of the unreasonable danger posed by its machine and of alternative safety designs and acted with reckless disregard for human life by failing to adopt the safety design. No one alleged that the defendant intended to cause her physical injury and no one knew the precise injury that she would suffer; she only alleged that the company acted recklessly.

similar case of an injured child against a corporate landlord and its corporate officers, regarding lead poisoning in paint, in violation of the D.C. Building Code.

Courts have held corporations liable for punitive damages where the reckless employee was the main person in charge of a site. *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 773-774 (9th Cir. 2005). In determining whether an employee is a managerial agent, the court should review the type of authority that the employer gave to the wrongdoing agent, the amount of discretion that the agent has in what was done. *Lazzaro v. Rite Aid Corporation*, 2010 U.S. Dist. LEXIS 84511 at *22-23 (W.D. Pa. 2010). *Clark v. Metro Health Foundation, Inc.*, 90 F. Supp. 2d 976 (N.D. Ind. 2000).

B. **The Trial Court Committed Reversible Error by Dismissing Plaintiffs' Claim for Punitive Damages Based on her Belief that "*Punitive Damages Carry a Stigma*" for Defendants, even if a Punitive Damages is Reversed on Appeal**

Plaintiffs appeal the Court's April 22, 2012 Order from the bench (**Ex. C,** April 22**,** 2013 Transcript at 51:16-20-61:12, after argument at 3:16-51:10), refusing to submit Plaintiffs' claims for punitive damages to the jury. Judge Josey-Herring *admitted* that the "cautious" decisionwould be to permit Plaintiffs' punitive damages claim to proceed to the jury; however, she expressly declined this reasonable option in favor of protecting the Defendant corporation against a purported *"stigma"* of punitive damages.

> While caution may dictate permitting the claim of punitive damages to go to the jury and then address it in post-judgment motions or on appeal, the court, I acknowledge, as counsel for Children's National medical Center has indicated, that punitive damages carry a stigma, even when they are later addressed by the Court of Appeals or the Court after the fact of sending the matter to the jury.
>
> JA 1345**,** 4/22/13 Trial Trans. at 53:7-13.

The standard instruction regarding punitive damages in the District of Columbia[12] tells the jury that it:

> may award punitive damages only if the plaintiff has proved with clear and convincing evidence: (1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful **disregard for the rights of the plaintiff**; and (2) that the defendant's conduct itself was outrageous, grossly fraudulent, **or reckless toward the safety of the plaintiff.** (*Emphases added*)
>
> Under District of Columbia law, "punitive damages are properly awarded where the act of the defendant is accompanied by fraud, ill will, **recklessness,** wantonness, oppressiveness, willful disregard of the plaintiff's rights, **or other circumstances tending to aggravate the injury**." *Mitchell v. DCX, Inc.*, 274 F.Supp.2d 33, 52 (D.D.C.2003) (citation and internal quotations omitted); *see also Pitt v. District of Columbia*, 491 F.3d 494, 508 (D.C.Cir.2007). (*Emphases added*)
>
> **Proof of the elements may be inferred from the acts of the defendant and from circumstantial evidence**. *Mitchell*, 274 F.Supp.2d at 52 (citation omitted). (*Emphases added*)….
> "it would [ ] be inappropriate to take the issue of punitive damages away from the trier of fact." *See Mitchell*, 274 F.Supp.2d at 52.

McGaughey v. District of Columbia, Slip Copy, 2010 WL 779300 at *5 (D.D.C. 2010).

The question of corporate liability for punitive damages and the definition of "managerial employees" has been addressed by the Supreme Court. *Kolstad v. American Dental Ass'n*, 527 U.S. 526 , 545 (1999). Following *Kolstad*, courts have held corporations liable where they failed to institute training and/or supervision of their employees regarding Title VII compliance, where they failed to institute policies practices and procedures that ensured compliance with Title VII and/or established such polices on paper, but failed to implement them through meaningful training and

[12] Standardized Civil Jury Instructions for the District of Columbia, No. 16.01[1]; *District Cablevision Ltd. Partnership v. Bassin*, 828 A.2d 714, 726 (D.C. 2003).

supervision.[13] Surely, preventing serious injury or even death to a child, should be at least as important to the public interest as enforcing employment discrimination laws. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. at 419.

Despite the controlling case law and the public interest in public safety, the Court precluded the jury from assessing punitive damages against Colonial or CNMC, holdings that a defendant cannot be held liable for punitive damages unless an officer or director of the defendant corporation (rather than a "manager") knowingly committed intentional acts that endangered the safety of others.

Former Colonial Facilities Specialist, Belete Belete, testified that his Site Manager, Isaac Song, and Assistant Manager, Mussie Mengiste, tried to force him to sign the backdated *Check Sheets* and that after he refused, they signed his name to them, backdated. (JA 817-824 April 1, 2013 PM Transcript at 122:3-148:16) Mr. Song was in charge of the Colonial site at CNMC; he was therefore a "manager."[14]

Mr. Blair testified that Colonial's website, which promises "safety" to its customers in all of its locations, was only meant to promise *safety for cars -- not people* and that Colonial has no legal duty to its own paying customers to provide a safe parking

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[13] *EEOC v. Management Hospitality or Racine, Inc.*, 666 F.3d 422, 437-440 (7th Cir. 2012) "[I]t is not sufficient in and of itself to insulate an employer from a punitive damages award. Otherwise, employers would have an incentive to adopt formal policies in order to escape liability for punitive damages, but they would have no incentive to enforce those policies." *Accord Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858-59 (7th Cir. 2001); *EEOC v. Federal Express Corporation*, 513 F.3 360, 371-375 (4th Cir. 2008); *McInnis v. Fairchild Communities, Inc*., 458 F.3d 1129, 1136-1138 (10th Cir. 2006).

[14] An employee is "managerial" where one "was not a mere gas station attendant, but a supervisor" with "direct control over the daily fuel hauling operation and fuel carriers" and his supervisor was the manager of the site. *See also Wal Mart Stores, Inc*. 187 F.3d at 1247 (assistant store manager was "managerial employee"); *Lowery v. Circuit City*, 206 F.3d 431, 437 (4th Cir. 2000) (same); *Hertzberg v. SRAM Corp*, 261 F.3d 651, 663 (7th Cir. 2001) (plant manager is a "managerial").

environment and that Colonial has no duty to its customers to maintain a safe environment for them to walk through while getting to or from their cars. (JA 2842-2843**,** 2825-2827, Blair depo at 228-232, 156-163, particularly 158:9-159:5) Mr. Blair was shown the case of *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130 (D.C. Cir. 1969) during his deposition, but stated that he had never heard of it or any other case holding that Colonial had a duty to its customers to maintain a reasonably safe premises in garages that it manages or operates. (JA 2820-2821, Blair depo at 135-139).

Despite the clear callousness of Colonial's President and CEO regarding safety in Colonial operated garages, Judge Josey-Herring deemed the potential the purported "*stigma*" that might have been attached to CNMC and/or Colonial, by a jury verdict imposing punitive damages, to outweigh the financial and emotional burden on the Destefano-Ibanez family[15] and their counsel, D.C. taxpayers, the court and jurors in a second trial that would result if this Court orders a new trial on the issue of punitive damages. In the face of the appropriateness of permitting punitive damages in this case, such a bias in protecting the reputations of these wealthy and powerful corporate Defendants -- at the expense of injured children, their counsel, the taxpayers and the public, clearly constitutes reversible error.

C. **Colonial Maintained a *Corporate Culture* of Reckless Disregard for the Safety of Others**

Despite the President and CEO of Colonial's statement that Colonial has no duty to its customers to maintain a safe parking environment, there are certain non-delegable duties and responsibilities for which the corporation is held directly liable, regardless of

[15] Ms. Destefano cried numerous times during her own testimony and the testimony of others, particularly doctors describing her son's condition and his teacher, Ms. Woughter, describing G.I.'s violent, out of character behavior, after the accident.

who, in fact, performs them -- one of which is to keep the premises in which the business operates reasonably safe. *Magnum Foods, Inc. v. Inc. v. Continental Casualty Co.,* 36 F.3d 1491 (10th Cir. 1994).[16] Co-defendants CNMC and Colonial were operating under a contract in which CHNC is referred to as "Owner" and Colonial Parking is referred to as "Manager." (JA 257-274) CNMC delegated to Colonial the right to operate a parking garage on the hospital's premises, along with the responsibilities related to that management. Colonial, through procedures established by its management, instructed its Site Managers to conduct, or have conducted, patrols of the garage, three times per day. (JA 1434, ¶ 221) Colonial uses uniform *Manager's Daily Check Sheets* to record inspections of all garages that it operates. (JA 2566)

Manager's Daily Facility Check Sheets produced by Colonial for it purported inspections of the CNMC garage reflect dates weeks and even months before the accident indicate that each of the parts of the garage listed was in acceptable condition (JA 2566); yet, there was no way that someone could have inspected the garage and overlooked the gaping hole in the wall (JA 643-645, Colindres at 37:9-44:9) -- let alone, for weeks worth of inspections by both a day an night manager. The "*Manager's Daily Facility Check Sheet*" for the Day Shift for the period from February 15th through March 14th, 2009, is listed repeatedly as "Belete;" however, *Mr. Belete testified that he never inspected the garage or completed any of the Manager's Daily Facility Check Sheets or conducted any inspection of the garage until after the March 11, 2011 accident.* (JA 817-824 April 1, 2013 PM Transcript at 122:3-148:16) Mr. Belete further testified that, two hours after the accident occurred, the Assistant Project

[16] *Magnum* quoted *Fletcher Cyclopedia of Corporations 4906* (Perm. Ed.) and cited *Restatement (Second) of Agency* 492 & 505 *Mainella v. Staff Builders Indus. Servs., Inc.*, 608 A.2d 1141, 1145 (R.I. 1992); *Missouri Valley, Inc. v. Putnam*, 627 S.W.2d 829, 832 (Tex. App. 1982); *Rainbow Exp. Inc. v. Unkenholz*, 780 S.W.2d 427 (Tex. App. 1989).

Manager, Mussi Mengiste, instructed him to **falsify** and backdate Check Sheets to indicate that he had been conducting and filling the Check Sheets out for months prior to the accident. (JA 817-824 April 1, 2013 PM Transcript at 122:3-148:16)

Obviously, if inspections had actually been conducted *by someone*, there would have been no need for managers to try to coerce Mr. Belete into falsifying backdated forms. The person who actually conducted the inspections would have already filled them out; it is clear from these managers' falsification of the forms themselves -- writing in Mr. Belete's name themselves, against his will -- that no inspections had been done for this time period -- months prior to the accident.

Colonial officers, directors and/or managers acted with *reckless disregard*, through acts and omissions that resulted in a long-standing, egregious safety hazard in the garage that was "an accident waiting to happen." This dangerous condition resulted from Colonial's "corporate culture" of reckless disregard for safety in the garage, through omissions in its policies, practices and procedures, established at the highest level of Colonial's management, with respect to training and supervision regarding safety issues. In order to save money, Colonial managers and/or officers made conscious decisions *not* to train Colonial managers or workers to recognize dangers in the parking garage, not monitor the *Manager's Daily Check Sheets* to determine whether inspections were being conducted, not to train the shift managers to conduct inspections or to complete the *Manager's Daily Check Sheets*, or to otherwise ensure that proper inspections are performed in the garage, constitutes reckless disregard for the safety of others.

Colonial's counsel expressly admitted, in open court, that its parking attendants were negligent in failing to report the hole in the wall. (JA 1337, Tr. 22:13-19)

> There is Mr. Colindres, who saw the hole and I suppose Mr. Sanchez and Mr. White Shoes. ... He seems to have been, you know, just someone who was negligent. And I agree with that. You can argue that. That's a reasonable conclusion that he should have done something more.

Clearly, this admission of negligence is inherently an admission that Colonial parking attendants had *a duty* to report safety hazards in the garage, such as the hole in the wall; yet, Colonial continues to argue, even on appeal, that it had no such duty. Now that the jury has come to the same conclusion that Mr. Hassell did, that Colonial was negligent, Colonial now appeals this verdict, arguing that none of its employees committed any negligent act that caused the accident. To the extent that it admits negligence, Colonial casts the blame on the lowest level employee possible; however, the blame does not flow *from the bottom up*, but rather, *from the top down*.

Like the Defendant Re-Direct, in the *Muldrow* case, Colonial managers falsified documents to indicate that it had fulfilled obligations to protect the safety of others, when in fact, it had not performed the task it knew was required by policy. As discussed above, cases such as *Muldrow*, courts in the District of Columbia have *not* required that officers, directors or even managerial employees have advance knowledge of the risk of the exact injury that occurred and ignored it, in order to be held liable for punitive damages.

> A claim alleging negligent supervision does not seek recovery under a theory of *respondeat superior*. Instead, it is an allegation of direct negligence. *See Brown v. Argenbright Security, Inc.*, 782 A.2d 752, 759-60 (D.C.2001)….

*McWilliams Ballard, Inc. v. Broadway Management Co., Inc***.,** 636 F.Supp.2d 1, 9 (D.D.C. 2009), *quoted in McWilliams Ballard, Inc. v. Level 2 Development* --- F.Supp.2d ----, 2010 WL 1068917 at *4 (D.D.C. 2010). See *also Perry*, 509 F.Supp.2d 11, 21-22.

Colonial management did not train or supervise its employees and contractors to recognize the dangers of the parking garage ventilation system or the importance of ensuring that the vents remained covered to avoid the risk of a person falling into the air shaft. Colonial conducts no safety classes and does not train Project Managers, Shift Managers, Facilities Specialists or any other employee delegated the "Shift Manager" task of inspecting the garage for safety hazards, to actually conduct this inspection, to fill out the *Manager's Daily Facilities Check Sheets* or to otherwise recognize or record structural or other hazards in the garage.

D**. <u>CNMC's Reckless Disregard for Safety</u>**

As discussed above, Plaintiffs' produced evidence, in the form of admissions by the Vice President of Operations at Children's National Medical Center, Roberta Alessi, received copies of the *Manager's Daily Facilities Check Sheets*, but that she threw them away. Had Ms. Alessi actually reviewed them, or delegated someone else to review them, she would have known that no inspections were being conducted -- which violated the contract between the hospital and Colonial that was specifically negotiated to protect the safety of the hospital's patients, employees and visitors, while in the garage. In addition, the Director of Facilities, Robert Beckwith, testified that the hospital officials instructed him to close the air shaft back up -- with the trash, blood, and rat carcass inside -- rather than clean it out and/or inspect the contents for evidence of how long the air shaft had been open. Instead of conducting the *investigation* that it promised the Destefano-Ibanez family -- and the public -- the hospital engaged in a "cover up," destroying evidence and allowing human and animal waste to further deteriorate in the air

vent for nearly a year after the accident, when renovations were made and all debris from all sources accumulated together and were finally removed.

Ms. Alessi actually *threw away the Facilities Checksheets*, without reviewing them or offering any input into what should be inspected. She could not even explain how long she kept them before throwing them away, without ever looking at them. If she had looked at them, she would have seen that weeks of Check Sheets were missing and that others with items circled as acceptable were missing the names of the Shift Managers who purportedly performed the inspections. CNMC's Director of Safety, Patricia Needham, whose job it was to inspect the premises for safety hazards, at least once per year, and to train both employees and contractors regarding safety hazards at the hospital, testified that she was not even provided information regarding the structure of the garage and did not even know that there were air shafts behind the vents prior to G.I.'s fall. (JA 1426 ¶ 179, Dkt. 331 Ex. J, Needham depo at 12:6-16, 40:3-219:19)

E. **A "Sham" Investigation Justifies Punitive Damages**

The court's preclusion of Plaintiffs' Argument that Defendants Conducted a "Sham" Investigation of the Accident is relevant to its decision to preclude punitive damages. Plaintiffs appeal the Court's November 20, 2012 Order (JA 364-365), holding that Plaintiffs could not present evidence that Defendants should be subject to punitive damages because they conducted "sham" investigations of the accident, or a "cover up." The Court held that *Daka, Inc. v. McCrae*, 839 A.2d 682, 696-697 (D.C. App. 2003), did not apply because it is an employment discrimination case. Judge Josey-Herring did not explain why the "cover up" investigation of a boy nearly dying from falling down an open air shaft would be less worthy of legal sanctions than a cover up of employment

discrimination; moreover, she *expressly relied on* her own interpretation of *Daka* in her April 22, 2013 decision dismissing punitive damages (JA 1344, April 22, 2013 Transcript at 52:20-53:1). *Daka* should be applied consistently and correctly, to restore Plaintiffs' punitive damages claims and to admit evidence that Defendants conducted a "sham" investigation as a basis for awarding punitive damages.

IV. **Evidentiary Rulings Relevant to Issues to be Tried on Remand**

A. **The DCRA Notice of Violation of the D.C. Building Code**.

Plaintiffs appeal the Court's November 20, 2012 Order excluding the District of Columbia Regulatory Agency (DCRA) *Notice of Violation and Notice to Abate* (JA 2892) issued to CNMC from evidence and prohibiting Plaintiffs' expert, former DCRA Inspector, Eric Woods, or any other person from testifying about deteriorated condition and missing screws in air shaft vent covers throughout the garage. Beginning with the Pre-Trial Conferences, Judge Josey-Herring repeatedly threatened Plaintiffs' counsel, that, if anyone violated any one of her many pre-trial orders regarding admissible evidence, directly or through any witness called by that party, she would declare a mistrial and assess the entire costs of the trial against the offending party and/or fine Plaintiffs' counsel (*see, e.g.,* JA 615-616, March 26, 2013 Transcript PM at 35:5-40:21, JA 821-824, April 1, 2013 Transcript at 135:12-148:18). *Defendants blatantly violated the Order when their own expert testified about the condition of other vent covers as a means of indicating that all vent covers were in proper condition for safety*.

Judge Josey-Herring's preclusion of testimony about the condition of the additional vent covers also precluded another potential witness, Ronnie Sellers, from doing so. (JA 1160-1164**,** April 10, 2013 PM Transcript at 66:25-81:20, JA 1165-1187,

April 11, 2013 AM Transcript 3:15-21:5, 56:8-66:5; JA 1189, April 12, 2013 AM Transcript at 3:23-5:2) Mr. Sellers was a witness discovered shortly before trial, who is a former employee of CNMC, working under the direction of Director of Facilities, Robert Beckwith. Mr. Sellers was prepared to testify that he saw another vent cover in the garage off the wall days before the accident -- indicating that work was being done in the air shafts before the accident, despite CNMC's and Colonial's claims to the contrary.

After CNMC's facilities expert, Mr. Dinoff, opened the door to other grilles by testifying about other grilles in the same air shaft, but on different levels, Judge Josey-Herring fluctuated, at times, holding that the door was opened, and so, did let some portions of the DCRA Notice of Violation be read into the record, which stated that other vent covers in the garage were loose, rusted and missing screws; however, Judge Josey-Herring later ruled that only evidence of the condition of other vent covers in the same air shaft that G.I. fell through could be discussed. This precluded the testimony of Mr. Sellers because he saw a vent cover off in another air shaft in the garage.

B. **Preclusion of Cross-Examination of Colonial's President and CEO, Andrew Blair, regarding his deposition statements that Colonial's Duty is to Keep Cars Safe Colonial Garages, but not People**.

Plaintiffs appeal the April 4, 2013 and 8, 2013 Orders precluding Plaintiffs from questioning Colonial's President and CEO, Andrew Blair -- who is also the Chair of Children's National Medical Center's Board of Directors -- regarding his deposition statements that Colonial's website, which Mr. Blair wrote and approved. To the extent that the state of mind of Colonial's corporate officers is relevant to the question of punitive damages, Judge Josey-Herring expressly prohibited Plaintiffs' counsel from asking Mr. Blair about his state of mind and actions regarding Colonial's polices and procedures regarding safety in its garages. JA

869-871**,** 4-2 Tr. at 181:10-189:25; JA 1030-1031, 1040 4-8 AM Trial Tr. at 12:5-15, 17:16-24, 53:22-115:16, particularly 61:17-76:22; JA 1057-1058, 4-8-13 PM Tr. Tr. at 6:16-11:5.

C. **Colonial's Disciplinary Action against Project Manager Isaac Song**.

Plaintiffs appeal the Court's January 4, 2013 Order (JA 386**)** excluding Colonial's disciplinary action against Isaac Song. The document included Colonial's admissions that its employees had a duty to inspect the premises for safety hazards and that Colonial employees' failure to discover and report the uncovered air shaft caused of the March 11, 2009 accident.

D. **Preclusion of Jury Consideration of Plaintiffs' Claims of Negligent Training and/or Supervision**.

Plaintiffs appeal the Court's April 17, 2013 Order holding that expert testimony is needed for this claim, even though neither Defendant could explain what, if any training was provided to its employees, thus making it impossible for any expert to analyze it beyond what a layperson could deduce. (JA 1274 April 17, 2013 AM Transcript at 10:20-11:2, after receiving Plaintiffs' legal and factual analysis in and JA 1351-1355**,** Plaintiffs' April 15th and 16th, 2013 e-mails to the Court and Defendants re training and Plaintiffs' April 16, 2013 e-mail to the Court and Defendants re supervision) precluding any jury finding of negligent training or supervision, Judge Josey-Herring's decision on this issue directly contradicted her own holding of April 8, 2013, JA 1028, 4-8-13 AM Transcript at 3:15-7:18.

E. **Exclusion of Eye-Witness, Freddy Sanchez**.

Plaintiffs appeal the Court's November 20, 2012 Order (JA 357) precluding the trial testimony of former parking attendant Freddy Sanchez, the only eye-witness to the March 11, 2009 accident, who also provided a written statement to the hospital, at the

time of the accident (JA 2875). In his affidavit, Mr. Sanchez stated that he reported the open hole in the wall to another parking attendant or supervisor, who was a full-time Colonial employee, but the Colonial employee dismissed the report as insignificant. (JA 2879 ¶ 19). The Court held that Defendants were deprived of an opportunity to depose Mr. Sanchez and that his testimony would therefore by unfair surprise; however, both Defendants had interviewed him extensively and taken written statements from him at the time of the accident. (JA 2873). Colonial's in house counsel, Julienne Bramesco, even *paid* Mr. Sanchez for an interview months after he stopped working for Colonial. (JA 2881, ¶ 26) Mr. Sanchez ceased cooperating with any of the parties because the hospital's process server harassed his family and his girlfriend's family, even involving his mother's employer in attempts to serve him with a subpoena. (JA 1831-1916).

F. **April 2, 2013 "Gag Order," Infringing upon the First Amendment Rights of Plaintiffs, their Counsel and the Press, as well as the Public's access to the courts and information involving Public Safety**.

Plaintiffs appeal the Court's April 2, 2013 "Gag" Order prohibiting any contact with the press regarding the case (JA 825, 836, discussed in 4-2 Tr. at 3:11-52:2). Judge Josey-Herring issued in response to April 1, 2013 Washington Post article (JA 2895); she thereby reversed her own November 20, 2012 Order *denying Defendants' joint motion* to prohibit Plaintiffs and their counsel from speaking to the press, recognizing their First Amendment right to do so (JA 373). [17]

[17] Judge Josey-Herring berated Plaintiffs' counsel, in open court, casting blame on her for an article in the Washington Post, written by reporter, Petula Dvorak, who recorded her own impressions of the testimony that she observed in court the previous day. Judge Josey-Herring characterized the article (JA 2895) as "one sided" and inaccurate, and accused Plaintiffs' counsel of controlling the content of the article -- even though Plaintiffs and their counsel were not barred from speaking to the press at that

It was actually CNMC, through its Director of Communications, that issued its own Press Release on the day of the accident, well before Plaintiffs or their counsel had any contact with any member of the press. (JA 1819-1830) CNMC continued its own "public relations" "spin" on the accident by issuing a second press release a week after the accident. **(***Id***.)** The Destefano- Ibanez family asked their counsel to correct some of the mis-statements that were made by television reporters who had not been able to speak to them and had received misinformation from a representative of the Fire Department.

Defendants relied on two controlling cases in the District of Columbia, *Coulter v. Gerald Family Care, PC*, 964 A.2d 170 (D.C. 2009) and *Welch v. United States*, 466 A.2d 829 (D.C. 1983); however, both *Coulter* and *Welch* expressly rejected the appellants' arguments that pretrial publicity deprive them of a fair trial. Defendants represented the *Coulter* decision as holding that " prohibiting public communication about matters not already in the trial record must be focused on ensuring a fair trial or preventing abuse of the discovery process;" however, neither this language nor this point appears in *Coulter*. *Coulter* actually holds that "a prior restraint on speech that is premised merely on protecting business interests "fails first amendment scrutiny." 964 A.2d at 186, *citing Bailey v. Systems Innovation, Inc*., 852 F.2d 93, 99 (3d Cir. 1988).[18]

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point and there was no reason why they should not have contacted the press. JA 825-837, April 2, 2013 Transcript at 3:11-51:12.

[18] Lawsuits receive media coverage every day -- thus, the term, "high profile cases," including capital cases where the death penalty is at issue, such as the O.J. Simpson trial and the trial of the D.C. snipers, John Muhammed and minor Defendant John Malvo. It also includes civil cases such as football players suing the NFL, *Monk v. NFL*, 2:2008 cv 02975 (Cal. Central Dist. Ct. 2008), for long-term injuries resulting from concussions sustained while playing football and *Damolewski v. Hillerich Bradsby Co.* 2:2012 cv 04759 (N.J. District Court 2008), which settled for $14.5 million, after seven years of litigation, for brain damage suffered by a 12-year-old boy against the Little League and other defendants who were allegedly responsible for the League using metal bats instead

A child was severely injured in a world renowned Children's Hospital, due to a glaring safety hazard. The facts of this case, and the conditions of the parking garage where the accident occurred, are matters of public concern. Publicity surrounding this case can result in safer garages and other structures with air shafts.[19] There is no public interest or concept of "fairness" to be protected in a "gag" order that allows these corporate Defendants to hide the facts of this case or the lack of care they take to prevent dangerous conditions on their premises from the public.[20]

G. **Unequal and Unreasonable Limits of Time and Number of Plaintiffs' Witnesses to Present Case**.

Plaintiffs appeal the Court's March 21st Orders limiting Plaintiffs' witnesses to 17 and 20, while permitting Colonial Parking was permitted to call as many as 31 witnesses (JA 408). Although there were two Plaintiffs and each had the burden of proof on all counts against two corporate defendants, acting through numerous persons, the Court further limited Plaintiffs' time to present their case by allowing Defendants to use up

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of wooden bats, knowing that the metal bats cause the ball to fly faster and harder than wood.

Publicity surrounding the NFL cases and *Damolewski* has literally changed the way children's sports are played, *making them safer*. The NFL litigation has also increased public awareness regarding *post concussive syndrome and its long-term effects -- a major issue in this very case*. The present case involves public safety, involving Colonial operated garages used by thousands of people in the D.C. area alone.

[19] Colonial initially blamed the children as well, but later retracted that defense

[20] After issuing its own *Press Releases* portraying itself as apologetic for the accident, concerned for the welfare of the family and dedicated to discovering why the air shaft was left open and not discovered, the Defendant hospital criticizes Plaintiffs for issuing their own *Press Releases.* It is particularly inconsistent and offensive that Defendants are seeking to withhold the facts of this case from the public, while at the same time, in this litigation, they are actually blaming the children's mother for the accident. Ms. Needham, uses the story of this accident as learning tool when training CNMC employees and contractors about the dangers of the air shaft. (Dkt. 331, Ex. J Needham depo at 117:20-121:5) The order requested by Defendants would have required Ms. Needham and any employee of either Defendant from using the accident as a teaching tool or otherwise referring to the accident.

Plaintiffs' witness time with motions, inappropriate objections and bench conferences, as well as long and unnecessary cross examination and cross examination of their own witnesses, counted against Plaintiffs' time.

Judge Josey-Herring used trial time to allow the Defendants to argue the same issues over and over again -- despite three pre-trial conferences, extensive Pre-Trial Order and permitting Colonial an entire day "mini-trial" on the issue of its duty to its customers to maintain a safe parking environment at CNMC. (JA 553) This time was deducted from Plaintiffs' trial time and prevented them from presenting all of the witnesses necessary to prove the extent of the children's injuries.[21] Because G.I. was the one most severely injured, and his injuries were hotly contested, the time allotted focused on him. Testimony regarding V.I.'s injuries was limited. For example, there was no time for her father, Mr. Ibanez, to testify at trial, although he had testified in detail about V.I.'s post traumatic stress disorder and nightmares in his deposition. (Dkt. 331, Exs. C and D.)

H. **Defense Counsel was Permitted to Ask Leading Questions of their own Client.**

Plaintiffs called employees and officers of Colonial and CNMC, including Colonial's President and CEO, Andrew Blair, as adverse witnesses. The Court

[21] Judge Josey-Herring sustained Defendants' objection to her *accurate* statement that the Defendants were asking the jury to find that they were not liable to the injured children at all. *See. e.g.*, JA 1286, 4-17-13 AM Tr. at 57:2-59:14; 53-90 and again in her rebuttal (JA 1312 4-17-13 PM Tr. Tr. at 41:2-19), while she did not interrupt either Defendant's opening or closing arguments at all. She repeatedly, improperly, and without justification, interrupted Plaintiffs' counsel in her Opening Statement, Closing Statement and Rebuttal to Defendants' Closing Statements, as well as repeatedly interrupting her examination of witnesses, *sua sponte*. She did not interrupt either Defendants' Opening or Closing Statements, even when they improperly made arguments and/or instructed on the law. *See, e.g.*, JA 607, 3-26 Tr. at 2:1-89:5; JA 1286 4-17 AM Transcript at 53:24-115:2 and JA 1304, 4-17 PM Transcript at 11:1-50:10. These interruptions distracted the jury from the witness' answers and cast doubt on her credibility as an attorney. This practice should be prohibited if this appeal results in a remanded trial.

improperly permitted Defendants to use leading questions to cross examine their own clients, suggesting the answers to them and allowing them to answer "Yes." (JA 1057)

V. **The Trial Court Erred by Denying Certain Costs Denied to Plaintiffs**

Plaintiffs' filed a Bill of Costs, for reimbursement of the out-of-pocket expenses of $247,553.91 spent on the litigation of this case. Judge Josey-Herring June 24, 2013 Order granted Plaintiffs only $51,683.84. This means that $195,870.07 will have to be subtracted from the children's award to pay for these litigation expenses.[22] As is clear from Judge Josey-Herring's 28 page decision on costs, she exerted a great effort to deny costs to Plaintiffs -- going far beyond even the costs to which Defendants objected and *sua sponte*, denying costs to which Defendants did not even object.

Plaintiffs appeal the denial of costs for: 1) videotaped depositions; 2) video conferencing for *Defendants'* deposition of Eric Woods, which the Defendants elected, but which Judge Josey-Herring's June 25, 2013 Order mistakenly assumed was arranged by Plaintiffs' counsel; 3) structural modification, repeated transport and assembly of model scene of the accident; 4) counsel's travel expense to Michigan to defend deposition of Plaintiffs' expert witness, being deposed by Defendants, in Michigan, *at Defendants* insistence; 5) expert witness fees for former DCRA Inspector Eric Woods, whose testimony was only necessary because Defendants denied that the open air shaft violated the D.C. Building Code -- a fact that the hospital's own expert witness admitted at trial; 6) photocopying and binders for voluminous exhibits used at trial and for required chambers copies of voluminous filings; 7) expert witness fees for expert pediatric neurologist, Dr.

[22] Plaintiffs' counsel will personally bear the cost of interest and other funding costs for money that borrowed to finance this litigation. Plaintiffs' counsel and her associates have worked tirelessly on this case for five years, without compensation, bearing the responsibility of all costs for this litigation.

Brian Woodruff, necessary because Defendants denied that the accident at issue caused G.I.'s post-concussive syndrome, but which the hospital's own expert witnesses conceded, at trial; and 8) expert witness fees for Debra Jenkins, LCSW, necessary because Defendants denied that the accident at issue caused G.I.'s and V.I.'s severe emotional distress and/or post traumatic stress disorder, but which the hospital's own expert witnesses conceded, at trial.

A. **Depositions**

Plaintiffs submitted invoices for depositions in this case totaling $61,644.74, which included videotaped depositions of certain key witnesses. Judge Josey-Herring permitted only $39,834.96 -- leaving the Plaintiffs to bear $24,916.71 in costs. *Comier v. District of Columbia Water and Sewer Authority,* 2012 D.C. Super. LEXIS 4 at 5 (D.C. Sup. Ct. 2012), requires that a prevailing party seeking reimbursement for both deposition transcripts and videos to explain why both are necessary. Plaintiffs took video depositions of Colonial employees due concerns that they would not be available at the time of trial, particularly due to the high turnover rate of parking attendants.[23] Paper transcripts were also necessary as exhibits for the numerous motions and responses that all parties filed, particularly, Colonial's multiple motions for summary judgment. Judge Josey-Herring denied Plaintiffs' request for $1,680.00 for the charges for the deposition of their expert, Eric Woods, via video-conference. She mistakenly assumed that it was Plaintiffs' choice to conduct the deposition by video-conference, but this was *Defendants'*

[23] As also specified in *Plaintiffs' Bill of Costs, Summary of Costs,* page 1, fn. 1 (JA 2465), numerous Colonial employees who were responsible for the facility at CNMC were no longer Colonial employees by the time of trial.

deposition of Plaintiffs' expert, Mr. Woods. It was Defendants who elected this method of deposition and the charges were assessed equally against each party. [24]

B. **"Visual," or Replica of Scene of Accident**

Plaintiffs sought reimbursement for the cost of the demonstrative evidence of the replica of the scene of the accident, for a total of $4,497.29. Judge Josey-Herring allowed only $1,268.75 for this exhibit. *Comier,* 2012 D.C. Super. LEXIS 4 at 10, holds that audio-visual costs for a trial presentation *may* be taxed in a Bill of Costs; however, they were denied in *Comier* because the prevailing party failed to itemize the $11,980.38 in costs. The *Comier* court could not therefore determine which of the components was necessary to the presentation. In contrast, Plaintiffs in the present case have itemized everything from the replication of the wall and the car, to the shipping charges and the clothes for the mannequins and the charges for transportation and assembly, for a total of $4,497.29**.** (JA 2990 Photos of Demonstrative evidence) Judge Josey-Herring acknowledged that the replica was appropriate demonstrable evidence, but she denied costs for its re-assembly and disassembly, its transportation to and from the courthouse on two occasions, its structural modifications with wood post reinforcements and even the shipping costs from the manufacture of the cardboard structures.

[24] Judge Josey Herring also denied any reimbursement for the cost of deposing certain witnesses, including Paula Darte -- CNMC's Director of Communications (public relations office). Ms. Darte is the person who issued the Press Releases on behalf of the hospital related to the accident. It was absolutely reasonable for Plaintiffs' counsel to depose her to determine where she received the information from to put in the Press Release. Her deposition was only two hours long, including off the record conversations. Ms. Forbes was the Manager, Accreditation, Licensure and Regulatory and she specifically responded to the Health Department Licensing Branch at the District of Columbia Health Department and Joint Commission, purportedly explaining how the accident occurred. (Dkt. 331 Ex. B, Forbes depo at 11-13, 45-103) She conducted safety training at CNMC. (Id. at 33-44) Ms. Forbes testified that the accident was considered a "sentinel event." (Id. at 82) Ms. Forbes' deposition was also only 2 hours long.

Judge Josey-Herring cited *Cormier*, 2012 D.C. Super. LEXIS 4 at *8 in which the court denied the cost of a delivery service on a letter that could have been mailed first-class with a stamp. Certainly, no one could expect that this life sized model of a car, the wall bordering the parking space (with 4 by 4 wooden post reinforcements nailed to 12 inch square bases), with three child sized mannequins and a stroller,[25] could have been mailed to and from the courthouse with a stamp.[26] Mr. Green's invoice included the hours that he worked and listed the tasks performed on each day. There was no basis for denying $3,228.54 in actual, legitimate costs incurred by Plaintiffs in order to present this invaluable demonstrative evidence at trial, as well as to the pre-trial conference, where it had to be assembled for the court's approval before trial.

C. **Process Service**

Judge Josey-Herring denied Plaintiffs reimbursement for $1,783.50 in fees paid to a professional process serving company, Same Day Processing, for serving the Complaint and subpoenas in this case. Judge Josey-Herring denied all of these costs, based on Defendants' misrepresentation of *Comier*, 2012 D.C. Super. LEXIS 4 at 8, as indicating that the case prohibits reimbursement for process service for witnesses; however, *Comier* addresses messenger and delivery service as a non-recoverable cost. Personal delivery is

[25] Judge Josey-Herring also denied full reimbursement of the $129.00 spent on the mannequins because they were bought in a set of four, but only three were used for the exhibit; however, counsel bought the set of four because they were less expensive as a set than buying the three needed individually would have cost.

[26] This exhibit filled Mr. Green's van. Mr. Green also had to stay in court during several hours on some days because Judge Josey-Herring had first indicated that the model would have to be removed after certain testimony, but changed her mind at several points and eventually decided to allow it to stay up for the duration of the trial. It also had to be assembled, pre-trial, in an area large enough to prepare Ms. Destefano for her trial testimony and familiarize her with the exhibit that she would use to explain how the accident occurred. Mr. Green assembled it in his garage and stored it there until trial. His services were extensive and bought at reasonable price under the circumstances.

optional, as opposed to mailing; however, the Complaint and subpoenas *must* be personally served on witnesses for depositions and for trial. This cost was clearly a necessary and reasonable litigation cost.

D. **Binders**

Plaintiffs requested reimbursement of $933.01 for binders and dividers for chambers copies and trial exhibits, with receipts for these binders -- most of them oversized to accommodate large filings with extensive exhibits. Judge Josey-Herring specifically required the binders for court filings longer than 25 pages, including exhibits; yet, she denied the entire amount of these binders.[27] Neither the children Plaintiffs nor their counsel should bear the personal expense of these binders, which were expressly required by the judge in this litigation.

E. **Photocopying**

Plaintiffs' *Summary of Costs*, page 2, in the *Bill of Costs*, clearly identifies the photocopying expenses, both in house and at Kinko's, as copies of trial exhibits and binders to hold them. *Comier*, 2012 D.C. Super. LEXIS 4 at 8-9, confirms that photocopying expenses should be taxed where invoices substantiate them.[28]

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[27] Judge Josey-Herring stated that she denied the costs of binders (many of which were more than $30 a piece, due to size) because Plaintiffs submitted some filings that were less than 25 pages in smaller binders. Plaintiffs' counsel did provide two or three filings slightly under 25 pages in small, flexible binders that cost $1-2; however, she also hand-delivered them to chambers and asked Judge Josey-Herring's law clerk whether she should keep them in the binders so that they did not get lost in the mass delivery of copies required by Judge Josey-Herring when the case was transferred to her from Judge Edelman, who did not want paper copies of the filings. Judge Josey-Herring certainly never refused or returned any of the binders, which, presumably, continue to sit somewhere in the courthouse on some bookshelves.

[28] Invoices for Kinko's, as well as paper, ink and binders are all included. Judge Josey-Herring denied the costs of ink and paper, purportedly because there was no accompanying affidavit stating that the ink and paper invoiced was used only for copying

Plaintiffs requested $587.94 for the reproduction of two copies of the Joint Trial Exhibits, which were used for the jury and provided to the Defendants. Judge Josey-Herring denied $293.97 of this amount because one of the two Kinko's checks, in the amount of $293.97, stated, on the memo line, "Joint Appendix," while the other said "Joint Exhibits." They were the same exhibits, which is why the checks were for the same amount, one day apart.[29]

F. **Transcripts of Hearings before Judge Bartnoff**

Plaintiffs requested reimbursement for court hearing transcripts in the amount of $4,786.70. Judge Josey-Herring disallowed $896.70 for hearings before Judge Bartnoff, although Plaintiffs' counsel provided copies of cancelled checks for payment to the Court because the invoices noting the charge per page were not included, and that there could be some chance that Plaintiffs ordered them on an expedited basis and paid more for the transcripts unnecessarily; however, the transcripts are actually part of the court record, so the number of pages is known. There was no reason for this speculation -- and certainly no reason to deny the costs in their entirety, rather than granting the non-rush, per page cost. Both Plaintiffs and Defendants quoted Judge Bartnoff's holdings in hearings. She did not normally issue written orders, but gave them orally from the bench. This is

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the copies of court filings in this case; however, the Bill of Costs itself requires counsel to certify that all costs were necessary for the litigation of the case at issue. (JA 434) Plaintiffs' counsel did so certify. There is no basis for an additional requirement of an affidavit, particularly since any filing signed by counsel constitutes a certification that its statements are true, to the best of counsel's knowledge.

[29] In fact, before Plaintiffs' counsel outsourced to Kinko's, Defendants specifically agreed that the copies were necessary and agreed to share these costs. In the heat of the trial and its aftermath, Plaintiffs' counsel did not demand payment during the trial, nor did either Defendant volunteer it, but it was appropriately listed as a reimbursable cost.

certainly not a normal expense of a law office, absorbed by the law office. These transcripts are absolutely an out of pocket expense related solely to this case.

G. **Travel Expense to Detroit for Deposition of Expert Witness**

Judge Josey-Herring denied Plaintiffs reimbursement for $658.22 in Plaintiffs' counsel's travel expenses to Detroit, Michigan, for the deposition of Plaintiffs' expert witness, Dr. Woodruff. Travel expenses for an attorney to travel for an out of state deposition is taxable as a reasonable cost *Comier.* 2012 D.C. Super. LEXIS 4 at 10,. It also makes clear that travel expenses for a witness to travel out of state for trial testimony or for a deposition, is also taxable. *Id.* The *Comier* Court denied a travel cost because there was a discrepancy, or apparent "double travel" charge. That is not the case here.

H. **Expert Witness Fees**

Plaintiffs requested reimbursement for expert witness fees, in the amount of $107,045.00, for all three expert witnesses. Judge Josey-Herring denied reimbursement for any of them. The court, may, in its discretion, award expert witness fees as part of costs. *See Cormier v. District of Columbia Water and Sewer Authority*, 2012 D.C. Super. LEXIS 4, at *7 (April 12, 2012); *Robinson v. Howard Univ*., 455 A.2d 1363 (D.C. 1983). Costs for expert witnesses should be awarded where the expenditures were reasonably necessary to present the case. *Id.* As Judge Josey-Herring acknowledged, Plaintiffs' expert, pediatric neurologist Dr. Brian Woodruff established causation between minor Plaintiff G.I.'s post concussive syndrome resulting from the March 11, 2009 accident. Debra Jenkins, LCSW, an expert in post traumatic stress disorder (PTSD), established causation between both children's PTSD and the accident. Without these experts, Plaintiffs' claims would have been dismissed; accordingly, they were essential.

Early in this case, Judge Bartnoff stated that Plaintiffs would need a facilities expert to establish the standard of care regarding dangerous conditions in the building (garage). In order to be prepared for these arguments, Plaintiffs retained Eric Woods, former DCRA Building Inspector, and an expert in the D.C. Building Code.[30]

VI. **Change of April 22, 2013 Date from which Post-Judgment Accrues to August 1, 2013**

The April 22, 2013 Judgment awarded Plaintiffs post-judgment interest. In its June 24, 2013 Order regarding costs, the trial court, *sua sponte*, changed the effective April 22, 2013 date from which interest would run, to August 1, 2013. There is no justification for retroactively excusing Defendants from paying three months of interest.

CONCLUSION

Appellants respectfully request that this Court: 1) restore Ms. Destefano's claim of negligent infliction of emotional distress; 2) remand the case for a jury determination of damages for G.I. as compensation for his *future* pain and suffering from his "ongoing" post-concussive syndrome; 3) remand the case for a jury determination of punitive damages; 4) assess interest on the judgment from April 22, 2013; and 5) hold that evidence improperly excluded from the first trial be admitted on remand.

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[30] This expense would not have been necessary if Defendants had admitted that the open air shaft violated the D.C. Building Code, as Defendant CNMC own expert, Lawrence Dinoff, finally admitted at trial. (JA 1097, 1111, Dinoff April 10, 2013 AM Trial testimony at 15:22-17:14, 72:24-73:25).

CERTIFICATE OF SERVICE

This is to certify that on this 18th day of February, 2013, a true copy of the foregoing *Appellants' Brief* and *Joint Appendix*, were served upon Appellee's counsel, named below, by e-mail, by consent.

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