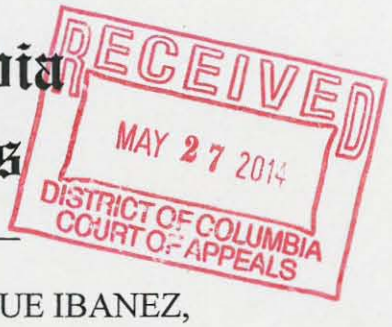
**Appeal Nos. 13-CV-679, 13-CV-693, & 13-CV-694**

*In the*

# District of Columbia Court of Appeals




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

*Plaintiffs-Appellants/Cross-Appellees,*

*v.*

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

*Defendants-Appellees/Cross-Appellants.*

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

## REPLY BRIEF OF THE APPELLEE/CROSS-APPELLANT CHILDREN'S NATIONAL MEDICAL CENTER TO CROSS-APPEAL OF APPELLEE/CROSS-APPELLANT COLONIAL PARKING, INC.

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### I. The Trial Court Correctly Concluded that Colonial's Agreement with CNMC Required It to Exercise Reasonable Care for the Plaintiffs' Safety

#### A. The Terms of the 2002 Parking Management Agreement

Reduced to its essence, Colonial's argument is that the 18-page Parking Management Agreement limited its duties to parking cars and keeping the floors clean. (Brief, at 36) The Agreement, however, was not so limited, and imposed housekeeping duties encompassing the identification of safety hazards such as that which Colonial ignored here. Colonial was required to operate and generally maintain the garage "in a first-class manner and in conformity with this agreement." (JA 258 § 2; 260 § 3(b)(iii)). Colonial paid monthly "operating expenses" which were charged back to CNMC pursuant to an annual budget. (JA 263-64 § 3(c) & (d); JA 265-66 § 4) Section 3 of the Agreement stated that--

> (b) "Operating Expenses" shall mean the following items:
>
> (iii) . . . General maintenance *shall include, but not be limited to, general cleaning of the Parking Garage* to [CNMC]'s reasonable satisfaction (i.e. treatment of oil spills, sweeping and trash pick-up and removal) *as well as patrolling*, sweeping and emptying of all trash containers in the Garage stairwells, patient drop-off areas and other such connected pedestrian areas; … *but shall not include repairing, servicing or maintaining major structural items, including concrete surfaces, and Building-related equipment* (described below). [Colonial]'s maintenance costs shall include janitorial costs and non-technical maintenance . . . .
>
> (iv) Minor repairs to, and maintenance of, the parking and/or revenue control equipment and trade fixtures in said Parking Garage, to maintain same in a clean, safe and usable condition and in conformity with [CNMC]'s reasonable standards. Notwithstanding anything herein contained to the contrary, all costs to repair and/or maintain major structural items and Building-related equipment shall be the responsibility of the [CNMC], and shall not be considered Operating Expenses hereunder. For purposes of the preceding sentence, major structural items and Building-related equipment shall include, but not be limited to, the air handling systems, the maintenance of … sewer systems, sump pumps, traps and drains, HVAC systems, plumbing, all concrete structures and other major structural elements including the main garage helix, sprinkler and fire systems and electrical and lighting fixtures, including the replacement of bulbs and tubes.

(d) . . . [Colonial] shall also supply a new $4,800 golf cart to patrol the Parking Garage.

(JA 258-260 § 3(b)(iii), (iv), (d) (emphasis added))

Section 7 of the Agreement, "Repairs and Maintenance," stated that Colonial "shall make all general repairs to the Parking Garage (so long as such repairs are consistent with Paragraph 3(b)(iii) and (iv) hereof), … the cost of which shall be an Operating Expense …. [Colonial] shall keep the entire Parking Garage free of trash and provide snow plowing for all parking areas, and treat oil spills on a daily basis. [Colonial] shall have no obligation, whatsoever, with respect to the heated, helical ramp, or to the condition, maintenance, or repair of any sidewalks or landings which may be in, on, adjacent to, or adjoin the parking Garage. (JA 267-68 § 7)

The Agreement required Colonial to "secure and maintain . . . comprehensive Public Liability Insurance with limits of not less than $2,000,000 for bodily injury or death per occurrence," naming Colonial as an insured, and CNMC as an additional insured. (JA 267-68 § 8) Colonial charged CNMC for the cost of this insurance as an operating expense. (JA 258-260 § 3(b)(ii))

Under Section 9 ("Use and Operation"), Colonial agreed

*to operate the Parking Garage in an efficient and proper businesslike manner making every reasonable effort to maximize revenues and minimize expenses, while maintaining high quality service to the customers of the Parking Garage*. Such operation shall include the obligation to:

…

(c) Direct courteously, and efficiently, all traffic into and out of the Parking Garage, *and take all such other actions and steps as may be necessary to manage, service and operate the Parking Garage properly and efficiently*.

(d) *Provide general "housekeeping" maintenance for the subject areas of the Parking Garage and keep the entire parking garage clean and free of trash and rubbish, and treat oil spills on a daily basis (consistent with paragraph 3(b) (iii))*.

…

> (h) Use its *best efforts* to fulfill the aforesaid obligations and undertakings and to operate the Parking Garage, at all times during the Term of this Agreement, pursuant to the policies and directions issued by [CNMC] so as to maximize income and maintain service. (JA 269-270 (emphasis added))

CNMC paid Colonial a monthly management fee to perform, *inter alia*, general housekeeping and cleaning. Section 3(b)(iii) states that general maintenance includes, but is *not limited to*, cleaning; defines cleaning separately from "patrolling"; and divides maintenance costs between "janitorial costs" and "non-technical maintenance."[1] Section 9(d) likewise described housekeeping and cleaning as separate undertakings.[2] Section 3(d) included the purchase of a golf cart to "patrol" the garage; nothing therein limited its use to cleaning.[3] Even Section 14(b), which Colonial regards as the reductive summation of all of its duties (Brief, at 39, 42), required it to perform "general housekeeping maintenance of the Parking Garage." The exclusion of the *cost* of repairing major structural items in subsections 3(b)(iii) and (iv) was not inconsistent with Colonial's duty to operate the garage efficiently and perform general housekeeping.[4] *Colonial* drafted the Agreement and chose to employ the term "housekeeping"--a term that *it defined in its own documents* to include safety inspections. As noted *infra*, over a long course of performance Colonial worked with CNMC to keep the garage safe, reported structural and equipment-related

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[1] Colonial's monthly invoices similarly included separate charges for janitorial services and maintenance. (JA 588, Tr. 142)

[2] "Housekeeping" includes "the care and management of property and the provision of equipment and services," and "the routine tasks that must be done in order for a system to function or to function efficiently." MERRIAM WEBSTER'S ONLINE DICTIONARY (11TH ED. 2008).

[3] "Patrol" means "to traverse a particular district, beat, section of coast, etc. for the purpose of guarding, watching, or protecting." WEBSTER'S NEW INT'L DICTIONARY (1950) (emphasis added).

[4] When Colonial desired to exclude something entirely from the scope of its responsibilities, as in Section 7, it employed language to make the same clear: "[Colonial] *shall have no obligation, whatsoever*, with respect to the heated, helical ramp, or to the condition, maintenance, or repair of any sidewalks or landings which may be in, on, adjacent to, or adjoin the parking Garage." This is precisely how Colonial argues that the repair exclusions of Section 3(b)(iii) and (iv) should be construed--yet it did not employ this language to remove major structural items and building-related equipment from its good housekeeping duties.

problems to CNMC, and provided CNMC with copies of its daily manager's checksheets as proof that it was fulfilling its contractual commitments.

Finally, the insurance clause reflected the parties' understanding that they could be exposed to legal action for unsafe conditions or acts of negligence by Colonial resulting in personal injury or death to their customers. In agreeing "to operate the Parking Garage in an efficient and proper businesslike manner making every reasonable effort to maximize revenues and minimize expenses, while maintaining high quality service to the customers of the Parking Garage," (§ 9), Colonial undertook an obligation to keep the garage reasonably safe so as to reduce the risk of meritorious claims and the adverse impact they could have on insurance premiums. As the "duty" hearing established, it was no surprise that: (1) Colonial's Claims Department created the inspection checksheet, (2) its risk manager emphasized the importance of consistently performing inspections, and (3) Colonial's site managers were required to file monthly reports about hazardous conditions, which Colonial maintained in its database.

**B. The Trial Court's Determination of Contract Ambiguity**

The Honorable Todd Edelman issued a written opinion laying out the rationale for his denial of Colonial's summary judgment motion. Carefully reviewing District of Columbia caselaw, the contract language, and the evidence submitted in connection with the motion, he concluded that "[a]s the operator or manager of a parking facility, Colonial likely owes its customers a common law duty of reasonable care," and that "[u]ltimately, based upon the case law, it appears that Colonial, as operator and manager of the garage, had a common law duty toward Plaintiff [s] … as customers of the garage." (JA 340-341) The Court noted, however, that several contract provisions could affect Colonial's liability. After reviewing the aforementioned sections, he concluded that Colonial's motion could not be granted because of

"the ambiguity of the plain language of the contract" and "the different interpretations of the agreement presented by the parties." (JA JA 343-346)

### C. The "Duty" Hearing Established that Colonial Interpreted General Housekeeping to Include Keeping the Garage Reasonably Safe

Judge Josey-Herring, to whom the case had been transferred (JA 86, #510), acknowledged that the "Court must determine the extent of Colonial Parking's duty to Plaintiffs prior to trial," and held an evidentiary hearing on the issue. (JA 99, #600 at 5; JA 106, #648).

Contract interpretation and whether a contract is ambiguous are questions of law reviewed *de novo*, *unless* the interpretation depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn therefrom. *1010 Potomac Assocs. v. Grocery Mfrs, Inc*., 485 A.2d 199, 205 (D.C. 1984); *International Bd. of Painters v. Hartford Accident & Indem. Co*., 388 A.2d 36, 43 (D.C. 1978). Under such circumstances the Trial Court, if acting as the finder of fact, is best situated to decide the credibility of the extrinsic evidence or the choice among reasonable inferences to be drawn therefrom. *Giordano v. Interdonato*, 586 A.2d 714, 720 (D.C. 1991); *1010 Potomac Assocs*., 485 A.2d at 205. In reviewing a determination of ambiguity, this Court "should be mindful of the trial court's familiarity" with the circumstances surrounding the making of the contract. *Morgan v. American Univ.*, 534 A.2d 323, 330 (D.C. 1987). In this case, the Trial Court correctly concluded that Colonial undertook to inspect the garage for unsafe conditions as part of its general housekeeping obligations.

Having determined the PMA to be ambiguous, the Trial Court properly took evidence of the circumstances surrounding the agreement and the parties' course of conduct. *1901 Wyoming Ave. Coop. Ass'n v. Lee*, 345 A.2d 456, 461-62 (D.C. 1975). The Restatement (Second) of Contracts provides that "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it

by the other, *any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement*." REST. (2D) CONTRACTS § 202(4) (emphasis added). Evidence presented at the "duty" hearing established the following:

Colonial first contracted to operate CNMC's garage in 1979, 30 years before the accident. (JA 556, Tr.14) Colonial's general counsel prepared the first contract, which was Colonial's standard contract. (JA 556, Tr.15) Thereafter, new agreements were signed every five years, with occasional letter extensions. (JA 557, Tr.17) This included a standard contact in 1991, which Colonial's counsel also drafted. (JA 556, Tr.16, 557, Tr.19)

The parties signed a new agreement in June 1997. (JA 592, Tr. 158) Richard Paris, CNMC's HR Vice-President, negotiated the inclusion of a "patrolling" duty in this contract because he wanted Colonial to "step up their game," and clarify the expectation that Colonial's employees had a contractual duty to patrol the entire garage and report any problems or issues. (JA 594, Tr. 165-166) The patrol obligation was carried over into the 2002 agreement without negotiation. (JA 595, Tr. 169-170)

Colonial's attorney also drafted the 2002 Agreement (JA 559, Tr.28; 599, Tr.187); consequently, ambiguities therein must be construed most strongly against Colonial. *1901 Wyoming Ave. Coop. Ass'n*, 345 A.2d at 462-63; *Cowal v. Hopkins*, 229 A.2d 452, 454 (D.C. 1967). The 2002 Agreement was very similar to the 1997 contract and involved very little negotiation (JA 558, Tr.21; JA 595, Tr.169-171; 599, Tr.187); according to Wainwright, the only changes were the addition of the golf cart, minor changes regarding insurance deductibles, and some changes in Colonial's fee. (JA 558, Tr.21) Paris testified without contradiction that the purchase of the golf cart under Section 3(d) was included because CNMC was spending a lot of

money to repair deteriorated concrete in the garage, and wanted to make patrolling the entire garage more efficient. (JA 595, Tr.170)

The scope or meaning of "housekeeping" as used in Section 9(d) was not discussed during negotiations. (JA 555, Tr.12) Paris testified, however, that neither Wainwright nor Colonial President Andrew Blair ever indicated to him during the 1997 or 2002 negotiations that "general housekeeping maintenance" referred only to trash pick-up. Had they done so, it would have been "completely unacceptable" and "put the contract in jeopardy" because Colonial had agreed to meet higher expectations for being aware of and reporting problems in the garage. (JA 595-596, Tr.172-74) Nor did Blair or Wainwright indicate that Colonial did not have an obligation to check building-related equipment or major structural items. (JA 596, Tr.174)

In addition to testimony about contract negotiations, substantial evidence was presented about performance under the 2002 Agreement.[5] Wainwright testified that in his administration of the contract over the years, he prided himself in operating "an efficient first-class operation," and he agreed that Colonial has always held itself out "as a first-class parking operation." (JA 558, Tr.21) Joseph Pelz, Colonial's former CNMC site manager and senior operations manager, similarly testified that it was Colonial's practice to operate the garage in a safe and efficient manner, and that *part of running the garage efficiently included operating it safely*. (JA 568, Tr.63; 575, Tr.92) Wainwright likewise agreed that "*any parking company worth its salt would inspect for safety hazards*." (JA 562, Tr.40)

[5] In determining what a reasonable person in the position of the parties would have thought the words of Agreement meant, the reasonable person is presumed to know all the circumstances surrounding the contract's making and is bound by usages of the terms which either party knows or has reason to know. *Intercounty Constr. Corp. v. District of Columbia*, 443 A.2d 29, 32 (D.C. 1982).

Colonial invoiced CNMC monthly in accordance with a budget. (JA 587, Tr.139) It was Colonial's standard practice to budget separate labor charges for janitorial and maintenance services. (JA 587, Tr.140; 588, Tr.142)

The evidence firmly established that the Colonial managers performed walk-around inspections three times a day to make sure there were no safety hazards in the garage. (JA 558, Tr.23-24; JA 565, Tr.51; JA 601, Tr.194-196) This was a standard practice in 2002 and 2009. (JA 561, Tr.35) On these patrols (JA 569, Tr.66), site managers were required to be alert for and report safety concerns including oil spills, trash, debris or water on the floor, and tripping or slipping hazards. (JA 558-59, Tr.24-26) The golf cart was used to facilitate these inspections. (JA 602, Tr.197) Draining problems with flooding were reported to the hospital's Engineering control room. (JA 566, Tr.53) Colonial supervisors were required to report falling concrete because it could present a hazard. (JA 559, Tr.25; 560, Tr.32) Also, although Colonial did not maintain the garage ventilation system, its supervisors were obligated to ensure that the fans were working properly to avoid carbon monoxide buildup in the garage. (JA 559, Tr.27; 560 Tr.30) Colonial's staff did, in fact, report issues relating to the exhaust fans in the years prior to the accident. (JA 598, Tr.182)

The Trial Court admitted into evidence "Manager's Daily Check Sheets" which Colonial used in 2002 and 2009 to document its inspections. (JA 555, Tr.12; 561, Tr.34-35; 563, Tr.42-43) Colonial did not intend the form's roster to be the exclusive list of items that shift supervisors were to check in the garage, and encouraged its employees to note other hazards indicative of "poor housekeeping." (JA 571, Tr.73-74; 576, Tr.95) Colonial's forms also contemplated that "action codes" would be assigned for corrective actions, including "resolved,"

"temporary fix," "*service call placed*," and "*property manager notified.*" (JA 2566) Corrective measures were to be noted on the reverse side. (JA 2567)

In September 2006, Colonial's risk management director emphasized the importance of consistently conducting garage inspections. (JA 570, Tr.70-71; 576, Tr.95-96; 603, Tr.204) Conditions found and recorded on the checksheets were reported monthly to Colonials' Claims Department, and maintained in a computerized database. (JA 558, Tr.24; 569-570, Tr.68-69; 576, Tr.96; 603-04, Tr.204-05)

Colonial's project manager reported conditions in need of correction to Children's Engineering Control Room. (JA 567, Tr.57; 598, Tr.181) Roberta Alessi, who oversaw parking for Children's, also received reports about conditions in the garage that needed to be addressed, including copies of Colonial's checksheets. (JA 588, Tr.142-143; 589, Tr.146-47; 591, Tr.154-155, 156)[6] Colonial was usually the source for reports about garage safety issues. (JA 580-581, Tr.112-113) There was no evidence that Colonial's general manager ever instructed his site manager not to report any particular type of condition; if something was in need of repair, it was to be reported. (JA 567, Tr.58-59) Reported issues included problems involving the structure of the garage, such as missing or misplaced drain covers, inoperable lights, leaks from broken pipes in the ceiling, concrete deterioration on the floor, and exposed wiring. (JA 567, Tr.60; 568, Tr.62-63; 582, Tr.117-119; 597, Tr.180; 602-03, Tr.199-201) Hazardous conditions to be reported to CNMC included a ventilation grille off of an airshaft. (JA 571, Tr.74) Had such a

[6] Alessi testified that Colonial had the expertise in garage management, and that its role was to manage parking on a daily basis and be responsible for general housekeeping and maintenance. "They were really our eyes and ears. They were there, you know, close to 18 hours a day. So that's what their major responsibility was, to manage the parking at Children's." (JA 587, Tr. 137-138) Alessi recalled being notified of overflowing drains, burned out lights, cracks in the concrete, and inoperable fans prior to the accident. (JA 589, Tr.147; 590, Tr.149) Colonial's managers never told her that they were not assessing building-related equipment or structural features of the garage. (JA 590, Tr.150)

condition been reported to Colonial's former site manager and senior operations manager, it would have been reported immediately as a safety hazard. (JA 571, Tr.74)[7]

Well before 2009, Colonial provided an "Employee Guide to Safety" to its employees. (JA 566, Tr.55-56; JA 586, Tr.133, 134) Under the Guide's "Good Housekeeping Program," Colonial's "Standards for Good Housekeeping" were set forth and specifically included a "walk-around assessment," whereby "[a]t least three times a day, the Shift Manager should walk around the facility, paying particular attention to spills, obstructions, refuse, improper storage of materials, and *other hazards that show poor housekeeping*. Employees are asked to identify and recommend corrective actions for their areas." (JA 1063, Tr.105-106; 1782; 2386 (emphasis added)). The Safety Plan emphasizes that "Employee participation is a key to effective housekeeping. That's why we encourage you to help us develop and uphold *high standards*, *assess hazards* and stay informed on incident investigations findings." (JA 1782 (emphasis added)). Included among many other housekeeping activities are the specific duties to "*coordinat[e] with building management* to keep garage floor and ramps free of potholes and chipped concrete;" and "*identifying and reporting* ***<u>any</u> structures that pose a safety hazard***." (JA 1782; 2386). The Guide listed two telephone numbers "to report a *safety concern*." (JA 1782).

[7] CNMC and Colonial had a good working relationship to rectify safety issues. (JA 582, Tr. 118; 597, Tr.179-180) Alessi met monthly with Colonial's site manager. (JA 588, Tr. 143) CNMC authorized the purchase of radios for Colonial's staff to improve communication and facilitate an effective response in the event of a garage incident. (JA 569, Tr. 65-66) Colonial made recommendations to CNMC on how to run the garage more efficiently, effectively and safely (JA 587, Tr.138) Safety concerns in the garage did arise between 2002 and 2009; for example, Colonial's manager reported a barrier that was creating a trip hazard. (JA 588, Tr. 144) And when hazardous conditions arose, such as a spillage of gasoline in 2007, Colonial and CNMC collaborated to develop ways to prevent them in the future. (JA 568-569, Tr. 64-65)

After G.I.'s accident, Colonial's general manager and its HR director disciplined their CNMC site manager for violating safety procedures because he had failed to be aware of the exposed ventilation opening and report it. (JA 577, Tr.98) The disciplinary notice stated:

> ***Colonial Parking policy requires that each parking facility be checked on a daily basis for hazards and other maintenance issues***. It would appear that if the facility was checked as required this particular area was missed and ***an extreme hazard*** was not located and cordoned off and reported to CNMC Maintenance Department.
>
> ***As the project manager on site, it is [your] responsibility to insure that the facility is free from any and all hazards that may endanger users of the facility.*** In this instance the fact that the airshaft grate had been removed and not discovered by you or your staff or blocked off to prevent access to the area while the hospital was notified and repairs made.

(JA 571, Tr.76; 572-73, Tr.79-81; 577, Tr.99 (emphasis added)) Colonial's general manager and senior operations manager concurred in the fact that these were obligations that the site manager owed to CNMC and its patrons. (JA 573, Tr.81-82; 577, Tr.100)

At the conclusion of the hearing, the Trial Court held that

> The issue in the case . . . involve[s] the question of duty. And I just want to cite you to . . . the case from the Court of Appeals, Becker verus Colonial Parking[8]. . . . And at page three of that decision, the court says a parking lot operator like other possessors of business premises--are not an insurer of the safety of his customer [but] does owe them a duty of reasonable care. Liability for injuries may be predicated upon a breach of this duty in regard to either his own activity or those of a third person on the premises. For the operator's obligation is to exercise prudent care, not only in his own pursuits but also to identify and safeguard against whatever hazardous acts of others are likely to occur thereon. And essentially in this case the court stated that a parking lot operator owes a duty of care to its customers. *So that I do find with respect to Colonial that it has a common-law duty effectively to its customers, even though it's not the owner of the property. But certainly with the management or provided management services for the . . . property*. (JA 605, Tr.211)

(JA 126 #778; 605, Tr.211, 212)

Just as it had in *Becker*, Colonial in the case *sub judice* undertook a duty to manage and operate CNMC's garage, and owed a duty of reasonable care to its customers. Having

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**8** 133 U.S. App. D.C. 213, 409 F.2d 1130 (1969).

undertaken the duty to inspect the garage for safety hazards--as established by its agreement with CNMC, its course of performance thereunder, its employment standards and operational requirements--Colonial was under an implied duty to carry out its inspections with reasonable care. *Long v. District of Columbia*, 261 U.S. App. D.C. 1, 820 F.2d 409, 411 (1987); *Guardian Trust & Deposit Co. v. Fisher*, 200 U.S. 57, 68-69 (1906). It was foreseeable that if it failed in this duty, injury to hospital patrons could result.

Colonial's reliance on *Presley v. Commercial Moving & Rigging, Inc*., 25 A.3d 873 (D.C. 2011), is misplaced. In *Presley*, this Court examined the defendant consultant's contractual undertakings and concluded that none of the evidence established that it should have foreseen that its contractual duties to anticipate jobsite problems and monitor safety compliance was necessary for the plaintiff's protection, given the breadth and duration of the project, the owner's and general contractor's role in establishing safety standards and procedures for the numerous contracting parties, and the limited duties that it had assumed. *Id*. at 889-890. The consultant's "non-exhaustive," "occasional" inspections were not the primary means of ensuring that safety precautions were taken all of the time. Rather, the general contractor and other contractors "charged with performing the actual construction work" were primarily obligated to carry out this task. *Id*. at 890. Colonial, by contrast, cannot claim that its duties were so circumscribed: it was *the* company hired to operate and manage CNMC's garage. Children's was not running the garage with Colonial as its "consultant," nor was Colonial merely offering advice or occasional inspection services. As part of its housekeeping duties, Colonial committed itself to consistently patrol and maintain the garage, and charged a monthly fee to do so. To satisfy that obligation, it established an operational scheme that entailed complete inspections of the garage three times a day, and required its management staff to use a checklist that encompassed "structural" items

and HVAC equipment. As such, it was liable to an invitee injured by a defective condition it failed to detect and report. *Kay v. Danbar, Inc*., 132 P.3d 262, 272 (Ala. 2006).

Nor may Colonial be likened to the plumber in *Haynesworth v. D.H. Stevens Co*., 645 A.2d 1095 (D.C. 1994), who came to an apartment building once, repaired a pipe in a non-negligent manner, and whose sole alleged failure was not notifying the property manager or tenants that water was flowing into an adjacent alley, five days before plaintiff was injured. This Court held that "[t]here is no evidence which shows that Stevens was obligated either by contract or by the usual practice in the plumbing industry to notify Smith about the building's water leak into the alley." *Id*. at 1098. By contrast, Colonial managed CNMC's garage for *decades* under a comprehensive agreement that made it primarily responsible for managing and operating a large, busy parking garage that was open to the public, including families and children. Colonial's managers and employees were routinely on-site, and Colonial understood the importance of routinely patrolling the garage and reporting safety hazards to the hospital for corrective action. As its former senior vice-president acknowledged, "*any parking company worth its salt would inspect for safety hazards*." (JA 562, Tr.40)

## II. The Trial Court Correctly Concluded that No Expert Testimony Was Needed to Establish Colonial's Negligence

Plaintiffs in a negligence action must prove "the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiff's injury." *Meek v. Shepard*, 484 A.2d 579 (D.C. 1984). Whether a duty of care is owed under the circumstances is a question of law to be determined by the court. *Croce v. Hall*, 657 A.2d 307 (D.C. 1995). If the subject in question is "so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson," expert testimony is required. *District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987). If, however, the

standard of care is within the "realm of common knowledge and everyday experience," no expert is needed. *District of Columbia v. White*, 442 A.2d 159, 164 (D.C. 1982); *Salem v. United States Lines Co*., 370 U.S. 31, 35 (1962) (internal quotations omitted).[9] A trial court's decision to admit or refuse expert testimony is reviewed for an abuse of discretion, and will be upheld unless manifestly erroneous. *Perkins v. Hansen*, 79 A.3d 342, 344 (D.C. 2013).

Colonial argues that Plaintiffs were required to present expert testimony regarding whether it exercised reasonable care because the scope of its contractual duties was narrow, and understanding whether Colonial exercised reasonable care in the performance of its inspections was not within the ken of common knowledge. (Brief at 43 & n.46) Colonial is wrong on both points.

First, as has been made clear *supra*, Colonial's agreement included an obligation to inspect the parking garage for the hazard involved in this case. The Trial Court correctly determined that Colonial, who had undertaken to operate and manage the garage, was fairly deemed under *Becker v. Colonial Parking, Inc*. to have a concomitant general duty to keep the garage reasonably safe for its customers.[10]

Second, the Trial Court correctly concluded that laypersons were readily capable of grasping the contours of Colonial's negligence within the framework of familiar tort principles. Plaintiffs' case did not require proof of specialized, technical or esoteric matters. The Colonial employees and managers who inspected the garage were not doing work beyond the

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[9] This Court has approved of *Salem*'s "cautious approach" to expert testimony. *Middleton v. United States*, 401 A.2d 109, 130 (D.C. 1979). *See also Morgan v. District of Columbia*, 263 U.S. App. D.C. 69, 824 F.2d 1049, 1061 (1987) (the law rarely predicates recovery upon expert testimony).

[10] *See also Daisey v. Colonial Parking, Inc*., 118 U.S. App. D.C. 31, 331 F.2d 777 (1963); *Caldwell v. Bechtel, Inc.*, 203 U.S. App. D.C 407, 631 F.2d 989, 997 (1980); *Husovsky v. United States*, 191 U.S. App. D.C. 242, 590 F.2d 944, 953 (1978).

understanding of laypersons, such as physicians, lawyers, architects, engineers or law enforcement. No "science" or specialized knowledge was involved in going around a garage to look for safety hazards and calling CNMC if something were found. Plaintiffs' case did not require proof of the appropriateness and sufficiency of academic disciplinary processes, or whether a prison security system was operated with reasonable care.[11] It did not present questions about how cardiopulmonary resuscitation should be performed on arrestees after suicide attempts, or compatibility testing of subway track circuit equipment.[12] Nor did it require proof of scientific matters such as coefficient of surface friction standards, national cushioning standards for playground equipment, traffic engineering and design, or engineering principles entailed by the erection and removal of pedestrian barriers in temporary construction walkways.[13] Simply put, it was a question of whether, having been put on notice of a large, uncovered ventilation shaft opening immediately adjacent to a parking space in a children's hospital, Colonial acted unreasonably by ignoring it over the course of several weeks.

As the Trial Court correctly noted, there was no evidence that Colonial took *any* action after its employee was notified of the condition. (JA 474-75) Colonial contends that "there is no authority . . . for the proposition that expert testimony is required when the defendant 'took some action' in a particular respect, but no need for expert testimony when the defendant 'took no action.'" (Brief at 48) However, the Trial Court's decision is supported by *Young v. District of*

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[11] *Varner v. District of Columbia*, 891 A.2d 260 (D.C. 2006); *Hughes v. District of Columbia*, 425 A.2d 1299 (D.C. 1981).

[12] *Toy v. District of Columbia,* 549 A.2d 1 (D.C. 1988); *In re Fort Totten Metrorail Cases*, 895 F. Supp. 2d 48 (D.D.C. 2012).

[13] *Frazza v. United States*, 529 F. Supp. 2d 61 (D.D.C. 2008); *Haney v. Marriott Int'l, Inc*., 2007 U.S. Dist. LEXIS 74872, at *9-*10 (D.D.C. Oct. 9, 2007); *Messina v. District of Columbia*, 663 A.2d 535 (D.C. 1995); *District of Columbia v. Freeman*, 477 A.2d 713, 719-20 (D.C. 1984); *Briggs v. WMATA*, 375 U.S. App. D.C. 343, 481 F.3d 839 (2007).

*Columbia*, 752 A.2d 138 (D.C. 2000). In *Young*, the plaintiff appealed the dismissal of his negligent training and supervision claims for failure to identify an expert witness. Young asserted that he needed no expert because the negligence was within the realm of common knowledge, and the District had admitted that it provided no training to police officers concerning the conduct in question. Although disagreeing with Young's characterization of the record and finding that the District had, in fact, provided some training, the Court of Appeals noted that "*no specialized knowledge is required*" to determine "whether the District was negligent in failing to provide *any* training." *Id*. at 145-46 (emphasis added). Likewise, given the essentially uncontradicted evidence about G.I.'s fall through the vent despite Colonial's knowing for weeks that it was open, it begs credulity for Colonial to argue that an *expert* was needed "to establish what '*reasonable'* meant in this case." (Brief, at 43) The question of Colonial's negligence was properly submitted to the jury, which found its conduct unreasonable. *District of Columbia v. Freeman*, 477 A.2d 713, 716 (D.C. 1984).[14]

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[14] Colonial argues that the jury instruction regarding its duty was improper because Plaintiffs did not call a standard of care expert (Brief at 48 n.52), and because the instruction given did not include guidance "about the meaning or effect of the Contract." (Brief, at 9) In its proposed instruction, the Trial Court included the qualification, to which Colonial did not object, that Colonial had no duty to repair the uncovered ventilation opening. (JA 429; 1228, Tr.38 L.16-17; 1231, Tr.52 L.23-24) When plaintiffs' counsel and the Court engaged in a colloquy regarding the inclusion of language describing the obligation to report and secure the opening--language based on substantial testimony and evidence at trial--Colonial objected, prompting the Court to exclude the proposed language. (JA 1231-32, Tr.53 L.18 - Tr.54 L.5) Colonial's only alternative was an instruction--flatly contradicting the evidence--which stated that it owed no duty to repair *or report* the condition (JA 1253, Tr.17 L.4 - Tr.18 L.4); it offered nothing else to "provide guidance on the various considerations to be taken into account in determining whether the general duty of reasonable care has been breached." *Sandoe v. Lefta Assocs*., 559 A.2d 732, 742 (D.C. 1989). Having objected to the inclusion of language which would have clarified the scope of its duties in accordance with the evidence, and having offered nothing further to clarify the same, Colonial cannot complain when the Court's response to its objection left a broader and more neutral instruction than might otherwise have been formulated. *Missouri P. R. Co. v. Gilbert,* 206 Ark. 683, 178 S.W.2d 73 (1944); *Fry v. Muscogee County Sch. Dist*., No. 03-16548, 2005 U.S. App. LEXIS 22285 (11th Cir. October 14, 2005); *Evans v. Schoonmaker*, 2 App. D.C.

The Trial Court's discretionary determination that no expert was needed to establish Colonial's negligence is also supported by *District of Columbia v. Shannon*, 696 A.2d 1359 (D.C. 1997), in which the defendant also had notice of a dangerous condition--albeit one much *less* obvious than a yard-wide hole in a wall. In *Shannon*, the minor plaintiff's thumb was severed when it became caught in the uncapped end of a one-inch siderail pipe. The District's maintenance mechanic testified that "he did not specifically remember seeing the holes, but that he did not think they were dangerous and therefore may have seen them but not noticed them." *Id*. at 1363. Plaintiff's trial expert was prohibited from explaining the national standards applicable to playground inspections, and from opining that the District should have regularly inspected the slide for open holes. *Id*. The District argued on appeal that plaintiff had failed to establish that it had a special duty of care based on national standards. The Court concluded, however, that the "question [of] whether the District had a duty to inspect the slide . . . is irrelevant *because District employees actually did inspect the slide regularly*." *Id*. at 1364 (emphasis added). The question, therefore, was whether the District "can be said to have had actual or constructive notice based on an inspection that would have revealed the defect to a reasonable person, exercising reasonable care." *Id*. (citing *Pessagno v. Euclid Inv. Co*., 72 App. D.C. 141, 112 F.2d 577 (1940)). The Court held that based on the maintenance employee's testimony, the jury could have found that the District had notice of the defect, and that the circumstances were within the realm of common knowledge and everyday experience, obviating

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62, 71-72 (1893); *Brotherhood of R.R. Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co*., 127 U.S. App. D.C. 58, 62, 380 F.2d 605, 609 (1967), *cert. denied*, 389 U.S. 928 (1967).

the need for a standard of care expert. *Id*. at 1365, 1365 (citing *Croce v. Hall*, 657 A.2d 307, 310 (D.C. 1995); *Sandoe v. Lefta Assocs*., 559 A.2d 732, 738 (D.C. 1989)).[15]

Like the handrail at issue in *Shannon*, the danger presented by the uncovered ventilation opening was not incapable of recognition by everyday experience. Indeed, the fall hazard it represented was readily appreciated by Colonial's former senior operations manager and project manager, who saw the open vent following the incident, agreed that it was an obvious safety hazard, and testified that he would have expected his shift supervisors to bring it to his attention so it could be blocked it off and brought to CNMC's attention. (JA 1141-42, Tr.108-109; 1145, Tr.7)[16]

*Bostic v. Henkels & McCoy, Inc*., 748 A.2d 421 (D.C. 2000), also supports the conclusion that no expert was needed to establish Colonial's negligence. In *Bostic*, the plaintiff fell through temporary plywood boards covering a trench dug by the defendant as an independent contractor for the local gas company. *Id*. at 422-23. The dismissal of the plaintiff's action for negligent maintenance of the plywood boards was reversed, the Court holding that regardless of its contract with the gas company, the defendant had a duty, like that of any "owner or occupier of land," to exercise reasonable care to pedestrians lawfully using the sidewalk. *Id*. at 425. It also held that no expert was needed to establish the standard of care for covering trenches. Citing *Shannon*, the Court held that no expert was needed "to permit a jury fairly to decide that leaving such a gap between boards covering a trench on which pedestrians were expected to walk was

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[15] *See also Trust v. Washington Sheraton Corp*., 252 A.2d 21, 22 (D.C. 1969); *AMTRAK v. McDavitt*, 804 A.2d 275, 285-86 (D.C. 2002).

[16] Pelz provided the same testimony at the February 21, 2013 "duty hearing." (JA 571, Tr.74) Colonial never objected to Pelz' testimony on either occasion, which they now complain was "just another example of trying to bootstrap standard-of-care testimony using Colonial's internal standards in this case and employee's personal opinion." (Brief, at 44 n.47)

negligence, particularly in the absence of safety cones and signs or other warnings of a hazardous condition." *Id*. at 425-26.

There was also no error in admitting Colonial's documents relating to its performance of garage inspections.[17]

District of Columbia law has consistently held that internal guidelines and private standards of conduct, although not conclusive of the question of the standard of care, constitute "some indication of the care required under the circumstances and may properly be considered in determining the question of negligence." *Garrison v. D.C. Transit Sys.*, 196 A.2d 924, 925 (D.C. 1964) (quoting *Schneider v. D.C. Transit Sys*., 188 F. Supp. 786, 787 (D.D.C. 1960), and citing 50 A.L.R.2D 16 (2010) (three-fourths of the jurisdictions where the question has arisen have held such rules admissible)).[18] Thus, in *Garrison* it was held that the transit company's internal rules regarding the use of brakes was admissible in an action for injuries caused by a sudden stop of the defendant's bus. 196 A.2d at 925-26.

Where, as here, laypersons are capable of understanding whether the conduct at issue was reasonable, expert testimony is unnecessary and the jury may base its verdict upon evidence of the defendant's failure to follow its own safety rules. Thus, for example, in *WMATA v. O'Neill*,

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[17] Colonial's "Manager's Daily Facility Checksheets" were designated a joint exhibit and were admitted *without objection* by any party. (JA 2566-2609; 2610) Colonial's Employee's Guide to Safety (*Colonial's* Exhibit 7), was *also* admitted *without objection or qualification*. (JA 1190 Tr.6, 8; 1193, Tr.20) Colonial argues that it was prejudiced because Plaintiffs relied upon these exhibits to support their negligent training and supervision claim, but were permitted, after the latter was dismissed, to use the evidence to argue their case of primary negligence. (Brief at 6-7, 9) The Trial Court dismissed Plaintiffs' negligent training claim pursuant to Colonial's motion for judgment as a matter of law. (JA 1098, Tr.19) Colonial, however, never requested a limiting instruction regarding the relevance of their records, nor objected to the closing arguments of Plaintiffs' counsel of which it now complains.

[18] *See also Snowder v. District of Columbia*, 949 A.2d 590, 603 & n.11 (D.C. 2008); *District of Columbia v. Wilson*, 721 A.2d 591, 598 n.13 (D.C. 1998); *WMATA v. Jeanty*, 718 A.2d 172, 177 n.11 (D.C. 1998); *Clark v. District of Columbia*, 708 A.2d 632, 637 (D.C. 1997).

633 A.2d 834 (D.C. 1993), this Court affirmed a judgment against WMATA for its bus driver's failure to timely signal for police assistance when a passenger assaulted the plaintiff. Plaintiff introduced portions of WMATA's rules handbook requiring its drivers to order a disruptive passenger to leave the bus if he did not stop harassing passengers, and to activate external lights and a silent alarm when conditions within the bus required law enforcement assistance. Rejecting WMATA's argument that an expert was needed because the average juror "has never driven a bus or had to engage in 'passenger control,'" *id*. at 841 & n.14, the *O'Neill* Court observed that the safety rules were themselves evidence of the standard of reasonable care, and that an average juror could apply them to the circumstances at hand. *Id*. at 841 (footnotes omitted); *see also WMATA v. Young*, 731 A.2d 389, 398 (D.C. 1999); *Doe v. Medlantic Health Care Group, Inc*., 814 A.2d 939, 951-52 (D.C. 2003); *Lucy Webb Hayes Nat'l Training School v. Perotti*, 136 U.S. App. D.C. 122, 419 F.2d 704, 709-10 (1969).

## CONCLUSION

For the foregoing reasons, CNMC prays that this Court affirm the denial of Colonial Parking's motion for judgment as a matter of law.

Respectfully submitted,

**McCANDLISH & LILLARD, P.C.**

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**District of Columbia Court of Appeals**
**Appeal Nos. 13-CV-679, 13-CV-693, & 13-CV-694**

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WENDY PAOLA DESTEFANO and ENRIQUE IBANEZ,
as parents and natural guardians of minor children G. I. and V. I.,
*Plaintiffs-Appellants/Cross-Appellees,*

*v.*

CHILDREN'S NATIONAL MEDICAL CENTER, *et al.,*
*Defendants-Appellees/Cross-Appellants.*

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## CERTIFICATE OF SERVICE

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

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

On the **27th Day of May, 2014**, I served the within **Reply Brief of Appellee/Cross-Appellant Children's National Medical Center to Cross-Appeal of Appellee/Cross-Appellant Colonial Parking, Inc.** upon:

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**via Express Mail,** by causing a true copy of each to be deposited, enclosed in a properly addressed wrapper, in an official depository of the U.S. Postal Service.

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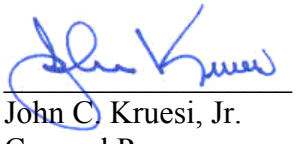
May 27, 2014



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