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

In the

District of Columbia Court of Appeals

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

Plaintiffs-Appellees/Cross-Appellees,

v.

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

Defendants-Appellees/Cross-Appellants.

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

CORRECTED BRIEF OF THE APPELLEE/CROSS-APPELLANT CHILDREN'S NATIONAL MEDICAL CENTER

* Gary W. Brown, Esquire #1495
Adam W. Smith, Esquire #424590
McCANDLISH & LILLARD, P.C.
11350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
(703) 273-2288

Counsel for Appellee/Cross-Appellant
Children's National Medical Center

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259

**Certificate required by Rule 28(a)(2)
of the Rules of the District of
Columbia Court of Appeals:**

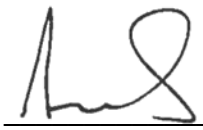
The undersigned, counsel of record for Children's National Medical Center, certifies that the following listed parties and counsel appeared below and/or in this appeal: (1) plaintiff/appellee Wendy Paola Destefano, an individual, represented by Dawn V. Martin, Esquire; (2) plaintiff G. D., a minor, represented by Dawn V. Martin, Esquire; (3) plaintiff V. I., a minor, represented by Dawn V. Martin, Esquire; (4) defendant Children's National Medical Center, a not-for-profit corporation, represented by Adam W. Smith and Gary W. Brown of McCandlish & Lillard, PC; and (5) defendant Colonial Parking, Inc., represented by Christopher Hassell, Esquire and Dawn Singleton, Esquire of Bonner Kiernan Trebach & Crociata, LLP.

In addition, the following is a list of parent or subsidiary corporations of Children's National Medical Center:

Children's Hospital
Brainy Camps
Children's Hospital Foundation
Children's National Advocacy & Public Policy, Inc.
Children's National Health Network Inc.
Children's Research Institute
Children's School Services
Safe Kids Worldwide f/k/a National Safe Kids
Safe Kids Worldwide Ltd.
Safe Pediatric Healthcare PSO

There is no publicly held corporation that holds 10 percent or more of the stock of Children's National Medical Center.

These representations are made in order that judges of this court, *inter alia*, may evaluate possible disqualification or recusal.



Adam W. Smith

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

A. Cases **Page**

B. Rules, Statutes and Other Authority

*** Cases and authorities chiefly relied upon**

STATEMENT OF ISSUES
PRESENTED FOR REVIEW

I. Whether the Trial Court Correctly Granted Summary Judgment on Wendy Destefano's Bystander Claim

II. Whether the Admissibility of Evidence in the Event of a Remand of Destefano's Emotional Distress Claim Should be Left to the Discretion of the Trial Court

III. Whether the Evidence Was Insufficient to Support an Instruction for Permanent Emotional Distress Damages from Post-Concussive Syndrome

IV. Whether Plaintiffs Failed to Establish a *Prima Facie* Case for Punitive Damages Against CNMC

V. Whether the Trial Court Acted Within Its Discretion in Excluding Plaintiffs' Trial Exhibit 3-6

VI. Whether the Trial Court's Rulings Regarding Freddie Sanchez Were Within its Discretion

VII. Whether the Trial Court Acted Within Its Discretion in Its Management of the Trial and Management of Witnesses

VIII. Whether the Trial Court Acted Within its Discretion in Awarding Costs

IX. Whether the Trial Court Abused Its Discretion in Refusing to Exclude the Surprise Opinions of Eric Woods

X. Whether the Trial Court Abused Its Discretion in Admitting Evidence Regarding the Condition of Other Garage Ventilation Grilles

XI. Whether the Trial Court Erred in Submitting V.I.'s Claim of Negligent Infliction of Emotional Distress to the Jury

In its protective cross-appeal, CNMC seeks review of the evidentiary questions in Issues IX and X only in the event that this Court grants one or more of the Plaintiffs a new trial as to CNMC in Appeal No. 13-CV-679.[1] CNMC also appeals the Trial Court's failure to grant judgment as a matter of law ("JAML") with regard to V.I.'s bystander claim.

[1] *Hartman v. Duffey*, 305 U.S. App. D.C. 256, 19 F.3d 1459, 1465 (1994) (party who is "generally pleased with the judgment and would have otherwise declined to appeal" may file a

COUNTER-STATEMENT OF THE CASE

This personal injury action was filed on March 25, 2010 by Wendy Destefano, individually ("Destefano"), and by Wendy Destefano and Enrique Ibanez, as parents and natural guardians of minor plaintiffs G.I. and V.I. ("Plaintiffs") against Children's National Medical Center ("CNMC") and Colonial Parking, Inc. ("Colonial"). (JA 230) Minor Plaintiff G.I. sought compensatory and punitive damages arising out of an accident at CNMC's parking garage on March 11, 2009 when he fell into an airshaft and sustained injury. (JA 255) Destefano and V.I. asserted "bystander" claims for emotional distress. (JA 237-38)

After extensive discovery, Plaintiffs moved for partial summary judgment on liability (JA 61, Dkt.358; 1373), and Defendants sought summary judgment with respect to the bystander claims and punitive damages. (JA 57, Dkt.329; 60, Dkt.352; 1368; 1445) The Trial Court dismissed Destefano's bystander claim but otherwise denied the motions. (JA 330-31) Following assignment to the Civil I calendar (JA 86, Dkt.510), four pretrial conferences were held to review the extensive Joint Pretrial Statement. (JA 480, 524, 531, 543, 1917)

The case was tried over nineteen days from March 25 to April 22, 2013.[2] Plaintiffs were given six trial days to present their witnesses. (JA 409; 874, Tr.7; 943, Tr.80) Plaintiffs called sixteen witnesses and rested on April 9, whereupon Defendants moved for Judgment as a Matter of Law ("JAML") on certain issues, including punitive damages and V.I.'s bystander claim. (JA

---

protective cross-appeal "to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well"); *Sea-Land Serv. v. DOT*, 329 U.S. App. D.C. 108, 137 F.3d 640 (1998); *Evans v.Medical Inter-Ins. Exch*., 856 A.2d 609, 616 (D.C. 2004).

[2] JA 139, Dkt.861; 607; 634; 687; 740; 787; 824; 873; 923; 975; 1027; 1069; 1115; 1165; 1189; 1219; 1249; 1273; 1320; 1332. The Trial Court bifurcated punitive damages by first trying the claims for compensatory damages with evidence that could support punitive damages. (JA 98, Dkt.595; __) If verdicts were returned for compensatory damages and evidence supporting punitives was found sufficient to survive Rule 50 motions, the Court would immediately proceed to a hearing on net worth. *Id*.

149-50, Dkt.901, 903, 905; JA 1084-86, Tr.60-67) The Court reserved ruling on punitive damages until the close of the Defendants' evidence. (JA 1099, Tr.23) The Defendants called eleven witnesses and rested on April 12. (JA 153, Dkt.914) Thereafter, they renewed their JAML motions, and Plaintiffs called Destefano in rebuttal. (JA 153-54, Dkt.914, 918, 919; 1217, Tr.55) Charging conferences were held on April 12 and 15, and the jury was instructed on April 15 and 17. (JA 153, Dkt.914; 156, Dkt.928; 157, Dkt.935) Defendants' JAML motions with regard to V.I. were denied. (JA 1228, Tr.38-40) Deliberations began on April 18. (JA 158, Dkt.944) On April 15 and 22, the Trial Court heard further argument regarding punitive damages (JA 1229-30, Tr.42-48; 1333-36, Tr.5-18), and granted the JAML motions. (JA 159-60, Dkt.948-50, 955; 1344-47, Tr.51-61) On April 22, a verdict was returned for Plaintiffs. (JA 178)

COUNTER-STATEMENT OF FACTS

Notwithstanding inclusion of the trial transcript in the Appendix, Plaintiffs frequently failed to cite the record in their Statement of Facts and in their arguments, or cited attachments to G.I.'s summary judgment motion which was denied. (Pltf. Brief at 4-6, 8-12, 14, 34-35) The Trial Court issued a Memorandum Opinion in connection with its summary judgment rulings (JA 332), but did not otherwise make findings of fact deemed established at trial. *C.f.* SUPER. CT. CIV. R. 56(d); *Nickens v. Labor Agency of Metro. Wash.*, 600 A.2d 813, 819 n.5 (D.C. 1991). Significant portions of Plaintiffs' factual assertions therefore fail to comply with Rule 28's requirement that facts be supported by "appropriate references to the record." D.C. APP. R. 28(a)(7); *Duggan v. Keto*, 554 A.2d 1126, 1144 & n.23 (D.C. 1989). For example, at trial Destefano did not testify that G.I. and V.I. were holding hands at the time G.I. fell, and there was no evidence that he "fell backwards" through the wall embrasure. (Pltf. Brief at 8). Nor did Destefano testify that she "almost fell into the hole herself, but V.I. grabbed her and helped her

keep her balance." (JA 765, Tr.102-03; 804-05, Tr.67, 70-74; 810, Tr.91-92) Similarly, there was no testimony that the wall opening "was not readily visible when standing next to it, but was readily visible from a distance."[3] (Pltf. Brief at 9)

ARGUMENT

I. The Trial Court Correctly Granted Summary Judgment on Destefano's Bystander Claim

A party opposing summary judgment must produce enough admissible evidence to make out a *prima facie* case. *Joeckel v. Disabled Am. Veterans*, 793 A.2d 1279, 1281-82 (D.C. 2002). "Summary judgment is appropriate only when the record, including pleadings together with affidavits, indicates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Padou v. District of Columbia*, 29 A.3d 973, 980 (D.C. 2011).

CNMC, relying on Destefano's deposition (JA 1446-68), argued that she was not in danger of physical injury, and did not fear for her safety. (JA 1445) Plaintiff did not see G.I. fall, and because she was facing her car attempting to unlock it, was unaware that he had fallen until V.I. alerted her. (JA 1457, 1466). The wall opening ended three feet up from the floor, approximately at the level of her waist. (JA 1461) After realizing that G.I. was gone, Plaintiff stuck her head into the opening, "want[ing] to go through that hole." (JA 1457-58). She was unaware at that time that there was a two-story drop to the shaft's lower level. (JA 1457) Plaintiff did not testify that she, herself, almost fell into the hole. (JA 1462)

In her opposition to CNMC's motion, Plaintiff adopted by reference her opposition to Colonial's summary judgment motion. (JA 64, Dkt.380; __) In her Statement of Disputed

[3] Plaintiffs' noncompliance with Rule 28 also extends to their characterization of the testimony of Roberta Alessi (Pltf. Brief at 11-12), addressed *infra* at 29-30 in connection with their claim that the issue of punitive damages should have been submitted to the jury.

Material Facts, Plaintiff did not contradict the foregoing, but asserted that she had "lunged into the hole to try to rescue her son," and that V.I. had "saved her from falling into the hole by grabbing her, which helped her restore her balance." (JA 1488) The proffered evidence, however, was merely Plaintiff's testimony that V.I. "had her hand right at the top part of the hole as to herself not fall, and I stuck my head in there, in the hole, and she was kind of at the same time pulling me back as she, as if she would be afraid of me falling as well" (JA 1462); and that Plaintiff's keys came out of her hand and fell due to "momentum" as she put her head into the hole. (JA 2775, Depo Tr.172)

Explaining its summary judgment ruling, the Trial Court held that

> the zone of danger created by the hole equates with the risk that a person could unintentionally fall through the hole, as Plaintiff G did. That risk simply did not exist for an adult. Plaintiff Wendy Destefano testified at her deposition that after she realized Plaintiff G had fallen through the opening: 'I stuck my head out through that hole or into that hold [*sic*], and I, I wanted to see something and didn't see anything down there. I wanted to go through that hole, but I couldn't.' She later submitted an affidavit stating that '[a]s I lunged forward into the hole, I dropped my keys into the hole and almost fell into the hole myself' and that '[t]he hole in the wall was so large that an adult could have fallen through it if they were bending down and looking into the hole.' The claims made in the affidavit were not enough to save Plaintiff Destefano's negligent infliction of emotional distress claim: even according to her modified description of the event and the size of the hole, *she was not exposed to risk of accidentally falling into the air shaft and was therefore not in the zone of danger when Plaintiff G fell.*

(JA 349-350 (record citations, footnotes omitted; emphasis added)).

On June 18, 2012, Plaintiff moved for reconsideration on the grounds that the Court had made a "mistake of fact" regarding whether the hole was sufficiently large for her to fall through, citing post-accident photographs and Eric Woods as to the hole's dimensions. (JA 71, Dkt.422 at 4-6; __)[4] Ms. Destefano also noted that in the affidavit signed before her deposition, she had

[4] Super. Ct. Civ. R. 12-I(k) allows the Court to assume that the facts as claimed by the movant to be admitted without controversy except and to the extent that they are in good faith controverted

stated that "[a]s I lunged forward into the hole, I dropped my keys into the hole and almost fell into the hole myself." *Id*. at 7; *see* JA 1471 ¶ 14. CNMC and Colonial filed oppositions (JA 1604; 73 Dkt.433), and the Trial Court denied the motion, stating that it "remain[ed] convinced that the evidence in the record creates no genuine dispute of fact as to whether Plaintiff . . . was in the applicable 'zone of danger,' i.e., whether she was at risk of unintentionally falling into the open hole." (JA 355).

1. Destefano Was Not in the Zone of Physical Danger

In *Williams v. Baker*, this Court adopted the "zone of physical danger" rule which allows recovery for mental distress caused by witnessing injury to an immediate family member if plaintiff was in the zone of physical danger, and as a result feared for her own safety because of the defendant's negligence. 572 A.2d 1062, 1073 (D.C. 1990) (*en banc*). Post-*Williams* cases have clarified that "the plaintiff's presence in the zone of danger be contemporaneous with her fear for her own safety." *Jane W. v. President & Dirs. of Georgetown College*, 863 A.2d 821, 826 (D.C. 2004) (quoting *Jones v. Howard Univ*., 589 A.2d 419, 423 (D.C. 1991)).

The "zone of physical danger" rule requires an objective test of whether plaintiff was unreasonably threatened with bodily harm. *Id*.; *Jane W*., 863 A.2d at 827. *Williams* reaffirmed the longstanding rule that there can be no recovery for mental distress resulting exclusively from

---

in an opposing statement. In her Statement of Disputed Material Facts (JA 1488-89), Plaintiff did not reference scene photographs nor proffer affidavits or testimony regarding the hole's dimensions. The only materials referenced therein were her deposition, and a post-accident photograph of G.I. *Id*.

In their brief, Plaintiffs cite to photographs taken well after the Trial Court's ruling. (Pltf. Brief at 14-16; JA 2950-2989) It is well established, however, that materials not before the court in Rule 12-I(k) statements cannot be relied upon to reverse summary judgment. *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Oparaugo v. Watts*, 884 A.2d 63, 74-75 (D.C. 2005); *Jane W. v. President & Dirs. of Georgetown College*, 863 A.2d 821, 826 (D.C. 2004). In any event, there is no basis to conclude that the Trial Court misapprehended the dimensions of the wall opening in its original ruling, given the Memorandum Opinion's specific reference to the "size of the hole." (JA 350)

observing harm or danger to a third person, and rejected the broad "foreseeability of risk" rule. 572 A.2d at 1064, 1069-1072.

The zone of physical danger rule is "strict," *Washington v. John T. Rhines Co*., 646 A.2d 345, 347 (D.C. 1994), and with the exception of *Hedgepeth v. Whitman Walker Clinic*, discussed *infra*, this Court has been reluctant to expand its scope. *Cauman v. George Wash. Univ*., 630 A.2d 1104, 1107 (D.C. 1993) ("we are unpersuaded that the prudence reflected in our adoption… of the 'zone of danger' rule would be enhanced by extending its reach"). Thus, in *District of Columbia v. Evans*, recovery was permitted after police shot the plaintiff's son, this Court noting the "critically important" testimony that "a firefighter pushed Ms. Evans to the ground in order to protect her from possible stray bullets." 644 A.2d 1008, 1019 (D.C. 1994). By contrast, in *Kaiser v. United States*, judgment was entered against a plaintiff who claimed emotional distress damages after a police officer shot her dog as it approached him. 761 F. Supp. 150, 152-53 (D.D.C. 1991). Although Kaiser alleged that her dog had been shot in her "direct line," the court held that she "did not have time to fear for her own safety," and was not in the zone of danger because the officer had "aimed his gun downward toward the dog." *Id*. at 156. *See also Gillman v. Burlington N. R. Co*., 878 F.2d 1020 (7th Cir. 1989) (railroad foreman who was standing near scene of fatal accident, but was unaware of co-worker's injury from falling rail until hearing scream, failed to allege that he felt contemporaneous fear for his safety).

Similarly, in *Johnson v. District of Columbia*, the mother of a young girl who suffered a severe scald injury after falling into a bathtub full of hot water was denied recovery for negligent infliction of emotional distress, although she had "r[u]n from the bedroom, grabbed her daughter from the tub, and peeled off her steaming clothing." 728 A.2d 70, 73, 77 (D.C. 1999). The Court

held that plaintiff had "failed to present any evidence that she was herself in danger from the hot water." *Id*. at 77.

In *Barker v. Hercules Offshore, Inc.*, an oil rig worker sought damages for severe emotional distress after witnessing a co-worker die after falling from a "pollution pan" that the two of them had cut free from the platform's bottom. 713 F.3d 208, 211-12 (5th Cir. 2013). Plaintiff was standing two feet away and had his back turned; "[a]lthough he did not see the incident itself, he turned around in time to witness his friend fall to his death." *Id*. at 212. The Fifth Circuit Court of Appeals affirmed summary judgment, holding that plaintiff was not in "immediate risk of physical harm" as a matter of law:

> at the time of the incident he was standing two feet away from the opening in the rig's drill floor. Barker specifically testified that he was standing "on solid ground [which] was not going to fall," and by the time the pan fell, Barker was "out of the dangerous position where something could have happened . . . if the pan had been cut." In fact, Barker had his back turned to the opening at the time of the incident, and only became aware of it after he heard a noise behind him. Barker further testified that his initial "reaction was not that [he] was scared that [he] was going to fall," but that he should make sure that his co-workers were safe. Because Barker does not allege any facts which would place him in immediate risk of physical harm, the zone of danger theory is inapplicable.

Id. at 224-25.

In the case *sub judice*, Plaintiff was attempting to unlock her car door, had her back turned away from the wall, and was unaware that G.I. had fallen until V.I. yelled out. The top of the opening was at waist level, and she never witnessed G.I.'s fall. After realizing that he was missing, she did not fear for her own safety, but instead reached in to search for G.I., not then being aware of the drop within the shaft. That V.I. put her hand on Plaintiff's shoulder does not provide evidence that Plaintiff was ever objectively at risk for falling into the hole, nor that subjectively she feared for her own safety, as required to meet the stringent test under *Williams*.

For these reasons, the Trial Court correctly concluded that at the time of the incident, Destefano was not at risk "of unintentionally falling into the open hole." (JA 355)

2. Destefano Did Not Meet Hedgepeth's Test for Emotional Distress Damages

Plaintiff contends that the Trial Court "misinterpreted" *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011) (*en banc*), and erred in granting summary judgment thereunder. A review of *Hedgepeth*, however, clearly establishes that Plaintiff did not satisfy the test for emotional distress damages established therein.

The *Hedgepeth* Court did not discard *Williams'* "zone of physical danger test." Instead, it recognized a "supplemental rule" for cases in which "a claimant could fear for his or her own health and safety, but their fear could result from having been placed in a zone of psychological rather than physical danger." *Id*. at 800, 799 n.13. *Hedgepeth* does not hold that mere foreseeability is the standard for establishing liability; in fact, it *rejected* foreseeability in favor of a stringent test requiring: (1) a relationship with or undertaking toward the plaintiff that "*necessarily implicates* the plaintiff's *emotional well-being*"; (2) an "*especially likely risk*" that the defendant's negligence would cause "serious emotional distress"--i.e., a "*deeply emotional response*"; and (3) proof that serious emotional distress has, in fact, resulted. *Id*. at 810-11 (emphasis added).

Hedgepeth involved a physician-patient relationship. Because the defendants failed to accurately transmit a test result, causing plaintiff to falsely believe that he was HIV positive for years, the Court had little difficulty concluding that its newly fashioned test was met. *Id*. at 820. It cautioned, however, that it would not specify all relationships that would qualify for liability. *Id*. at 812. The footnote Destefano cites as the linchpin of her argument (Pltf. Brief at 18) did *not* state that all of the enumerated relationships would satisfy the rule. To the contrary, the Court

observed that "not all relationships will give rise to a duty to avoid negligent infliction of emotional distress, as the law recognizes and imposes a duty of care on many different types of relationships, *not all of which necessarily implicate the emotional well-being of the parties*." *Id*. at 812 n.39 (emphasis added).

Plaintiff based her *Hedgepeth* claim on her status as a business invitee and upon Dr. Gaillard's doctor-patient relationship with G.I. (Pltf. Brief at 18). However, she proferred neither evidence nor case law to conclude that a hospital owes the parent of a patient in its parking garage a duty or undertaking that would "necessarily implicate" the parent's "emotional well-being," or that a breach of that duty would create an "especially likely risk" of "serious emotional distress." As *Hedgepeth* was careful to note, a duty to avoid negligently inflicting emotional distress generally does not arise where the purpose of a particular relationship or undertaking is "to obtain a financial, commercial or legal objective."[5] *Id*. at 815. Thus, it is not enough merely to claim the status of an invitee and argue that the accident's circumstances were likely to cause emotional distress. RESTATEMENT (THIRD) OF TORTS § 46 (Tentative Draft No. 5, 2007) Cmt. d ("Courts do not address liability on the mere fact that serious emotional disturbance was foreseeable under the facts of the specific case"). In conclusion, the Trial Court correctly held that Destefano failed to establish that providing a reasonably safe parking garage met the test under *Hedgepeth*'s "supplemental rule."

[5] In its analysis of *Sowell v. Hyatt Corp*., 623 A.2d 1221 (D.C. 1993), in which a restaurant patron vomited repeatedly after consuming food and observing a worm in her rice, *Hedgepeth* cautioned that it was not holding that Mrs. Sowell would have benefitted from its new rule merely because she was a business invitee. 22 A.3d at 809.

II. The Admissibility of Evidence in the Event of a Remand of Destefano's Emotional Distress Claim Should be Left to the Discretion of the Trial Court

Destefano appeals the exclusion of a post-accident photograph of G.I. (JA 365-366, 1621, 1626, 2912) The Trial Court held that the photo's potential for undue prejudice was "extremely high"; that it concededly did not show G.I.'s "major injuries from the fall"; and that G.I. could call witnesses to testify as to his pain and suffering. (JA 365-366) At trial, the excluded photo was shown to witnesses, and there was extensive testimony, lay and medical, regarding his post-accident appearance and injuries. (JA 742-743, Tr.11-13; 744, Tr.16-17; 746, Tr.25; 748-49, Tr.35-36, 38; 750, Tr.41-42; 751, Tr.46; 766, Tr.107; 900-902, Tr.111-118; 969-70, Tr.183-88) Destefano contends that the photo should be admitted if summary judgment of her bystander claim is reversed. At the time of the Trial Court's ruling, however, her claims had been dismissed; Destefano was not aggrieved by the ruling, and cannot appeal the decision. D.C. CODE ANN. § 11-721(b); *Valentine v. Elliott*, 819 A.2d 968, 996 (D.C. 2003), *cert. denied sub nom*. 540 U.S. 1109 (2004). Whether the photo is admissible with respect to Destefano's claim was not decided below, and this Court typically does not render advisory opinions on the admissibility of evidence. *Street v. Hedgepath*, 607 A.2d 1238, 1245 (D.C. 1992).[6]

III. The Evidence Was Insufficient to Support an Instruction for Permanent Emotional Distress Damages from Post-Concussive Syndrome

A party is entitled to an instruction if supported by the evidence. *District of Columbia v. Peters*, 527 A.2d 1269, 1274 n.4 (D.C. 1987). The evidence must be viewed most favorably to the appellant, but "[a]n instruction should not be given if there is no evidence to support it." *Howard Univ. v. Roberts-Williams*, 37 A.3d 896, 906 (D.C. 2012); *Ceco Corp. v. Coleman*, 441 A.2d 940, 949 (D.C. 1982). In assessing G.I.'s claim that the Trial Court erred in instructing the

[6] Plaintiff's argument regarding the admissibility of hospital surveillance videos (Pltf. Brief at 20-21), is flawed for the same reason.

jury not to award damages for permanent post-concussive syndrome ("PCS"), this Court "must weigh the persuasive character of the evidence." *Romer v. District of Columbia*, 449 A.2d 1097, 1100 (D.C. 1982). Decisions regarding whether an instruction is supported by the evidence are reviewed for abuse of discretion. 37 A.3d at 906.

The Court modified Standard Jury Instruction ("SJI")13.01 by adding the italicized language:

> If you find in favor of Plaintiff G.I., then you should consider whether he is entitled to any damages. You may award damages for any of the following items that you find the defendants' negligence proximately caused:
>
> . . .
>
> 4. any emotional distress that G.I. may suffer in the future, *except you may not award future damages due to permanent Post-Concussive Syndrome*;
>
> . . .
>
> 7. any inconvenience G.I. may experience in the future, *except you may not award future damages due to permanent Post-Concussive Syndrome*.

(JA 430-31)[7] The modification was necessary because the case presented medically complicated questions and aggravation of a pre-existing condition; to avoid jury speculation, expert medical testimony was needed to establish causation and permanency of PCS.[8] (JA 1273-1275, Tr.3-9)

Damage awards must be supported by substantial evidence, and cannot be based on speculation or guesswork. *Doe v. Binker*, 492 A.2d 857, 860 (D.C. 1985); *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 550 (D.C. 1981). Future damages are available "only if such consequences are reasonably certain. Unless there is nonspeculative evidence demonstrating that

---

[7] Plaintiffs suggest that the Court gave SJI 13.02 (Permanent Injury Absent Medical Testimony) when it initially charged the jury. (Pltf. Brief at 21-22). However, CNMC objected to SJI 13.02, and it was not given. (JA 1213-1214, Tr.37-41; JA 1271-1273, Tr.89-96) The Court allowed Plaintiffs to submit alternative language for this instruction (JA 1213, Tr.38-39), but they failed to do so.

[8] The added language did not prohibit the jury from awarding damages for future emotional distress or inconvenience; only damages for *permanent post-concussive syndrome* were excluded.

future suffering…will occur, the question should not be submitted to the jury." *Curry v. Giant Food Co*., 522 A.2d 1283, 1291 (D.C. 1987).

The purpose of expert testimony is to avoid jury findings based on speculation or conjecture. *Washington v. Washington Hosp. Center*, 579 A.2d 177, 181 (D.C. 1990). Expert medical testimony is required for permanent injuries, or when complicated medical questions must be resolved. *Williams v. Patterson*, 681 A.2d 1147, 1150 (D.C. 1996); *Baltimore v. B.F. Goodrich Co*., 545 A.2d 1228, 1231 (D.C. 1988); *Gray Line, Inc. v. Keaton*, 428 A.2d 360, 362 (D.C. 1981); *Early v. Wagner*, 391 A.2d 252, 254 (D.C. 1978); *Jones v. Miller*, 290 A. 2d 587, 590 (D. C. 1972).

There can be no question that the instant case was medically complicated: four of the six physicians who testified were pediatric neurologists, and a pediatric psychiatrist, a clinical and developmental neuropsychologist, and two therapists were also called. There was substantial testimony regarding G.I.'s complex and largely undisputed neurologic history, which began at 13 days of life when he suffered a brain hemorrhage that destroyed a portion of his parietal lobe, leaving a porencephalic cyst. (JA 724, Tr.151; 736, Tr.199; 737, Tr.202; 760, Tr.81; 845, Tr.86) As a result, G.I. developed a lifelong seizure disorder (epilepsy). (JA 724, Tr.151; 931, Tr.33-34)

Dr. William Gaillard, a treating epileptologist at CNMC, testified that children with epilepsy have a higher incidence of developmental delays and cognitive difficulties, and that behavioral disabilities are common. (JA 942, Tr.77) Dr. David Franz, a pediatric neurologist called by Colonial, testified that the damage from the neonatal bleed made G.I. prone to seizures, impaired his intellectual ability and attention, and caused developmental delay. (JA 842, Tr.73-74; 844, Tr.82; 845-46, Tr.86-87; 855, Tr.126) Dr. Sue Ellen Antell, a clinical and developmental neuropsychologist called by CNMC, likewise testified that G.I. was left with

developmentally serious injuries to virtually all parts of his brain that are important for human behavior: intellect, speech, and impulse and behavior control. (JA 977-78, Tr.10, 12; 982, Tr.28) Plaintiffs' expert, Dr. Woodruff, did not dispute that the intracranial bleed caused injury and a porencephalic cyst in the parietal lobe, leaving G.I. with epilepsy and developmental delay. (JA 724, Tr.151)

G.I. was presecribed phenobarbital for seizures in May 2004 (JA 846, Tr.90), and received hospital care for seizures, some prolonged, in 2004, 2006 and 2007. (JA 794-95, Tr.30-31; 796, Tr.36-37; 797, Tr.42; 847, Tr.91) As early as August 2004 and on many occasions prior to March 2009, Destefano reported difficulties with his school and home behavior.[9] (JA 799-800, Tr.50-51)

By September 2007, the seizures were so frequent despite medications that G.I. was referred to Dr. Gaillard for surgical evaluation. (JA 735-76, Tr.196-97; 915, Tr.170-71; 931, Tr.33-34; 1009, Tr.136-137) Dr. Gaillard attributed the seizures to a structural abnormality associated with the neonatal injury. (JA 931, Tr.34-35) An MRI showed scarring (mesial temporal sclerosis ("MTS") bilaterally in the hippocampi--areas responsible for memory, and

[9] In 2005, Destefano reported that G.I. "behaved badly." (JA 800, Tr.51-52) In July 2005, she reported episodes of irritability and headaches to Dr. Magram, a neurosurgeon. (JA 800-801, Tr.54-55) In March 2006, she stated that G.I.'s social behavior fluctuated at school; he enjoyed being the center of attention, but behaved differently when he did not get the attention he desired, or did not want to comply with an adult's request. (JA 801, Tr.55-56) In the same month, she told Dr. McClintock that G.I. had a breathholding spell after crying in which he passed out and became pale. (JA 801, Tr.57) In August 2006, she told Dr. Magram that occasionally G.I. had a lot of temper tantrums. (JA 801, Tr.57-58) In January 2007, G.I. was having "problems of violence with his dad," and she reported to the neurologist that the school was experiencing behavioral issues with G.I. (JA Tr.40-41) He had become very aggressive, hitting V.I. and her, and she was worried that it was due to medication. (JA 801-02, Tr.58-59) In May 2007, she reported to McAuliffe School that G.I. sometimes appeared to be "bothered" by something, threw temper tantrums at home "because of nothing" or related to his medication, and was easily frustrated. (JA 802, Tr.59-61) Following a July 2007 shunt revision (JA 848, Tr.96), she told Dr. Corder-Campbell that he had bad behavior. He misbehaved during the doctor's exam, and the doctor diagnosed "conduct disorder" and anxiety. (JA 802-03, Tr.61-63; 803, Tr.66)

very important for controlling impulsivity and mood.[10] (JA 845, Tr.84-85; 846, Tr.87-89; 916, Tr.175; 932, Tr.35-36; 934, Tr.44; 736, Tr.200; 738, Tr.205-06; 846, Tr.88-89)

On November 14, 2007, Ms. Destefano told Dr. Gaillard that since G.I. had started taking Keppra, he had become more aggressive at home and was acting out in class. (JA 803-804, Tr.66-67) Dr. Gaillard therefore stopped Keppra and started Lamictal. (JA 736, Tr.198) On March 17, 2008, Destefano reported that G.I. had suffered several seizures and had been admitted to the hospital. (JA 935, Tr.49-50) In 2007 and 2008 he had many prolonged seizures ("status epilepticus") which can deprive the brain of oxygen. (JA 799, Tr.48; 848, Tr.97; 850, Tr.103; 1008, Tr.132-135; 1009, Tr.136) Dr. Gaillard prescribed Topamax to control the seizures. (JA 935-36, Tr.50-51)

In September 2008, G.I. repeated his Kindergarten year and was placed in a class for students with moderate cognitive impairment. (JA 962, Tr.157-158) At times he became mildly aggressive at school, and injured himself to get reactions from others. (JA 963, Tr.160-61) He wanted attention, could be obstinate, and quickly became impatient when seeking help, and habitually caused disruption to gain attention. (JA 963, Tr.159) At times he also taunted other children and became possessive of their things. (JA 963, Tr.159-60) These behaviors occurred throughout the school year, but had improved by the end of his first year in June 2009. (JA 963, Tr.160)

---

[10] Because the seizures could be coming from either hemisphere, surgery posed a risk of substantial memory impairment. (JA 917, Tr.177) Consequently, Dr. Gaillard pursued medical therapy. (JA 916-17, Tr. 175-176) In October 2008, Dr. Gaillard ordered an EEG because G.I. was not responding to conventional medications. (JA 936, Tr.54) Due to the prolonged seizures, he thought it was worth reevaluating G.I. for surgery if he could document unilateral seizures. *Id*. The EEG, however, showed bilateral abnormalities. (JA 849, Tr.100-102; 937, Tr.57) In Dr. Gaillard's opinion, the right side of the brain had most likely been damaged when the left-sided injury occurred. (JA 940, Tr.70)

In March 2009 G.I. was six (JA 1918), but grossly functioned at a two-year-old level. (JA 760, Tr.81; 882-83, Tr.39-40) Pre-accident testing showed a moderately delayed full-scale IQ, and he received occupational, physical and language therapy. (JA 879, Tr.24) He had a severe language delay, and was largely nonverbal. (JA 883, Tr.40)

After the accident, Dr. Nathan Dean, a pediatric intensivist, diagnosed a probable concussion. (JA 741, Tr.4; 757, Tr.71) However, G.I. did not lose consciousness, suffer a skull fracture, or experience a new brain bleed, and an MRI showed no evidence of new brain injury. (JA 757, Tr.70-71, 850, Tr.104, 106; 1012, Tr.150-51) He did not require neurosurgical intervention and was discharged in four days. (JA 1012, Tr.151) Banzel, an anti-seizure medication prescribed before the accident, was started within one to two weeks after his discharge. (JA 736, Tr.198-199; 1022, Tr.191)

Dr. Adair Parr, a child psychiatrist, saw G.I. from March 30 through early June, 2009. (JA 875, Tr.9; 883, Tr.41) She diagnosed PCS, post-traumatic stress disorder ("PTSD"), and developmental disorder. (JA 877-78, Tr.19-20) Some of the symptoms used to diagnose PTSD, including irritability and sleep problems, overlapped with PCS. (JA 884, Tr.46) Dr. Gaillard concurred with Dr. Parr's impression of PCS. (JA 919, Tr.185) In his experience, issues that may occur with PCS are sleepiness, irritability, inattentiveness, school difficulties, achiness and headaches, but not aggressiveness. (JA 919, Tr.186; 922, Tr.197-98)

Dr. Dean testified that a single concussion is a self-limiting injury, i.e., its symptoms go away after a period of weeks, and do not worsen. (JA 757-58, Tr.71-72) Dr. Gaillard testified that absent post-accident bleeding in the head or a coma, he had never seen anyone with a concussive injury lasting more than several months to a year. (JA 920, Tr.191) Dr. Franz agreed that a concussion is not progressive, and absent further concussions, the brain recovers with time.

(JA 851, Tr.107-108) CNMC's pediatric neurology expert, Dr. Terry Watkin, testified that the majority of concussion injuries resolve within a month, and the "vast majority" of concussion patients recover quickly and completely. (JA 1012, Tr.149-150; 1019-20, Tr.179-80) Significantly, Dr. Woodruff did not deny that a single concussion is a self-limiting injury, and that the brain recovers with time. (JA 723-38, Tr.145-206; 1074-76, Tr.19-27)

At an April 2009 follow-up visit, G.I.'s PCS symptoms had improved "tremendously." (JA 938, Tr.60-61) Dr. Gaillard thought it unlikely that he would experience PCS beyond a year after the accident, and thought the probability of permanent injury from the concussion was remote--i.e., "extraordinarily rare." (JA 920, Tr.190; 938, Tr.61; 946, Tr.92-93) By April 20, G.I. was back to school full time. (JA 806, Tr.77-78) Ms. Woughter, his teacher, testified that by the end of the school year in June, his behavior had actually improved, not worsened.[11] (JA 963, Tr.161)

On August 26, 2009, Destefano told G.I.'s physical medicine doctor that other than occasional headaches, he was no longer having any major symptoms since the accident. (JA 808, Tr.84-85) On September 3, she informed therapist Karen Wells that G.I. had been doing a lot better, had not been aggressive, and was getting along with his sister. (JA 808-09, Tr.86-87) After G.I. returned to school, he was easily redirected when he engaged in inappropriate behavior. (JA 963, Tr.161-62) On October 19, Destefano reported that he was performing well at school. (JA 809, Tr.87-88) On November 9, she told Wells that G.I. was not as aggressive as he had previously been, and that she had not heard about anything bad going on at school. (JA 811, Tr.97-98) Woughter noted in November 2009 that G.I.'s social behaviors had improved

[11] Dr. Parr also testified that G.I. improved during her care. At the last visit, Destefano reported that his appetite was all right, his energy was better at home, and that he was sleeping less. (JA 807, Tr.81; JA 884, Tr.45) Dr. Parr noted in June 2009 that with continuing treatment and therapy, he had a fair prognosis for recovery. (JA 880, Tr.28; 884, Tr.46)

from the spring. (JA 963, Tr.161-62) The first school disciplinary report about G.I. did not occur until December 2, 2009 (JA 963, Tr.162), and the major escalation of his behavioral problems began in April 2010 and lasted two months. (JA 963, Tr.162) According to his 2011-2012 school year teacher, his behavior was problematic in the first two weeks, but thereafter did not require intervention. (JA 984, Tr.36)

In *Early v. Wagner*, plaintiff attempted to link injuries sustained in a bathroom fall to injuries suffered two years earlier when a construction barricade fell upon her. 391 A.2d 252, 253-54. Plaintiff contended that the latter had caused ongoing left-sided weakness which precipitated her bathroom fall, but she did not present a medical expert to establish causation between them. *Id.* at 253. The defendant, however, called a neurosurgeon who attributed her weakness to pre-existing cerebrovascular disease. *Id.* at 254. The Court of Appeals reversed a plaintiff's verdict, concluding that the evidence was insufficient to allow the jury to consider the bathroom accident:

> Considering the expert testimony presented by appellants which contradicted appellee's claim of permanent injury, and appellee's failure to present any expert testimony to support her position, we conclude that there was an insufficient evidentiary basis for submitting the overall issue of permanent injury to the jury. Additionally, since appellants presented expert testimony (uncontradicted by other expert testimony) to the effect that the 1975 accident was unrelated to the 1973 accident, the trial court erred in allowing the jury to consider as an element of damages the injury suffered by appellee in the 1975 bathroom fall.

Id. The Court further held that given plaintiff's lengthy and complicated medical history and cerebral thrombosis, the cause of the later injury was not a matter of common experience or knowledge. *Id*. at 255.

In *Williams v. Patterson*, 681 A.2d 1147 (D.C. 1996), damages were sought for permanent exacerbation of a pre-existing back condition. The Court held that an aggravation claim requires the factfinder to differentiate between a present medical condition and a pre-

existing one in evaluating the causal role of an intervening accident, because only increased or augmented sufferings proximately caused by the defendant's negligence are compensable. *Id*. at 1150. *Williams* is instructive because the undisputed evidence in G.I.'s case clearly indicated that he had a profound, pre-existing brain injury with manifold, ongoing consequences, and Plaintiffs sought damages for permanent PTSD and PCS resulting from the accident.[12] Implicit in such claims is the extent to which "the pre-existing condition would have worsened or otherwise become more symptomatic in the absence of trauma." *Id*. Moreover, when claims for permanent injuries are made, the complexities increase:

> Such permanency in the aggravation setting, especially where the natural progression of the pre-existing condition must be taken into account, will ordinarily not be obvious, thus requiring the testimony of medical witnesses to establish both the fact of a permanent aggravation and causation attributable to the defendant.

Id. at 1151 (quoting 2 M. Minzer, DAMAGES IN TORT ACTIONS § 15.33[1]). Dr. Woodruff agreed that G.I. had suffered a significant brain injury from an intracranial bleed which caused a porencephalic cyst, MTS, medically refractory epilepsy and developmental delay, and that he had "inappropriate behaviors" in three of the first six years of his life. (JA 724, Tr.151; 732-33, Tr.184-85; 736, Tr.199-200). Although Dr. Woodruff minimized the significance of G.I.'s pre-accident behavioral problems (JA 733, Tr.186), he never took into account the impact that G.I.'s original brain insult and its consequences would have had on his ability to maintain "appropriate" behavior in the future, irrespective of the garage accident.

In *Green v. Lafoon*, 173 A.2d 212 (D.C. 1961), an automobile case for back injuries, plaintiff appealed refusal of an instruction authorizing recovery for future medical expenses and

---

[12] Plaintiffs requested and received SJI 13.07 (13-7 - Aggravation of a Pre-Existing Condition). (JA 1995; 1272, Tr.92) At the April 15 charging conference, Plaintiffs' counsel noted with respect to PCS, "You could argue that it's aggravating a pre-existing condition because it's another aggravating a condition to the brain . . . ." (JA 1234, Tr.65)

income. The court did instruct the jury that they could award damages for "pain, discomfort, and mental anguish" the plaintiff suffered or might suffer. *Id*. at 212. Plaintiff's physician testified that "he would hesitate to say that any of Roy Green's injuries were permanent," but opined that he "will have symptoms for a long time to come." *Id*. at 213. Plaintiff contended that "the jury should have been allowed to infer permanent injuries from the fact that his symptoms had persisted for eighteen months," but this argument was rejected, the Court reasoning that

> Where appellant's own physician would not draw such a conclusion, a jury without expert qualifications will not be permitted to speculate on such an eventuality. The doctor would say only that he believed the symptoms would continue for an indefinite time. This aspect of damages was satisfactorily covered by the court's instruction on future pain and suffering.

Id. at 213-14. Similarly, in the instant case, Dr. Woodruff never opined that G.I.'s PCS was permanent. In fact, he admitted that most concussions resolve in "a couple of weeks to a couple months," and in response to a question about his "belief"[13] about how long the PCS "lasted," merely stated that it was "ongoing." (JA 730, Tr.173-74; 729, Tr.172) *See also Davis v. Abbuhl*, 461 A.2d 473, 476 n.5 (D.C. 1983) (jury consideration of permanency improper where doctor testified that although plaintiff needed medical treatment, he could not say how long such treatment would be needed).[14]

---

[13] Given how the question to Dr. Woodruff was posed, his response regarding "ongoing" PCS was not expressed with the requisite reasonable medical certainty. *Sponaugle v. Pre-Term, Inc*., 411 A.2d 366 (D.C. 1980). Counsel's attempt to "expertize" his testimony 11 days later with a blanket question ("Doctor, with respect to the *professional opinions* that you've provided during your testimony this morning and also that you've provided previously in this case, did you express them to a reasonable degree of medical certainty?" (JA 1080, Tr. 44), was insufficient where the original answer given was in the first instance merely a "belief," not a "professional opinion." *See Townsend v. Donaldson*, 933 A. 2d 282, 298 n.25 (D. C. 2007).

[14] The Trial Court correctly determined that the expert testimony exceptions recognized in *Jones v. Miller*, 290 A.2d 587, 590-91 (D. C. 1972), were inapplicable. As noted above, the evidence established that the allegedly permanent aggression did not arise either coincidentally with or "very soon" after the garage accident. In fact, the problems with aggression that precipitated a transition to another school did not arise until a year after the accident.*C.f. District of Columbia*

Given G.I.'s undisputed developmental delay, pre-existing neurologic impairment of brain areas responsible for behavior, and prior history of behavioral problems, it cannot be said that his alleged "disability" was of a type "which by its very nature reflected its cause," or that the cause of his behavioral problems related to matters of common experience, knowledge, or observation. For this reason, *Estate of Underwood v. National Credit Union Admin*., 665 A.2d 621 (D.C. 1995), *American Marietta Co. v. Griffin*, 203 A.2d 710 (D.C. 1964), and *International Sec. Corp. v. McQueen*, 497 A.2d 1076 (D.C. 1985), are distinguishable. In *McQueen*, no claim was made for aggravation of a pre-existing condition and a lay jury could appreciate the causal link between receiving a "karate chop" and resultant fall to plaintiff's shoulder pain and knee swelling. 497 A.2d 1076, 1080-81. In *Underwood* and *American Marietta Co.* the plaintiffs' symptoms had continued unchanged over a period of multiple years prior to trial; there was also clear testimony in *Underwood* that plaintiff was "permanently disabled." 665 A.2d 621, 642; 203 A.2d 710, 712.

In *Merida v. Holiday Inn, Inc*., 1993 U.S. Dist. LEXIS 14859 (D.D.C. October 19, 1993), the plaintiff recovered damages from a hotel where she was sexually assaulted. Defendants challenged the verdict on the grounds that without an expert, plaintiff should have been precluded from adducing evidence regarding the "permanence" of her injuries. Noting the

---

v. Anderson, 597 A.2d 1295, 1303 (D.C. 1991) (jury could not find proximate cause relating to loss of plaintiff's leg without expert testimony when plaintiff first experienced symptoms several months after his release from defendant's correctional facility); *Lewis v. WMATA*, 305 U.S. App. D.C. 238, 19 F.3d 677, 680-81 (1994) ("It is neither immediately apparent nor a matter of common knowledge or experience that a ligament tear in a wrist, diagnosed in 1991, could have been caused by an accident in 1989, when, for many months thereafter no treating physician discovered the tear and the patient manifested none of the symptoms associated with a traumatically-caused injury of that type"). Moreover, lay testimony cannot override uncontroverted expert medical testimony, such as that of Dr. Franz and Dr. Watkin, that a single concussion is self-limiting and resolves over time. *Early*, 391 A.2d 254; *D. C. Transit Sys., Inc. v. Simpkins*, 367 A.2d 107, 109 (D.C. 1976).

caution with which claims for emotional damages should be approached, the court granted the new trial motion, holding that

> Even if Merida's fears arose coincidentally with the assault and even if a layperson could comprehend such a fear, *no layperson could tell, without recourse to expert testimony, that Merida's injury was of such a magnitude that it would last an entire work lifetime*. A jury, unskilled in the impact of emotional trauma and its duration, can only reasonably draw such a conclusion after the benefit of expert testimony to that effect.

Id. at *20 (emphasis added). The fact that Plaintiff's claim for permanent PCS rested upon proof of G.I.'s behavioral/emotional problems heightened the need for clear medical expert testimony that such problems were reasonably likely to last the remainder of his life. Testimony that G.I.'s aggression was "ongoing" fell far short of the mark, and the Trial Court properly exercised its discretion to withhold permanent PCS from the jury.

IV. Plaintiffs Failed to Establish a *Prima Facie* Case for Punitive Damages Against CNMC

D.C. Superior Court Rule 50(a) provides, in relevant part, that if

> "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

SUP. CT. CIV. R. 50(a)(1). Whether evidence is sufficient to survive a Rule 50 motion is a question of law examined *de novo. WMATA v. Jeanty*, 718 A.2d 172, 174 (D.C. 1988). Judgment of as a matter of law may be directed if the evidence, viewed in the light most favorable to plaintiff, is so clear that reasonable men could reach but one conclusion and the plaintiff has not established a *prima facie* case. *Clement v. Peoples Drug Store*, 634 A.2d 425, 427 (D.C. 1993).

1. Standard for Award of Punitive Damages

Punitive damages are awarded to punish the wrongdoer and deter repetition. *Saunders v. Branch Banking & Trust Co*., 526 F.3d 142, 152 (4th Cir. 2008). They are disfavored, and cannot be awarded absent outrageous, malicious, or willful disregard or criminal indifference to the rights of others. *Vassiliades v. Garfinckel's*, 492 A.2d 580, 593 (D.C. 1985); *King v. Karlin*, 626 A.2d 882, 884 (D.C. 1983).

The test for punitive damages is rigorous. *Rosenthal v. Sonnenschein Nath & Rosenthal*, 985 A.2d 443, 455 (D.C. 2009), *corrected*, 2010 D.C. App. LEXIS 139 (D.C. 2010), *cert. denied*, 131 S. Ct. 475 (2010). They are appropriately reserved only for tortious acts "replete with malice," *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989), and may be recovered only if it is proven, with clear and convincing evidence:

> (1) that the defendant acted with evil motive, actual malice, deliberate violence or oppression, or with the 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.

District Cablevision Ltd. Partnership v. Bassin, 828 A.2d 714, 726 & n.15 (D.C. 2003); D.C. STD. CIV. JURY INSTR.§16.01.

A punitive damages award must be based on a "sufficient legal foundation" supported by law and the record. *Vassiliades*, 492 A.2d at 593. A clear and convincing standard of proof is applied because punitives are "only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil motive over and above that required for the commission of a tort." *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995)

(quoting *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 681 (1986)).[15] This heightened proof standard is also applied to Rule 50 motions on punitive damages claims. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986).

In the District of Columbia, punitive damages are generally available only in actions arising from intentional torts. *Doe v. De Amigos, LLC*, 2013 U.S. Dist. LEXIS 145665 *11 (D.D.C. October 9, 2013). Claims based on theories of negligence will not support punitive damages. *Jackson v. Correctional Corp*., 564 F. Supp. 2d 22, 29 (D.D.C. 2008); W. Keeton, PROSSER & KEETON ON TORTS § 2 at 10 (5th ed. 1971). Even gross negligence is insufficient to warrant punitive damages, because the most extreme negligence lacks the essential element of conscious indifference to consequences. *Knippen v. Ford Motor Co*., 178 U.S. App. D.C. 227, 546 F.2d 993, 1003 (1976); *C & P Tel. Co. v. Clay*, 90 U.S. App. D.C. 206, 194 F.2d 888, 891 (1952); W. Keeton, § 2 at 10. The touchstone inquiry is whether the defendant's conduct contains elements of intentional wrongdoing or conscious disregard of plaintiff's rights. *Martini v. Fannie Mae*, 977 F. Supp. 464, 476 (D.D.C. 1997), *rev'd on other grounds*, 336 U.S. App. D.C. 289, 178 F.3d 1336 (1999), *cert. denied*, 528 U.S. 1147 (2000); *see Bernstein v. Fernandez*, 649 A.2d 1064, 1074 n.12 (D.C. 1991) (a "willful tort" is one which is "calculated rather than inadvertent, flagrant, and in disregard of obligations of trust").

2. Plaintiffs' Evidence of CNMC's Liability at Trial

Plaintiffs based their case against CNMC on the claim that it had constructive notice of the uncovered ventilation opening. (JA 1086, Tr.68; 1919; 1388; 1586) Their theory was that the grille had fallen off over time from vibration and poor maintenance. (JA 1289, Tr.68) Henry

[15] The clear and convincing standard of proof requires evidence producing a firm belief or conviction in the facts to be established. *In re T.W.M.*, 18 A.3d 815, 819 (D.C. 2011); *In re T.J.*, 666 A.2d 1, 17 n.17 (D.C. 1995).

Colindres, a temporary parking attendant, testified that he observed the opening about a month before the accident, and that the condition was the subject of a conversation involving a Colonial employee. (JA 643-44, Tr.37-40; 649) However, there was no evidence that a CNMC employee was so informed, or was otherwise aware that the grille was not in place. (JA 649, Tr.61-62; 699, Tr.50; 1039, Tr.49; 1061, Tr.22-23; 1135, Tr.83; 1188, Tr.24)

Testimony was adduced regarding CNMC's annual inspections of the garage and its day-to-day working relationship with Colonial, by which safety and maintenance items were brought to the hospital's attention. Patricia Needham, Executive Director for Safety and Emergency Management, had been employed by CNMC for 11 years at the time of trial. (JA 1025, Tr.201-202) Previously she had worked for six years as the safety officer for Swedish American Hospital ('SAH") a 400-bed hospital. (JA 1038, Tr. 44-45) While at SAH, she had received safety training from ECRI, and had earned a certification from ECRI in health care environmental management. (JA 1038, Tr.45)

Pursuant to regulation by The Joint Commission, Needham led a team from the Departments of Facilities and Engineering, Environmental Services, and Biomedical Engineering to perform annual hazard surveillance inspections of non-patient areas of CNMC, including the garage, which looked for fall hazards. (JA 1025, Tr.202-203; 1033, Tr.25; 1037, Tr.41; 1038, Tr.47; 1039, Tr.49) She used a checklist that she had developed at SAH for these inspections. (JA 1025, Tr.202; 1039, Tr.47). The last pre-accident inspection was approximately one year prior to March 2009. (JA 1037, Tr. 40-41). Facilities and Engineering, which accompanied her on the inspections, was responsible for maintaining the structure, and looked at the physical plant. (JA 1037-38, Tr.42-43; 1038-39, Tr.46-47)

Needham testified that she was familiar with the OSHA standards for fall protection. (JA 1036, Tr.35 & 38) She discussed the safety training that she provided to new employees, and described the fall hazard standard for walking surfaces. (JA 1036, Tr.36-38) When conditions were found, she would direct her assistant to enter a work order for repairs. (JA 1035, Tr.34) She did not need to know what was behind the grate to consider the uncovered air shaft to be a "very serious immediate threat." (JA 1036, Tr.38; 1039, Tr.49-50)

Joseph Pelz, Colonial's former Senior Operations Manager (JA 1142, Tr.109), supervised Isaac Song, the on-site project manger at CNMC's garage, including ensuring that the garage was inspected. (JA 1142, Tr.110; 1147, Tr.12) He testified that Colonial had an inspection policy, and that its garage supervisors did inspections and filled out a form every shift. (JA 1142, Tr.111; 1143, Tr.113) Colonial checked for problems such as oil, ice and water on the floor; lights missing or out; potholes and spalling; exposed or hanging wiring; non-working fans; displaced drain covers; signage; and leaks from pipes, ceiling or wall. (JA 1143, Tr.114) Colonial employees were supposed to notify a supervisor if they saw an unsafe condition so the issue could be "forwarded up." (JA 1143, Tr.116; 1145, Tr.4)[16] The project manager could refer the issue directly to the hospital engineering department, or to Roberta Alessi. (JA 1145, Tr.4) Pelz himself visited the CNMC garage once every two weeks to speak with the managers, walk through the garage, make sure things were running well and take care of any issues. (JA 1143-44, Tr.116-117) He could report observed conditions directly to Alessi or the Engineering Control Center. (JA 1143, Tr.115) Pelz had an "excellent" working relationship with Alessi, and met with her from time to time to report on issues. (JA 1144, Tr.117-118) He considered the

[16] Colonial's checklist had space on one side for noting items that were observed to be noted so the project manager could follow up. (JA 1143, Tr.115) Colonial gave their employees an "Employee's Guide to Safety" handbook as part of their orientation that instructed them on good housekeeping and safety in operation of garage. (JA 1142, Tr.112; 1143, Tr.116; 1149, Tr.21)

uncovered wall opening to be a safety hazard. (JA 1145, Tr.7) Had he seen it, he would have blocked it off and notified the engineering department, and he expected his project manager to do the same. *Id*.

Roberta Alessi testified that she had been employed at CNMC for 30 years, was Executive Director of Operations from 2008 to 2009, and was responsible for Parking, Safety, and Security, including implementing the contract with Colonial. (JA 1062-63, Tr.27-28)[17] CNMC hired Colonial because it had expertise in garage management, and CNMC did not. (JA 1064, Tr.32)

Alessi was briefed by Ms. Farinelli, who was leaving CNMC, and met with Colonial General Manager Tony Tennant to review the parking management agreement. (JA 1063, Tr.29) She also met with Tennant and Colonial's project managers regarding budgets and to prepare for special events. (JA 1064, Tr.33-34) Her meetings with Colonial's project manager usually included Robert Beckwith, Director of Facilities and Engineering, and Keith McGlen, CNMC's Security Director, so that she could "reach out to the respective individual who could fix that problem." (JA 1064, Tr.34) With respect to garage maintenance, Alessi relied on Colonial to notify her of needed repairs in the garage because they were in the garage every day. (JA 1065,

---

[17] Alessi was not an officer or director of CNMC at the time of G.I.'s accident or prior thereto. To obtain punitive damages against a corporation for the acts of an employee, not only must the employee's act have been intentional, malicious or willful, but the corporation, through its officers or directors, must have participated in the doing of the wrongful act, or authorized or subsequently ratified the offending conduct "with full knowledge of the facts." *Woodward v. City Stores Co.*, 334 A.2d 189 (D.C. 1975); *Safeway Stores v. Gibson*, 118 A.2d 386, 388 (D.C. 1955), *aff'd*, 99 U.S. App. D.C. 111, 237 F.2d 592 (1956); *Rieser v. District of Columbia*, 183 U.S. App. D.C. 375, 563 F.2d 462, 482 (1977) (punitive damages recovery against corporation requires proof that corporation's "high officers" participated or acquiesced in tortious conduct), *modified*, 188 U.S. App. D.C. 384, 580 F.2d 647 (1978). There was no evidence at trial that an officer or director of CNMC participated in the removal of the ventilation grille, failed to reinstall it, or being aware of the condition, authorized, or later ratified any conduct giving rise to it. (JA 1346, Tr.58-59)

Tr.36) Colonial's on-site managers brought items in need of correction to her attention (JA 1065, Tr.36, 1066, Tr.42); depending on the issue, she would contact Engineering or Security to resolve the problem. (JA 1064-65, Tr.35-36)

Before the accident, Alessi had from time to time seen daily facilities checklists used by Colonial, but could not recall what dates she had seen. (JA 1065, Tr.36-37) She would review them, and then file them. (JA 1065, Tr.37) Eventually she would discard them, but she could not recall specifically when she had done so. *Id*. Occasionally she would review the checklists to see that things were inspected. *Id*. She could not recall seeing checklists with blanks where the shift manager names were to be noted. (JA 1065, Tr.37-38) She could not recall whether she had reviewed the items on the checklist with Colonial before the accident. (JA 1065, Tr.39)

3. The Trial Court's Ruling

In refusing to submit the punitive damages claim to the jury, the Trial Court determined that Plaintiffs had failed to present sufficient evidence that CNMC had acted with willful disregard to their rights:

> To demonstrate . . . willful disregard…, the defendant must have had actual knowledge of the hazard and the danger it posed yet made a conscious decision or calculation to disregard the danger. On these [f]acts, there is no indication that [CNMC] had actual knowledge of the hazard. In fact, this case has been a constructive notice case against Children's…. From the first day of this action, it's been a constructive notice case. Accordingly, the Court does not find that plaintiffs have met their burden with respect to Children's….

(JA 1345, Tr.56)

The Trial Court also concluded that Plaintiffs had not introduced sufficient evidence that CNMC's conduct was outrageous to submit the issue to the jury. (JA 1346, Tr.57-59) The Court ruled that "for there to be a finding of recklessness, the defendants must have knowledge of a

risk and must either willfully disregard the risk or be[,] or have been[,] deliberately indifferent to the risk. Neither of which has been demonstrated." (JA 1346, Tr.59)

4. The Trial Court Correctly Held that Plaintiffs' Evidence Was Insufficient as a Matter of Law to Support Punitive Damages Against CNMC

The Trial Court's decision was correct. Evidence that CNMC had constructive notice that the grille was off does not meet this jurisdiction's rigorous test for punitive damages because there is no evidence of a *conscious* indifference to the rights of others, let alone clear and convincing evidence that its employees acted with actual malice or willful misconduct. *Dalo v. Kivitz*, 596 A.2d 35, 40 (D.C. 1991); *Djourabchi v. Self*, 571 F. Supp. 2d 41, 52 (D.D.C. 2008). Such evidence was also insufficient to establish that CNMC's conduct "itself was outrageous, grossly fraudulent, or reckless," as the Trial Court properly concluded.

Plaintiffs argue that punitive damages were justified because Alessi received copies of Colonial's check sheets, but threw them away. (Pltf. Brief at 34). Alessi testified, however, that she reviewed the forms, retained them for a period of time, and *then* discarded them. (JA 1065, Tr.37) Plaintiffs also claim that a *prima facie* case for punitive damages against CNMC was established because

- Alessi "made no effort to understand how [Colonial's] inspections were conducted, whether they were conducted or how the forms were--or should be--completed";
- "[a]lthough [Alessi] received the forms periodically, [she] 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)";
- "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"; and
- had Alessi "actually reviewed [Colonial's check sheets], or delegated someone else to review them, she would have known that no inspections were being conducted . . . ."

(Pltf. Brief at 11-12, 34) Plaintiffs, however, cite not to Alessi's trial testimony, but to a deposition that was never presented to the jury.[18] Plaintiffs did not establish that prior to the accident, checklists with incomplete signature lines were provided to Alessi. In any event, negligence in Alessi's supervision of Colonial's inspections would be insufficient to satisfy the stringent standard necessary for punitive damages. *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (tnegligent supervision involves "a degree of culpability ordinarily insufficient to support punitive damages *at all*" (emphasis added)).

The argument that CNMC failed to train Needham on the garage's structure and airshafts is flawed for the same reason: it does not establish either a conscious decision to disregard the danger presented by the ventilation opening, or rise to the level of "outrageous, grossly fraudulent, or reckless" conduct. It also ignores evidence regarding Needham's qualifications, substantial prior employment experience, working relationship with the engineering staff, and uncontested knowledge of fall hazards.[19]

Citing *Perry ex rel. Perry v. Frederick Inv. Corp.*, 509 F. Supp.2d 11 (D.D.C. 2007), Plaintiffs argue that CNMC's reckless indifference was established by its citation for a building code violation.[20] (Pltf. Brief at 26-27) Plaintiffs' reliance on *Perry*, however, is misplaced

---

[18] Plaintiffs never designated deposition transcripts to be used as substantive evidence at trial. (JA 1989) Moreover, Alessi's deposition does not support their contentions. Alessi testified in deposition that she was aware of Colonial's inspections through communications with its on-site managers, and because she "occasionally" or "sporadically" asked to see the manager's check sheets. (Dkt.331, Ex. I, Tr.173 L.3 - Tr.174 L.1; Tr.181 L.5-19) Consistent with her trial testimony, she also testified that she had not seen unsigned forms. (*Id*. Tr.186 L.18 - Tr.187 L.7) *C.f. Halcomb v. Woods*, 767 F. Supp.2d 123, 137-38 (D.D.C. 2011) (award of punitive damages "must rest on the evidence presented at trial, not on counsel's characterization of it").

[19] Ironically, while claiming that Ms. Needham was inadeuately trained, Plaintiffs called her in their *case-in-chief* to elicit her opinions regarding OSHA fall standards. (JA 1035-36, Tr.34-35, 38).

[20] The Trial Court held that evidence of CNMC's regulatory violation did not constitute negligence *per se*, but could be considered evidence of negligence. (JA 425; 1239, Tr.82) The

Perry was an action was brought against the officers and shareholders of companies that managed and indirectly owned a residential apartment for the lead poisoning of a child. *Id*. at 12. The case involved summary judgment, not a Rule 50 motion following the presentation of trial evidence, and the court therefore accepted as true the mother's affidavit that the defendants knew that a child of eight years or younger lived in the contaminated apartment. *Id*. at 14. Given this Court's decision in *Childs v. Purll*, 882 A.2d 227 (D.C. 2005), this fact was determinative:

> In § 707.3, we have before us a particular Housing Regulation that is designed to protect public safety and that requires landlords to be proactive when its specified preconditions are satisfied. *Upon notification that the prospective tenants of [the apartment] would include children under eight years of age, § 707.3 imposed a specific, affirmative duty on the owners and their agents to provide those premises to the [tenants] in a lead-free condition or not at all*. Although the [owners] and their management company may not have known there was lead paint in the premises, "actual knowledge [of the defect] is not required for liability; it is enough if, in the exercise of reasonable care, [the "owners"] should have known that the condition … violated the standards of the Housing Code." *Whetzel*, 108 U.S. App. D.C. at 393, 282 F.2d at 951. "Ordinarily, the landlord will be chargeable with notice of conditions which existed prior to the time that the tenant takes possession," RESTATEMENT § 17.6 cmt. c, and *the creation in § 707.3 of an affirmative duty to furnish lead-free premises implies a concomitant, antecedent duty to ascertain whether the premises in fact are lead-free.* In effect, § 707.3 *presumptively serves to put the landlord on constructive notice of any lead paint hazard in premises occupied by children under eight*.

509 F. Supp.2d at 17 (quoting *Childs*, 882 A.2d at 236-37 (emphasis added)). Thus, under the circumstances of *Perry* and *Childs* involving violations of D.C.'s lead paint regulation, constructive notice was established upon proof of the landlords' knowledge that young children would be residing in the leased premises. 509 F. Supp.2d at 17-18; 882 A.2d at 237. Plaintiffs

---

regulations that were ultimately the subject of Plaintiffs' statutory negligence claim were couched in general terms ("All buildings or structures that are … deteriorated [or] unsafe…shall be … made safe and secure, as the code official may deem necessary"; "Equipment, systems, devices and safeguards … shall be maintained in good working order"). (JA 425). *See Phillips v. Fujitec Am., Inc*., 3 A.3d 324, 330 n.17 (D.C. 2010) (building code regulations do not impose a high duty amounting to negligence *per se*; such regulations only serve to indicate what the standard of care may be).

cite no controlling authority extending *Childs*' constructive notice holding to a building code violation occurring in a parking garage open to the public.

Moreover, in marked contrast to the substantial testimony presented regarding the management of CNMC's garage, *supra* at 25-28, the general manager of the apartment management company in *Perry*: (a) had no prior property management experience; (b) assumed that the company followed inspection policies, but did not know whether the apartment had ever been inspected; (c) did not know about the lead paint regulation, or whether it had been met; and (d) never checked with the on-site property managers to see if lead paint inspection policies were being followed. *Id*. at 13-14. The bulk of the *Perry* opinion addressed the defendants' contention that they could not be held individually liable, *id*. at 15-22, and the court disposed of the punitive damages issue in an opaque and summary fashion. *Id*. at 22.[21]

Finally, Plaintiffs contend that the Trial Court should have permitted them to assert that CNMC conducted a "sham" investigation of the accident to support the claim for punitive damages. (Pltf. Brief at 34-35) Specifically, they argue that evidence of the hospital's failure to preserve "the trash, blood, and rat carcass" within the airshaft after the accident should have been admitted. The Trial Court held that information regarding the investigation was irrelevant because there was no spoliation claim which would justify the admission of the evidence. (JA 365) The Court concluded that the cases cited by Plaintiffs arising from the employment

[21] Plaintiffs' reliance on *Rogers v. Ingersoll-Rand Co.*, 971 F. Supp. 4 (D.D.C. 1997), and *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc*., 377 U.S. App. D.C. 187, 493 F.3d 160 (2007), also is misplaced. The manufacturer in *Rogers* chose not to alter its design despite knowledge of prior safety problems, including the death of a road worker killed by an identical machine a year before the accident. *Id*. at 12. Similarly, in *Muldrow* (in which punitive damages were *not* appealed), four youths under the defendant's care and protection had been murdered within one to two years of plaintiff's death. *Id*. at 163-64. In the case *sub judice*, however, there was no evidence of any previous, similar incident from which a conscious disregard of a known safety hazard could be inferred. (JA 1333, Tr.7)

context, such as *Daka, Inc. v. McCrae*, were distinguishable, and that Plaintiffs had failed to provide any "cases in support of their argument that a 'sham' investigation may be used as evidence against CNMC in the context of a negligence claim as a matter of course." (JA 365 at n.2)[22] This decision was an appropriate exercise of discretion over the admissibility of evidence. *Duk Hea Oh v. National Capital Revitalization Corp*., 7 A.3d 997, 1011 (D.C. 2010).[23]

In conclusion, the Trial Court correctly ruled that the evidence presented at trial was not sufficient to send the issue of punitive damages to the jury.

V. The Trial Court Properly Excluded Plaintiffs' Trial Exhibit 3-6

"The determination of what evidence is relevant, and what evidence may tend to confuse the jury, is left to the sound discretion of the trial court," *Turcios v. United States Servs. Indus*., 680 A.2d 1023, 1030 (D.C. 1996), and are reviewed for abuse of discretion. *Freeman*, 60 A.3d at 1145. In the instant case, the alleged negligence related to the uncovered ventilation opening through which G.I. fell. The Trial Court recognized that other grilles which did not cause or contribute to the accident were irrelevant, and would substantially prejudice the Defendants if

---

[22] Unlike general tort claims, in Title VII cases a plaintiff may seek to rebut an employer's non-discriminatory justification for adverse action by seeking to prove that the proferred reason was pretextual; this may include evidence that the employer conducted a "sham" investigation and, in fact, acted in retaliation for the assertion of a federally protected right. *See, e.g., Loya v. Sebelius,* 840 F. Supp. 2d 245, 254-55 (D.D.C. 2012); *Musick v. Salazar,* 839 F. Supp. 2d 86, 96-97 (D.D.C. 2012); *Brown v. Mills*, 674 F. Supp. 2d 182, 193-94 (D.D.C. 2009).

[23] CNMC produced extensive photographs of the accident scene, many of which Plaintiffs used at trial to establish the conditions existing in the shaft. (JA 2914-2945) Testimony was elicited regarding the presence of dirty trash, a dead rat, and the fact that no sales receipt was recovered which could date the fast food trash. (JA 1139-40, Tr.100-102) During discovery, Plaintiffs did not designate an expert to testify regarding what the results of a forensic analysis of the debris would have revealed, or otherwise establish that relevant, noncumulative evidence regarding the age of the trash or other materials in the shaft had been rendered unavailable because the shaft was eventually cleaned. (JA 1360-68) *Battocchi v. Washington Hosp. Center*, 581 A.2d 759, 767 (D.C. 1990); *Freeman v. District of Columbia*, 60 A.3d 1131 (D.C. 2012); *Herbin v. Hoeffel*, 806 A.2d 186, 194 (D.C. 2002); *Anderson v. United States*, 352 A.2d 392 (D.C. 1976).

admitted. (JA 363-64)[24] The probative value of the violation notice (JA 2892) was quite weak, as Woods could not provide accurate information regarding which other grilles were involved. (JA 364 n.1; 1625; 1627; 2621-22; 2630; 2649-50) Because the notice would tend to confuse the issues and distract the jury from the key question regarding the vent involved in the accident and Defendants' actual or constructive knowledge of the same, the Court acted within its discretion to exclude it. *Duk Hea Oh*, 7 A.3d at 1011.

In any event, Plaintiffs were not prejudiced because they were allowed to read its text to the jury, and examine witnesses about its contents. (JA 1129, Tr.60; 1138-39, Tr.96-98) Given that admission of the form would have been cumulative, its exclusion would not warrant reversal absent a "manifest abuse of discretion"--a standard clearly not met here. *Stone v. Alexan*der, 6 A.3d 847, 853 n.12 (D.C. 2010). Moreover, Plaintiffs' counsel argued about other grilles in closing (JA 1288, Tr.61-62; 1289-90, Tr.68-69), and Plaintiffs recovered a verdict. Consequently, exclusion of the notice was harmless and did not affect the ultimate outcome of the trial. *Stone*, 6 A.3d at 853 n.12; *Sullivan v. Yellow Cab Co*., 212 A.2d 616, 618 (D.C. 1965).[25]

VI. The Trial Court's Rulings Regarding Freddie Sanchez Were Not an Abuse of Discretion

Defendants moved to exclude Sanchez following extensive attempts to subpoena him for deposition. (JA 1659-1748) Sanchez provided brief, unsworn, statements to Defendants. (JA 1666-68) After he signed an affidavit prepared by Plaintiffs' counsel that corrected CNMC's

---

[24] *See, e.g., Burkowske v. Church Hosp. Corp*., 50 Md. App. 515, 439 A.2d 40 (1982); *Benna v. Reeder Flying Serv., Inc*., 578 F.2d 269, (9th Cir.1978); *Marocco v. Ford Motor Co*., 7 Cal. App. 3d 84, 86 Cal. Rptr.526 (1970).

[25] Plaintiffs assert that the Trial Court excluded a rebuttal witness, Ronnie Sellers, but the record reflects that their counsel *withdrew* Sellers. (JA 1189, Tr.3-4) Plaintiffs' counsel told the Court that the nature of his anticipated testimony had been "*misunderstood*" (JA 1189, Tr.4), and their failure to make a proffer as to the true nature of his testimony and obtain a ruling precludes appellate review. *Rafeedie v. Seelye*, 178 A.2d 922, 924 (D.C. 1962).

statement and disclosed more extensive information (JA 358), Defendants sought for almost a year--unsuccessfully--to secure his deposition. (JA 1661-63)

In its order, the Trial Court held that Defendants had been prejudiced by the inability to depose Sanchez (JA 359), but nevertheless granted additional time to depose him. (JA 360) CNMC attempted twice more to subpoena Sanchez, but to no avail. (JA 481-83, 487-88, 1845-50) At the first pretrial conference, the Court ruled that if Plaintiffs wished to call Sanchez, they would need to notify the Court. (JA 489) Plaintiffs never so notified the Court at any of the later pretrials (JA 524-543), or at trial. However, Sanchez's hearsay statement regarding notification to a Colonial worker of the uncovered ventilation opening was admitted. (JA 644, Tr.39-40)

In disposing of the motion to exclude Sanchez, the Court observed that

> parties are not permitted to conduct "trials by surprise." Discovery exists so that the parties have the opportunity to explore the factual issues incumbent in each case and to narrow the issues based on the existing evidence. This includes depositions of potential fact and expert witnesses; unless parties have the opportunity to conduct adequate discovery into witnesses' knowledge of the circumstances of the incident in question, that witness will not be permitted to appear and testify at trial. The Court retains broad authority to govern the discovery process.

(JA 358-59 (citations omitted)) This ruling was correct and within the exercise of the Court's discretion to maintain the orderly administration of justice and ensure a fair trial. *Corley v. BP Oil Co.*, 402 A.2d 1258, 1262 (D.C. 1979); *Redding v. Capitol Cab Co.,* 284 A.2d 54 (D.C. 1971). In addition, having recovered a jury verdict and judgment, Plaintiffs were not prejudiced by the ruling.

VII. The Court's Trial Management Was Not an Abuse of Discretion

1. Time Allotments. To ensure a fair, but also orderly and efficient, trial, SUP. CT. CIV. R. 1; SJI § 1.01, reasonable limits upon the number of witnesses permitted to testify as to particular facts and issues are permitted. SUPER. CT. CIV. R. 16(g); *Loux v. United States,* 389

F.2d 911, 917 (9th Cir. 1968); *United States v. Colomb,* 419 F.3d 292, 301 (5th Cir. 2005). Trial judges have broad discretion in managing a trial and controlling witness examination, and such decisions are reviewed for abuse of discretion. *Lomax v. United States*, 510 A.2d 225, 228 (D.C. 1986); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr*, 68 A.3d 697, 717 (D.C. 2013); *Geders v. United States*, 425 U.S. 80, 86-87 (1976).

Plaintiffs contend that the Trial Court unreasonably limited their witnesses and deprived them of sufficient time to present their case.[26] (Pltf. Brief at 41-42) The record reflects, however, that the Court reasonably managed the trial time.[27] *Teneyck v. Omni Shoreham Hotel*, 361 U.S. App. D.C. 214, 365 F.3d 1139, 1155-56 (2004). Plaintiffs assert that the Trial Court's conduct "prevented them from presenting all of the witnesses necessary to prove the extent of the children's injuries," and that "there was no time for her father, Mr. Ibanez, to testify at trial." (Pltf. Brief at 42) However, Ibanez was not excluded as a witness for Plaintiffs (JA 392), and they fail to identify any point in the record where they sought to call him, were prevented from doing so, and made a testimonial proffer. Under such circumstances, no issue is presented for

---

[26] Plaintiffs also complain about interruptions during opening and closing. The Trial Court interrupted counsel's opening three times, twice to remind her to confine her remarks to what the evidence would show, and once to address a hearsay issue. (JA 607, Tr.3; 609, Tr.10; 609-12, Tr.12-24). In closing, counsel was admonished when she improperly stated that Defendants had "coerced" doctors to testify, and sought to inject personal experience. (JA 1312, Tr.41-42; 1313, Tr.48) These actions were within the Court's supervisory authority. *Cox v. Treadway*, 75 F.3d 230, 237 (6th Cir. 1996); *Herring v. New York*, 422 U.S. 853, 862 (1975).

[27] The claim that the Court deducted the hearing on Colonial's duty from Plaintiffs' trial time is incorrect; the hearing was on February 21, prior to the trial. (JA 553). The Trial Court ensured that Plaintiffs had sufficient time by excluding the first two days of *voir dire* and opening statements, and extending the time for Plaintiffs' case over the course of the first two weeks of trial. (JA 791, Tr.18; 873-75, Tr.3-8; 942-43, Tr.78-81; 973, Tr.201-02) On April 4, the Court allowed Plaintiffs to call two additional witnesses (JA 973, Tr.199-201), and explained that she had backed out from Plaintiffs' time the legal discussions that had transpired, as well as a defense witness that had been called out of turn. (JA 973, Tr.201) Plaintiffs began presenting evidence on March 27. (JA 142, Dkt.876) Plaintiffs' case was concluded on April 9, ultimately spanning a significant portion of eleven trial days. (JA 1080, Tr.44)

review. *District of Columbia v. Barriteau*, 399 A.2d 563, 569 (D.C. 1979); *Stager v. Florida E. C. R. Co*., 163 So.2d 15, 17 (Fla. App. 1964).

2. Cross-Examination of Adverse Witnesses. In *Coulter v. Gerald Family Care*, 964 A.2d 170 (D.C. 2009), this Court affirmed the vigorous cross-examination by the defense of the defendants' employees whom plaintiff had called adversely, observing that:

> Under Super. Ct. Civ. R. 43(b), when a party (here, Coulter) calls an adverse party as a witness, that witness (here, Dr. Fullum) "may be cross-examined by the adverse party"; *and, as our case law recognizes, leading questions are "the principal tool and hallmark of cross-examination*." *United States v. Hsu*, 439 A.2d 469, 472 (D.C. 1981) (citation and internal quotation marks omitted).

Id. at 182-83 (emphasis added). The Trial Court correctly followed *Coulter* and allowed Defendants to ask leading questions of their employees called in Plaintiffs' case.[28]

VIII. The Trial Court's Cost Award Was Not an Abuse of Discretion

"Costs" means "something less than a litigant's total expenses in connection with a suit." *Robinson v. Howard Univ.*, 455 A.2d 1363, 1368 (D.C. 1983). The discretion to award costs under SUP. CT. CIV. R. 54(d) is limited to items specifically authorized by 28 U.S.C. § 1920, other statutes, or court rule. *Cormier v. DCSWA*, __ A.3d __, 2013 D.C. App. LEXIS 387 *24 (D.C. July 3, 2013)(quoting *Talley v. Varma*, 689 A.2d 547, 555 (D.C. 1997)). Trial courts have

[28] Plaintiffs also challenge an April 2, 2013 "gag order" forbidding counsel from speaking about the case to the media during the trial, affirming and extending a prior order requiring compliance with SUPER CT. CIV. R. 203(c). (JA 145, Dkt. 887; 374) The order was imposed only after (1) a news article was published which the Court deemed "explosive," and which referred to information not in evidence or ruled inadmissible (JA 826, Tr.7-8; 2895); and (2) the Court learned that the online version of the article contained a link to Ms. Martin's web site containing such information. (JA 827-28, Tr.12-15; 2556-60) The Court determined that a jury instruction would not protect the jurors' impartiality and the integrity of the trial. (JA 825-28, Tr.3-15; 836-37, Tr.49-51) *Coulter,* 964 A.2d at 186; *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 555 (U.S. 1976); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). The order was rescinded at the conclusion of the trial. (JA 162 Dkt.961) Ms. Martin did not appeal the order, and Plaintiffs were not subject to the order.

"large discretion in regard to costs, and it is not the function of the appellate courts to substitute their own discretion." 455 A.2d 1363, 1369.

1. Expert Fees. The Trial Court, relying on *Talley v. Varma*, 689 A.2d 547, 557 (D.C. 1997) and 28 U.S.C. § 1821(b), properly refused to award $107,045 of expert witness fees. (JA 459).

2. Deposition Expenses. Plaintiffs sought over $61,000 for deposition transcription and videotaping. (JA 436) The Trial Court denied the videotape costs, properly concluding that their demonstrative value and concerns for witness unavailability did not establish necessity. (JA 438) The Court's award included the Paula Darte and Jacqueline Forbes depositions. (JA 437, 441-42).[29]

3. Demonstrative Exhibit. The Court allowed the documented preparation cost of the accident scene mock-up, but refused to tax transportation charges because they were akin to courier or delivery charges, which are disallowed.[30] (JA 453, 455) The Court awarded 75 percent of the mannequin expense because four were purchased, but only three were used.[31] (JA 454) The Court properly refused to tax costs for dressing the mannequins because the expense

---

[29] The deposition of Plaintiffs' expert in Florida was conducted by videoconference in lieu of counsel traveling to depose him there, and the claimed invoice represented half of the cost "per agreement of counsel." (JA 165, Dkt.983, Ex. A, Invoice 350353; JA 2485, 2661-62) As the charge was incurred for counsel's convenience as a less expensive alternative to attorney travel costs, holding it nontaxable was appropriate. *Cormier,* at *23-24; *Mody v. Center for Women's Health*, 998 A.2d 327, 337 (D.C. 2010); *Coulter*, 964 A.2d at 203; *Robinson*, 455 A.2d at 1368.

[30] *Cormier*, 2013 D.C. App. LEXIS 387 *8; *Burns v. Greater S.E. Comm. Hosp*., 119 W.L.R. 1869, 1873 (D.C. Super. July 11, 1991); *Stansel v. NAACP*, 125 W.L.R. 2157, 2160 (D.C. Super. Oct. 2, 1997). Plaintiffs also sought a $1,000 "bonus" paid to delay collection of the bill until after trial, which was properly nontaxable because it was "incurred for additional flexibility in Plaintiffs' payment terms." (JA 455)

[31] That Plaintiffs may have saved expense by purchasing four rather than three was not disclosed in the Bill of Costs or supporting exhibits.

was unnecessary and lacked sufficient documentation. (JA 454 & n.16) These decisions were within the Court's sound discretion, and should not be disturbed.

4. Other Expenses. Plaintiffs fail to demonstrate the Trial Court's taxation of other various costs was an abuse of discretion.[32]

5. Interest on Costs. Costs were addressed pursuant to Rule 54(d)(1), and the Trial Court has equitable discretion with regard to awarding interest thereon. *Burke v. Groover, Christie & Merritt*, 26 A.3d 292, 304 & n.11 (D.C. 2011). Before the Court awarded costs, their amount was unliquidated and uncertain, and less than a quarter of the amount claimed was properly taxable. Upon determining the amount of taxable costs, the Court did not abuse its discretion to grant the defendants 30 days to pay the same, or pay interest from that point forward.

---

[32] *Transcripts* - The Trial Court taxed $3,890 for transcripts, excluding two hearings because Plaintiffs failed to submit supporting invoices, thereby preventing a determination of whether they were ordered on a regular or expedited basis. (JA 446-47) The Trial Court was not obligated to seek out and count the pages of the transcripts.

Private Process Service - The Trial Court correctly noted that no specific statutory authority exists for taxation of these costs, and that "the clear weight of the published opinions by Judges of this Court, counsel against an award of special process server fees." (JA 447) The Court also noted this Court's admonition that "the discretion to tax costs should be sparingly exercised with referenced to expenses not specifically allowed by statute." *Robinson*, 455 A.2d at 1369 n.10.

Binders & Dividers - Plaintiffs did not provide sufficient documentation to determine the extent to which charges for binders and dividers were incurred to comply with the Court's order, preventing an informed "necessity" decision. (JA 450-51)

Counsel Travel Expenses - Given the absence of "unusual circumstances" justifying a departure from the rule that parties bear their attorney's travel and lodging expenses, *id*. at 1368, the Court properly refused to tax $658.22 for counsel's travel for Dr. Woodruff's deposition. (JA 457)

Outside Copying Costs - Plaintiffs submitted two checks payable to Kinko's. One referenced "joint appendix," another "joint ex"; only the latter was supported by a receipt. (JA 449-50) The Court concluded that it had "no basis for finding that the 'Joint Appendix' expense was necessary…particularly since it appears distinct from the Joint Exhibit charge." (JA 450) The Court's analysis was based on a careful review of Plaintiffs' submission, and it was not an abuse of discretion to tax only the sufficiently documented expense.

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

Plaintiffs designated former DCRA Inspector Eric Woods as an expert on March 18, 2011. (JA 33, Dkt.178; 1360-1367) Plaintiffs had earlier deposed Woods as a fact witness. (JA 2620-60) In the first deposition, Woods attributed the problem with the grille to damaged or crumbling concrete. (JA ___, Tr. 61-62; ___, Tr.104-105) He did not know whether the metal collar for the grille in question was loose at the time, did not examine it sufficiently to provide a professional opinion about it, and could not recall what kind of screws were used to secure the grilles. (JA 2629, Tr.143; 2634-35, Tr.164-165)

Plaintiffs' expert disclosure designated Woods to testify regarding numerous building code violations. (JA 1363-1367) Nowhere did the designation state that (1) screw holes on the grille collar had been "overtorqued," (2) the grille screws were stripped from overtorquing, or (3) that the screws had been subjected to oscillation and building vibration. The disclosure merely provided that "many vents were loose and screws were rusted, missing and apparently had fallen out over time." (JA 1366)

CNMC deposed Woods as an expert on July 11, 2011. (JA 2661) He agreed that after reinstallation the grille passed his field test (JA 2693, Tr.130-32), and that if the grille had been on the wall before the accident, it would have provided adequate fall protection. (JA 2708, Tr.191) He testified that he was not going to render an opinion regarding whether the grille had been initially jarred loose, or whether someone had removed it. (JA 2704, Tr.177) He never offered any opinions regarding overtorquing damage to the collar or the screws, even when

asked at the conclusion of the deposition whether he had any further opinions. (JA 2713, Tr.212)[33]

Discovery closed on March 5, 2012, approximately one year after Woods was designated. (JA 54, Dkt.316) Neither prior to that time nor thereafter did Plaintiffs file a supplemental Rule 26(b)(4) statement disclosing that Woods would be offering additional opinions. Woods testified for the first time at trial, over objection as being outside the scope of his expert disclosure and deposition, that the screw holes appeared to be "overtorqued," that overtorquing can strip the screw threads, and that the screws had worked themselves out over time from oscillation and vibration. (JA 675-76, Tr.166-67; 679, Tr.180-182; 684, Tr.201) Although Plaintiffs acknowledged that Woods had not expressed these opinions in his deposition, the Trial Court nevertheless refused to exclude the testimony. (JA 693, Tr.27; 694, Tr.32)

Sup. Ct. Civ. R. 26(b)(4) provides that "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Rule 26(f)(1)(B) requires seasonable supplementation of expert disclosures if additional opinions become known.

The primary purpose of these rules is "to prevent unfair surprise and limit the issues to those articulated before trial, so that an efficient and orderly presentation of evidence may be insured." *Weiner v. Kneller*, 557 A.2d 1306, 1309 (D.C. 1989). Another "obvious purpose" of Rule 26(b)(4) is to permit "meaningful deposition of expert witnesses concerning their opinions." *District of Columbia v. Kora & Williams Corp.*, 743 A.2d 682, 689 (D.C. 1999)(citing

[33] Mr. Woods also agreed to notify counsel in the event he developed any new opinions, so that CNMC would have an opportunity to re-depose him. (JA 2713, Tr.212-13)

Mizrahi v. Schwarzmann, 741 A.2d 399 (D.C. 1999)). *Mizrahi* emphasized depositions as the "critical tool" for the cross-examination of opposing experts. 741 A.2d at 404.

The duty of supplementation may be enforced through sanctions, including exclusion of evidence, continuances, or other appropriate action. *Corley*, 402 A.2d at 1261; *Weiner*, 557 A.2d at 1309. Relevant factors to consider in determining an appropriate sanction include:

> (1) whether allowing the evidence would incurably surprise or prejudice the opposite party; (2) whether excluding the evidence would incurably prejudice the party seeking to introduce it; (3) whether the party seeking to introduce the testimony failed to comply with the evidentiary rules inadvertently or willfully; (4) the impact of allowing the proposed testimony on the orderliness and efficiency of the trial; and (5) the impact of excluding the proposed testimony on the completeness of information before the court or jury.

Id. at 1311-12.

At trial, Woods introduced a new theory of liability when he testified that not only was there damage to the concrete (JA 675, Tr.163), but also that the screws and grille collar had been damaged from misuse. These new opinions were a surprise to the defense, had never been expressed despite two depositions, and were quite "distinct from the theory generally articulated by the witness," *viz*., that damaged concrete substrate was the cause of the condition. *Id.* at 1310. The prejudice was all the more severe because, unlike CNMC's expert, Woods had the opportunity to inspect the grille hardware and opening shortly after the accident in his role as a DCRA building inspector, lending an aura of credibility and impartiality to his opinions no retained expert could share. (JA 671-74, Tr. 150-51, 156-60) Moreover, given the breadth of Woods' opinions, granting CNMC's request to strike his testimony would not have "incurably prejudiced" Plaintiffs, nor substantially impaired "the completeness of information" before the jury. A continuance at the start of the three-week trial would not have been a workable solution because Woods had traveled from Florida to Washington to testify, and other fact and expert

witnesses had already been scheduled to testify in the first week of trial, including Dr. Dean, an intensivist, Plaintiffs' therapist, Wendy Radding, and Plaintiffs' neurology expert from Michigan, Dr. Woodruff. (JA 458; 635, Tr.4; 717, Tr.123; 728, Tr.165; 739, Tr.212; 741, Tr.4; 767, Tr.110-111; 2469 & n.3; __, Tr.136-139, 144 (3/11/13 Pretrial Conf.)) The Trial abused its discretion by refusing to exclude Woods' testimony, or take any other action to sanction Plaintiffs' violation of the discovery rules.

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

Prior to trial, the Trial Court excluded evidence from Woods regarding the condition of other grilles, concluding that the same was irrelevant and unfairly prejudicial. (JA 363-64, 378-79) After G.I.'s accident, Woods walked through the hospital garage to examine other ventilation grilles and thereafter issued a notice of violation which stated,

> [t]he garage ventilation shaft grilles are loose, have screws missing, damaged and the substrate by which grilles are attached is crumbling and missing. Grilles are old, rusted and lack structural strength to act as sufficient safeguards to provide fall protection for the four (4) level parking garage exhaust shafts.

(JA 2892) The Court wrote that Woods' excluded testimony appeared to lack foundation because he "could not remember which of the grates were deteriorated or where the deteriorated grates were located." (JA 364 n.1) The Court correctly noted that "CNMC and Colonial Parking are not on trial for the condition of the other grilles in the parking garage; rather, they have been sued in connection with the uncovered ventilation opening, through which G.I. fell, and their alleged roles in the grate being off the wall." (JA 379)

At trial, Plaintiffs called Woods to testify, *inter alia*, that crumbling concrete had contributed to loosening of the grille. Woods' testimony was based on several post-accident

photographs of the aperture and interior of the airshaft. (JA 676, Tr.167-68; 678, Tr.175-76; 703, Tr.66-67; 2925 (Pltf. Ex. 11-12); 2926 (Pltf. Ex. 11-13); 2940 (Pltf. Ex. 11-27))

CNMC disputed Woods' claims of deteriorated concrete by calling an architectural expert, Lawrence Dinoff. (JA 1099-1100, Tr.25-26) During direct examination, Dinoff explained how the grille was attached by a collar to the interior shaft wall. He supported his opinion regarding the lack of concrete deterioration by referring to the wall and collar of the grille opposite the opening through which G.I. fell, using the same photos Woods had relied upon. (JA 1106, Tr.52-53; 1109, Tr.62-63; 2925 (Pltf. Ex. 11-12); 2926 (Pltf. Ex. 11-13)) Plaintiffs seized upon Dinoff's testimony to argue that he had "opened the door" to evidence regarding other ventilation grilles "throughout the garage." (JA 1123, Tr.36; 1125, Tr.41) The Trial Court, although acknowledging that Dinoff's testimony had referred only to the back sides of grilles in the photos, agreed that the door had been opened, and over CNMC's objection, permitted Plaintiffs to cross-examine Dinoff and Robert Beckwith regarding the violation notice's reference to the condition of unidentified grilles elsewhere in the garage. (JA 1127-28, Tr.52-56; 1129, Tr.59-60; 1138-39, Tr.96-98)[34] In closing, Plaintiffs' counsel read the previously excluded language from the violation notice to the jury. (JA 1288, Tr.62)

The doctrine of "curative admissibility" provides that "in certain circumstances a party may inquire into evidence otherwise inadmissible, but only after the opposing party has 'opened the door' with regard to this evidence." *Mercer v. United States*, 724 A.2d 1176, 1192 (D.C. 1999). The *sine qua non* of the doctrine is the introduction of irrelevant evidence by a party which opens the door to the admission of otherwise inadmissible evidence to the extent

[34] Plaintiffs' counsel was also permitted to examine the witnesses regarding repairs that Woods had ordered (JA 1131, Tr.66; 1138-39, Tr.96-97), evidence the Court had previously ruled inadmissible as a subsequent remedial measure. (JA 532)

necessary to remove any unfair prejudice. *Dyson v. United States*, 450 A.2d 428, 442 (D.C. 1982). This Court has cautioned that the rule "is one dangerously prone to overuse," 724 A.2d at 1192 (quoting *United States v. McClain*, 142 U.S. App. D.C. 213, 216, 440 F.2d 241, 244 (1971)), and "should not be used unfairly to prejudice the defendant," or "subverted into a rule for injection of prejudice." *Id*. (quoting *United States v. Winston*, 145 U.S. App. D.C. 67, 71, 447 F.2d 1236, 1240 (1971)).

The conclusion that CNMC "opened the door" was erroneous, and substantially prejudiced the hospital. Simply put, CNMC did not "open the door" and thereby gain an unfair advantage through Dinoff's direct testimony--because *Woods had himself referred to precisely the same photographs, grille components and concrete surfaces during his examination*. (JA 676, Tr.167-68; 678, Tr.175-76; 2925 (Pltf. Ex. 11-12); 2926 (Pltf. Ex. 11-13); 2940 (Pltf. Ex. 11-27)) *Plaintiffs*, not CNMC, obtained admission of the evidence showing the interior of the shaft and the grilles therein, which they later claimed had violated the exclusion order (JA 366, 396), and Woods relied on the same photographs to support his opinion that deteriorated concrete contributed to loosening of the grille. It was therefore imminently fair for CNMC to rebut his testimony with reference to the *same exhibits*, and Dinoff's testimony did not unfairly prejudice Plaintiffs nor open the door to evidence regarding other grilles in the garage that were the subject of Woods' violation notice.

Moreover, the findings in the notice related to the external condition of other, unidentified grilles. Consequently, the notice did not properly rebut Dinoff's testimony, which was based entirely on the appearance of grille components and concrete surfaces inside the airshaft at issue and in particular, the grille directly opposite the opening involved in fall.

Consequently, the Trial Court's misapplication of "curative admissibility" did, in fact, subvert the doctrine "into a rule for injection of prejudice."[35]

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

Whether evidence is sufficient to submit a claim to the jury over a Rule 50 motion is a question of law examined *de novo. WMATA v. Jeanty*, 718 A.2d at 174. Judgment of as a matter of law may be directed if the evidence, viewed in the light most favorable to non-movant, is so clear that reasonable jurors could reach but one conclusion, and it is clear that plaintiff has not established a *prima facie* case. *Clement*, 634 A.2d at 427.

As noted *supra* with regard to Destefano's claim, recovery is permitted for mental distress absent physical injury only if the defendant's conduct caused plaintiff to be in danger of physical injury and, as a result, to reasonably fear for her own safety. *Williams*, 572 A.2d at 1066; *Hedgepeth*, 22 A.3d at 796-97. The rule requires that plaintiff's concern for her own safety arise from being in the "zone of physical danger" created by the allegedly negligent conduct. *Id*. at 799. Recovery is not permitted for mental distress from merely observing harm or danger to a third person. 572 A.2d at 1069. In addition, plaintiff must establish that her presence in the zone of danger was contemporaneous with fear for her own safety. *Jones*, 589 A.2d at 423.

In the instant case, there was simply no proof that V.I. suffered fear of her own safety at the time G.I.'s accident occurred. Destefano testified that when she was at the driver's door, she told G.I. and V.I. to move back so she could open the door. (JA 804-05, Tr.70, 71) The last time she saw the children before G.I.'s fall, G.I. was standing to her right, and V.I. was standing to the

---

[35] The prejudicial effect of the improperly admitted evidence related both to Plaintiffs' claim of common-law negligence and regulatory violations, because proof of the latter entailed evidence of "deteriorated, unsafe… or... otherwise dangerous" structures, and "safeguards [not]...maintained in good working order." *Supra* n.19.

right of G.I. (JA 805, Tr.71) There was no testimony from Destefano that V.I. felt as though she was going to fall, or feared for her own safety at the time of the accident. (JA 765, Tr.102-03; 804-05, Tr.67, 70-74; 810, Tr.91-92)

Nothing in Ms. Radding's testimony established that V.I. had feared for her own safety at the time of the accident; if anything, her therapy suggested that V.I. was concerned about G.I.[36] Indeed, Radding specifically stated that V.I. was "very concerned" about her brother. (JA 774, Tr.136; 775, Tr.140, 141) She stated that V.I.'s "regressed" drawing was "possibly due to trauma," but could not be more certain because "we can never ascertain for sure when it comes to mental health." (JA 775, Tr.143)

Debra Jenkins testified that V.I.--

> was actually at the scene. She was actually holding her brother's hand. And in a deposition by the mother, she screamed something to the effect, "My brother is gone." So he let go of her hand and he's gone and she hears screams. And not only that, she also sees the response of her mother. And so that in itself, being the traumatic experience of seeing her brother, one, holding her hand and then all at once he's not there and they can't get to him and he can't get to them and seeing the mother's response, that's traumatic, that goes along with the DSM criteria.

(JA 902, Tr.119) Jenkins also related that V.I. had said "that she felt guilty because [G.I.] pinched her hand and she let go and she felt as though it was her fault." (JA 903, Tr.120) Jenkins informed Destefano that V.I. felt "guilty because of what happened to her brother, that she remembers what happened and that's a big problem for a girl." (JA 794, Tr.28-29). Although it is understandable that V.I. became distressed at seeing her brother fall, witnessing her mother's reaction, and even feeling "guilty" about what happened, this evidence is not probative of

---

[36] Ms. Radding testified that "[h]er play depicted several reenactments. She took doctor kits and took care of me, things of that sort." She explained that V.I. "took a string and tied it around a figure of a dog's neck and dangled it off the stairs, and then pulled it back up again, which to me seemed like she was saving the dog from dropping a certain distance." (JA 770, Tr.122-23; 771, Tr.125)

whether V.I. feared for her own safety at the time of the event, as required to satisfy the elements for bystander recovery under District of Columbia law. Consequently the claim should not have been submitted to the jury.

In denying CNMC's post-trial motion, the Trial Court noted testimony regarding nightmares V.I. reported after the accident about her and family members drowning, and Dr. Parr's testimony regarding V.I.'s statement "I died" to hospital administrator Pat Johnson, recorded in an April 10, 2009 e-mail almost a month after the accident. (JA 886, Tr.52; 903, Tr.120-21; 2565) As Dr. Parr explained, there was nothing in the e-mail about the fall in the shaft; V.I. was with G.I. at CNMC because he was undergoing an EEG, and expressed concerns about his seizures. (JA 882, Tr.38-39) Dr. Parr's PTSD diagnosis was, in fact, based on the experience of V.I. *witnessing G.I.* falling down the vent. (JA 885, Tr.51)

Juries are permitted to draw reasonable inferences from the evidence, but cannot base a verdict on speculation. *Wallace v. Eckert*, 57 A.2d 943, 951 (D.C. 2012); *Giordano v. Sherwood*, 968 A.2d 494, 498 (D.C. 2009); *Majeska v. District of Columbia*, 812 A.2d 948, 950 (D.C. 2002). The evidence regarding V.I. indicates that her fears were directed to G.I.'s safety and the negative feelings she experienced as a result of seeing him fall. Assuming that her remark to Ms. Johnson or her nightmares could, without speculation, point to a fear for her own mortality, there remains a paucity of evidence that V.I. experienced this fear at the time of G.I.'s accident, rather than upon later reflection, and the jury would have needed to speculate to reach such a conclusion. Consequently, CNMC was entitled to judgment as a matter of law with respect to V.I.'s claim.

CONCLUSION

For the foregoing reasons, CNMC prays that the judgment be affirmed with respect to the appeal in 13-CV-679, with costs taxed against Appellants. With regard to CNMC's cross-appeal, CNMC requests that:

(1) the judgment in favor of V.I. be reversed, and that final judgment be entered against V.I. and in favor of CNMC with costs; and

(2) in the event this Court reverses or modifies the judgment in 13-CV-679 as to CNMC on any issue and awards Plaintiffs a new trial, that the judgment of the trial court be reversed or modified in accordance with CNMC's protective cross-appeal issues.

Respectfully submitted,

McCANDLISH & LILLARD, P.C.

By: 

Gary W. Brown #1495
Adam W. Smith #424590
11350 Random Hills Road
Suite 500
Fairfax, Virginia 22030
(703) 273-2288
Counsel for Children's National Medical Center

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

WENDY PAOLA DESTEFANO and ENRIQUE IBANEZ,
as parents and natural guardians of minor children G. I. and V. I.,
Defendant-Appellant/Cross-Appellees,
v.
CHILDREN'S NATIONAL MEDICAL CENTER, *et al.,*
Plaintiffs-Appellees/Cross-Appellants.

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 **30th Day of June, 2014**, I served the within **Corrected Brief of Appellee/Cross-Appellant Children's National Medical Center** upon:

Dawn V. Martin, Esquire
Law Offices of Dawn V. Martin
1725 I Street, N.W. Suite 300
Washington, DC 20006

Christopher E. Hassell, Esquire
Dawn Singleton, Esquire
Bonner Kiernan Trebach & Crociata, LLP
1233 20th Street, N.W., 8th Floor
Washington, D.C. 20036

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.

Unless otherwise noted, 4 copies have been sent to the Court on the same date as above via hand delivery. The brief was originally filed and served on April 8, 2014.

Additionally, a pdf copy has been emailed to the Court to briefs@dcappeals.gov. The pdf has been scanned for virus using VIPRE.

June 30, 2014

John C. Kruesi, Jr.
Counsel Press