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

In The
District of Columbia
Court of Appeals

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

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

CORRECTED BRIEF OF APPELLEE/CROSS-APPELLANT COLONIAL PARKING, INC.

***Christopher E. Hassell**
Andrew Butz
Dawn Singleton
Megan Kinsey-Smith
BONNER KIERNAN TREBACH & CROCIATA, LLP
1233 20th Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 712-7000

Counsel for Appellee/Cross-Appellant Colonial Parking, Inc.

THE LEX GROUP^{DC} ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

CORPORATE CERTIFICATE UNDER RULE 28(a)(2)

Plaintiffs in this action are Wendy Paolo Destefano and Enrique Ibanez, as parents and natural guardians of minor children, G.I. and V.I., suing on behalf of Ms. Destefano and the minor children.

Defendants in this action are Children's National Medical Center ("CNMC") and Colonial Parking, Inc. ("Colonial").

Plaintiffs are represented by Dawn V. Martin, Esq., of the Law Offices of Dawn V. Martin.

Defendant CNMC is represented by Adam Smith, Esq. and Gary Brown, Esq., of McCandlish Lillard.

Defendant Colonial is represented by Christopher E. Hassell, Esq. and Dawn Singleton, Esq., who are joined on appeal by Andrew Butz, Esq. and Megan Kinsey-Smith, Esq., all of Bonner Kiernan Trebach & Crociata, LLP.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

**Chief Authorities are Designated by an Asterisk.*

RULES

OTHER AUTHORITIES

COUNTER-STATEMENT OF ISSUES PRESENTED

I. Issues Raised by Plaintiffs' Appeal

A. Did the trial court correctly dismiss Ms. Destefano's claim for negligent infliction of emotional distress, (i) because she was a mere bystander under the *Williams* case at the time of her son's fall and was not in the zone of danger and thus was not in reasonable fear for her own safety and (ii) because there was no "special relationship" entailing a high risk of serious emotional injury as required by the *Hedgepeth* case?

B. Did the trial court correctly preclude the jury from awarding future damages from post-concussive syndrome to Plaintiff G.I., because Plaintiffs' expert failed to opine to a reasonable degree of medical certainty that G.I. would suffer such future damages?

C. Did the trial court correctly dismiss Plaintiffs' claim for punitive damages, since Plaintiff failed to offer clear and convincing evidence either: (a) that any employee or agent of Colonial had sufficient knowledge or appreciation of the risk at issue here to be charged with "egregious conduct" that is "malicious, wanton, reckless, or willfully disregards another's rights" or (b) that any Colonial corporate officer, director or managing agent authorized, participated in, or ratified any legally malicious conduct?

D. Did Plaintiffs receive a fair trial, with appropriate evidentiary rulings and administrative decisions, and was any error during trial harmless in light of Plaintiffs' verdict on liability and damages?

E. Did the trial court exercise sound discretion in limiting Plaintiffs' claim for costs and timing its award of related interest?

II. Issues Raised by Colonial's Cross-Appeal

A. Did the trial court err in denying Colonial's Motion for JNOV, since Colonial did not have any contractual duty to Defendant CNMC to inspect or maintain CNMC's facility except for vehicle-related hazards, such as oil spots or exhaust fumes, and since Plaintiff did not present any expert testimony of any national standard of care for garage managers to have to inspect the client's building for structural hazards?

B. Did the trial court err in allowing the jury to consider whether four-year-old Plaintiff V.I.

acquired a cognizable claim for negligent infliction of emotional distress when her brother fell into the air shaft, since there was no evidence that she suffered emotional distress other than concern for her brother?

COUNTER-STATEMENT OF THE CASE

Plaintiffs received a fair 19-day trial at which they were able to recover compensatory damages of $1.56 million on six-year-old Plaintiff G.I.'s claims of bodily injury as well as $26,000 on four-year-old Plaintiff V.I.'s claim for negligent infliction of emotional distress ("NIED"). In addition to opposing Plaintiffs' appeal, Defendant Colonial cross-appeals from the trial court's denial of JNOV on non-liability grounds, and from the trial court's failure to dismiss four-year-old V.I.'s NIED claim for lack of cognizable evidence that she actually feared for her own safety when her brother fall.

Before trial, the court granted Defendants summary judgment on Plaintiff Destefano's NIED claim, because she was not within the zone of danger where her son G.I. was injured.

At trial, the court bifurcated the issues of liability and compensatory damages from the issue of punitive damages and, while the jury was out, dismissed the punitive-damages claim for lack of clear and convincing evidence of legal malice of either Defendant.

During trial, the court excluded certain evidence and gave certain limiting jury instructions, ruling that: (1) Plaintiffs failed to offer expert testimony (a) that Plaintiff G.I. would suffer future post-concussive syndrome, and (b) that Colonial had failed to adequately train and supervise garage employees to inspect and deal with structural hazards in its building; (2) Plaintiffs must not refer to (a) Defendants' subsequent remedial measures, including accident investigations and disciplinary actions, and (b) certain irrelevant or unduly prejudicial tangential facts or events, including: (i) the condition of other air shafts and vent covers in the garage, (ii) Ms. Destefano's supervision of her children inside the hospital before the accident,

(iii) Plaintiff G.I.'s appearance after his rescue from the air shaft, and his mother's emotional state in the emergency room, (v) a safety-related comment Colonial's president made at deposition years after the accident; and (vi) testimony of contract worker Freddy Sanchez, who avoided service of deposition subpoenas. The trial court also exercised sound discretion in (a) allocating trial time and witnesses numbers and (b) limiting contact with the press during trial.

After trial, Defendant Colonial timely moved for JNOV, renewing its previous summary-judgment, trial brief, and directed-verdict arguments: (a) that Colonial had no contractual duty for inspection or maintenance of Defendant CNMC's garage structure and (b) that Plaintiff failed to offer any expert evidence showing a national standard of care for any such tort duty. The court below denied Colonial's JNOV motion, erroneously holding: (a) that Colonial's contract with CNMC "does not remove" responsibility for monitoring the facility structural safety (JA.478, *id*. at 10) and (b) that Plaintiffs did not need an expert despite the limited nature of Colonial's contractual obligations to CNMC, because Colonial had "to do *something* to address the dangerous condition." (JA.475, *id*. at 7 (court's italics).)

After trial, the court also awarded Plaintiffs certain substantial costs, but exercised sound discretion in denying costs for various other expenses. Despite having won a large damages verdict and substantial costs, Plaintiffs immediately noticed an appeal, and Defendants Colonial and CNMC thereafter timely cross-appealed.

COUNTER-STATEMENT OF FACTS

On March 25, 2010, Plaintiffs filed this action against Defendants Colonial and CNMC, alleging that their negligence caused the injuries Plaintiff G.I. sustained when he toppled backwards into an uncovered wall vent and fell about 24 feet down an air shaft in the hospital's parking garage, which Colonial staffed and supervised under the terms of a written contract with

CNMC. Plaintiffs sought compensatory damages for G.I. and NIED damages for Ms. Destefano and her daughter V.I., as well as punitive damages.

The Complaint alleged that "the hole in the garage wall was a premises hazard" and that both CNMC and Colonial were negligent in the "control and management of the premises." (JA.243 & JA.245, ¶ 89 & ¶¶ 106-107.) Specifically, the Complaint alleged that Colonial: (1) had a contractual duty to CNMC to patrol, inspect, repair and maintain the parking garage safely for customers; (2) neglected to "warn others" not to remove the vent covers without authorization; (3) failed to exercise due care in "maintaining" the garage by permitting an air shaft vent to remain uncovered without sealing off the area; (4) "failed to train and supervise" its employees to recognize dangers of the air-shaft system; and (5) maintained an "inherently dangerous condition on its premises" without warning customers. (JA.248-250, ¶¶ 114-129.)

At the time of Plaintiffs' accident, the obligations of Colonial (as "Manager") to CNMC (as "Owner") were governed by an 18-page Parking Management Agreement (the "Contract") dated January 7, 2002. (JA.2061 *et seq*.) Under the Contract, Colonial provided vehicle parking services and related housekeeping as an independent contractor. (*Id.*; *see* JA.2077 at ¶ 14(b).) Leland Kuhn, with 30 years contract-negotiation experience, negotiated the Contract for CNMC (JA.2035-2039) and Charles Wainwright negotiated for Colonial. (JA.2036.) In the negotiations, CNMC never asked Colonial to inspect the garage ventilation system or the vent covers to air shafts (JA.2037.), and in fact did not discuss patrolling, housekeeping or Building-related equipment. (JA. 2036.) At that time, Mr. Kuhn was not aware of any Colonial internal policy and procedure documents – Manager's Daily Facility Checksheet (the "Checksheet") and Employee Safety Guide – and therefore did not rely on them during the negotiations. (*See*

JA.2037.) The following provisions of the Contract are most pertinent:[1]

> WHEREAS, Manager has been managing and operating said Parking Garage, and wishes to continue to do so, and
>
> WHEREAS, Owner is willing to have Manager continue to manage and operate said Parking Garage, on a self-park and "attendant-assisted" park basis, upon the terms, conditions, covenants and agreements set forth hereinafter,
>
> NOW THEREFORE, the parties hereto, for adequate consideration and intending legally to be bound hereby, covenant and agree as follows:
>
> * * *
>
> 3.(b) "Operating Expenses" shall mean the following items:
>
> * * *
>
> (iii) Operation and general maintenance of said Parking Garage in a first class manner and in conformity with this Agreement. General maintenance shall include, but not be limited to, general cleaning of the Parking Garage to the Owner's reasonable satisfaction (i.e. treatment of oil spills, sweeping and trash pick-up and removal) as well as patrolling, sweeping and emptying of all trash containers in the Garage stairwells, patient drop-off areas and other such connected pedestrian areas; mechanical sweeping of all parking levels, the driveways from Michigan Avenue and the helix P-1 parking level to be swept twice per month; pressuring washing of the garage areas twice per annum and maintenance of the professional operating equipment to Owner's reasonable satisfaction, but shall not include repairing, servicing or maintaining major structural items, including concrete surfaces, and Building-related equipment (described below). . . .
>
> (iv) Minor repairs to, and maintenance of, the parking and/or revenue control operating equipment and trade fixtures in said Parking Garage, to maintain same in a clean, safe and usable condition and in conformity with Owner's reasonable standards. Notwithstanding anything herein contained to the contrary, all costs to repair and/or maintain major structural items and Building-related equipment shall be the responsibility of the Owner, and shall not be considered Operating Expenses hereunder. For purposes of the preceding sentence, major structural items and Building-related equipment shall include, but not be limited to, the air handling systems, . . . HVAC systems, plumbing, all concrete structures and other major structural elements including the main garage helix . . . .
>
> * * *
>
> 7. . . . Manager shall make all general repairs to the Parking Garage (so long as such repairs are consistent with paragraph 3(b)(iii) and (iv) hereof), and all repairs to parking access and revenue control equipment . . . . Manager shall keep the entire Parking Garage free of trash and provide snow plowing for all parking areas, and treat oil spills on a daily basis. Manager shall have no obligation, whatsoever, with respect to the heated, helical ramp, or to the condition, maintenance or repair of any sidewalks or

[1] Emphasis added herein unless otherwise noted.

landings which may be in, on or adjacent to, or adjoin the Parking Garage.

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

* * *

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

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

* * *

14.(b) It is understood and agreed that in undertaking the performance of, and in performing under, this Agreement, Manager is, and shall at all times be, acting as an independent contractor and that Owner shall determine all the policies and procedures that shall be in effect respecting the operation of the said Parking Garage during the entire term, except as herein otherwise expressly provided. Manager shall not be requested to provide or perform any service hereunder **other than with respect to the parking and storage of automobiles and general housekeeping maintenance of the Parking Garage.** Manager shall not be considered Owner's agent for any purpose whatsoever and has not been granted any right or authority to assume or create any obligation or liability, express or implied, on Owner's behalf or bind Owner in any manner whatsoever except as otherwise expressly set forth herein.

* * *

As indicated above, Plaintiffs' theory of liability as to Colonial was based on contractual duty and negligent training, supervision, patrolling, inspection and maintenance. As a result, Plaintiffs sought summary judgment on "undisputed" facts including the following:

a) Colonial shift managers were required to patrol the garage three times per day using the Checksheet. (*see* JA.1434-1436, G.I.'s Facts Nos. 221-229.)

b) None of the completed Checksheet forms reported any missing vent cover, adjacent wall spalling, rusted vents or missing screws. (*See* JA.1437, G.I.'s Fact No. 239.)

c) Colonial's site manager "did not know the dangers behind the air shafts and was not trained to inspect them, [and] so did not train his staff to inspect them, because Colonial's officer and upper-level manager *did not train* [him] regarding the structure of the garage or how to inspect the premises." (JA.1437, ¶ 240; *also see* JA.1441-1442, G.I.'s ¶ 267.)

Plaintiffs persisted with this negligent-training-and-supervision theory throughout trial, relying

on Colonial's internal documents and employee testimony about training. However, they failed to establish a proper evidentiary basis on which a reasonable jury could conclude that Colonial was negligent, because Plaintiffs failed to proffer any expert testimony about parking-garage operation, management, training or supervision,[2] and the remainder of Plaintiffs' evidence about negligent training and supervision was based solely on Colonial's internal policies and practices.

Equally significant for what it failed to show against Colonial was the testimony that Plaintiffs elicited from current or former Colonial employees. For example, Plaintiff called or cross-examined a number of Colonial employees on the same issues of training and supervision, the Employee Safety Guide, patrolling and inspections, and use of the Checksheet:

a) Joseph Pelz, former Senior Operations Manager, testified about the instruction and training provided to Colonial employees on safety in orientation and from the Employee Safety Guide. (JA.1142-1143, Trial Tr, at 112:17 - 113:3 & 115:22 - 116:5; JA.1145, at 4:13-19; JA.1146, at 11:17-25; JA.1148, at 18:18-25 & 19:1-11; & JA.1149, at 21:3-22.) There was no evidence at trial that Mr. Pelz knew about the missing vent cover or the vertical air shaft behind it.

b) Khalid Ahmed, a shift manager, testified that he was instructed on the use of the Checksheet, that he had received internal documents on safety, and that he conducted inspections and filled out the forms for his shift during the period at issue.[3] (JA.1184, Trial Tr. at 7:25 - 8:17; JA.1185, at 10:15-18; & JA.1188, at 23:6-11.) Mr. Ahmed patrolled the floor where the accident occurred, but never saw the grate off the wall, never heard that the grate was missing and did not know what was behind the grate.

[2] Plaintiffs' building-code expert, Eric Woods (JA.671, 3/27/2013 Trial Tr., at 149:20 - 150:9), testified that CNMC's hidden air shaft violated Code for lack of fall protection (JA.680, at 184:23 - 185:15), but he did not testify about duty, standard of care, or breach as to Colonial.

[3] There was also testimony at trial that, a couple hours after the accident, Colonial's then site project manager, Isaac Song, and assistant project manager, Mussie Mengiste, asked Belete Belete to sign his name on some Checksheet forms and circle items reflecting previous inspection activities, but Mr. Belete refused to do it. (JA.819-820, 4/1/2013 Trial Tr. (morning), at 129:21 - 130:25 & 131:9-132:16.) There was no evidence showing that any Colonial officer, director or managing agent authorized, participated in or ratified such misconduct.

(JA.1188, at 22:13-20 & 23:19 - 24:13.)

c) Belete Belete, a facilities specialist, which is a fill-in position subordinate to managers (JA.817-818, Trial Tr. at 122:3 - 123:3; JA.839, *id*. at 61:18-22), testified that he was provided certain safety training when he started at Colonial. (JA.817, *id*. at 120:11-14.) He became familiar with the Checksheet and knew it was used to patrol the garage and check for items. (JA.818, at 123:4-23.) Mr. Belete did not complete any Checksheets before Plaintiffs' accident, however, because he was not assigned such work. (*Id*. at 124:21-24.) Prior to Plaintiffs' accident, Mr. Belete had observed the assistant project manager walking around the garage checking it and conducting inspections, but Belete did not recall seeing him with the Checksheet. (JA.838, 4/2/2013 Trial Tr., at 57:21 - 58:25 & 59:1 - 59:3.) Mr. Belete did not know what was behind the hole in the wall that Plaintiff G.I. fell through. (JA.820, *id*. at 134:8-14; JA.838, 4/2/2013 Trial Tr. (morning), at 55:12-25; JA.839, *id*. at 69:11-22.)

Thus, Plaintiffs' case in chief against Colonial was about negligent supervision and training, and focused on testimony by Colonial employees about training, the Employee Safety Guide, site inspection, and completion of the Manager's Daily Facility Checksheet, plus testimony that certain garage attendants had noticed that the vent cover was off the wall.[4] Plaintiffs did not offer any expert testimony against Colonial about (a) any standard of care, either about facility management or employee training in the parking management industry; (b) whether Colonial's internal policies and procedures embodied any standard of care for the parking industry; or (c) whether any building code prevision was applicable to a parking garage manager.

Just before giving instructions, the trial judge ruled that she would tell the jury that they were not permitted to conclude that Colonial was negligent in training its employees to inspect or

[4] Henry Colindres testified that he and Freddy Sanchez, both contract attendants, noticed the missing vent cover and that Sanchez reported it to an unnamed Colonial employee, who said not to worry about it. (JA.643-644, Trial Tr. at 37:16 - 41:18.) Plaintiffs never identified to whom (if anyone) Sanchez actually made such a report and did not call any witness to corroborate the Colindres testimony, as Belete and Ahmed testified that the missing vent cover was never reported to them. (JA.838, *id*. at 55:12-25; JA.1188, *id*. at 23:19 - 24:13.)

maintain the parking garage where Plaintiffs' accident occurred. (JA.1269, Trial Tr. at 82:4-7; *see* JA.424, ¶ 5.02.) Thus, without instructions about the meaning or effect of the Contract or expert testimony about the standard of care for garage operators, the jury was left to speculate about what reasonable care was required and whether Colonial met that degree of care.

Notwithstanding the jury instruction striking Plaintiffs' claim of negligent training and supervision, the lack of any instruction regarding the meaning or effect of the CNMC-Colonial contract, and Plaintiffs' lack of any standard-of-care expert, Plaintiffs' closing argument included contentions that Colonial's training and supervision had been negligent, including:

1. That Colonial's contractual patrolling duties included responsibility for air-shaft vent covers. (JA.1289, Trial Tr. at 65:7-16.)

2. That missing screws holding the vent cover in place must have been swept up by Colonial employees, as the Contract required "sweeping," and that they should have been trained to spot them during inspections and sweeping. (JA.1290, *id.* at 69:17 - 70:10.)

3. Even though they did not know that there were air shafts behind the vent covers, and therefore did not know about the hidden hazard, garage employees should have used Daily Facility Checksheets to report that the vent cover was not in place. (*See id.*)

4. Daily Facility Checksheets for certain days before the accident were falsified after the accident. (*Id*. at 70:17 - 18:9.)

5. Colonial should be held responsible for asserted deficiencies in the Daily Facility Checksheets, such as the lack of mention of air shafts or vent covers, which Colonial had not considered in designing the form. (*See id.* at 71:22-25; JA.12981, at 73:7-19.)

On April 22, 2013, the jury returned a verdict in favor of Plaintiffs against both Defendants, awarding Plaintiffs G.I. $1,560,000 and V.I. $26,000 in compensatory damages.

SUMMARY OF ARGUMENT

Plaintiffs' Appeal Should Be Denied in Its Entirety. Plaintiff Wendy Destefano has no zone-of-danger NIED claim, because she was not in the zone of danger where her son G.I. fell and his fall did not cause her to fear for her own safety, and she has no *Hedgepeth* NIED claim

because she *was not* in any cognizable "special relationship" with the defendants, as owners and managers of the garage. Similarly, Plaintiff G.I. did not prove entitlement to future PCS pain and suffering, because he did not present expert testimony on that claim to contradict Defendants' expert testimony against it. Furthermore, Plaintiffs are not entitled to punitive damages, because: (i) Defendant Colonial did not have contractual responsibility to CNMC for the inspection or maintenance of the garage's ventilation shafts, (ii) any putative breach of duty by Colonial here was inadvertent and far from egregious, and (iii) no Colonial employee knew of a vertical ventilation-shaft hazard to "recklessly disregard," and (iv) no Colonial officer, director or managing agent authorized, participated in, or ratified any legally malicious act. The trial court did not commit reversible error in any evidentiary or trial-management ruling, and correctly handled Plaintiffs' demand for costs with related interest.

Defendants' Appeal Should Be Granted. Defendant Colonial is entitled to reversal of Plaintiff V.I.'s claim for negligent infliction of emotional distress, because Plaintiffs failed to offer cognizable evidence that she was ever in fear for her own safety, as required for a zone-of-danger claim. Next, Colonial is entitled to Judgment NOV, because the duty at issue here was beyond the scope of its contractual obligations to CNMC as a parking service manager and because Colonial therefore was not expected to provide personnel, training or supervision focused on inspection and maintenance of the CNMC garage's ventilation shafts.

ARGUMENT

I. PLAINTIFFS' APPEAL SHOULD BE DENIED IN ITS ENTIRETY, AND PLAINTIFF V.I.'S NIED JUDGMENT SHOULD BE REVERSED.

A. Plaintiffs Wendy Destefano and Her Daughter V.I. Do Not Have Cognizable NIED Claims.

The dismissal of Ms. Destefano's NIED claim and the failure to grant Colonial's JNOV motion on V.I.'s NIED claim are subject to *de novo* review. Under this standard, the Court

should affirm the dismissal of Ms. Destefano's NIED claim and reverse the denial of JNOV for Defendants on V.I.'s NIED claim.

1. Judge Edelman Correctly Granted Summary Judgment Against Plaintiff Destefano Because She Was Not in the Zone of Danger.

The initial issue on appeal is whether the trial court correctly granted partial summary judgment on Plaintiff Wendy Destefano's NIED claim because she failed to offer any evidence that she was in the zone of danger or had any cognizable fear for her own safety.[5] As set forth below, the trial court correctly granted summary judgment,[6] because: (i) Plaintiffs' proffered evidence failed to create any genuinely disputed material issue of fact and (ii) Plaintiffs' belatedly proffered evidence still does not create any such genuine issue of material fact.

Plaintiffs argue that Judge Edelman relied on an erroneous assertion in his June 12, 2012 Order that Ms. Destefano "could not fit through the hole." (JA.349-350.) However, the issue is not whether she could have "fit" (*e.g.*, if she had bent down and crawled through), but rather, whether she actually was in the same "zone of danger" as her son – the danger of unintentionally falling through that two-by-three-foot hole – and whether she reasonably feared harm from a fall.

The answer to this question clearly is "no," as the trial court correctly decided. On

---

[5] Contrary to Plaintiffs' Brief (at 16 n.5), whether someone was in the zone of danger is not necessarily a jury question. (*See id.*, *citing Ferrell v. Rosenbaum*, 691 A.2d 641, 646-52 (D.C. 1997).) As a failure-to-diagnose case with no NIED discussion, *Ferrell* does not support Plaintiff's contention. In NIED cases, the threshold issue of duty is a legal question for the Court. *Hedgepeth*, 22 A.3d at 812 ("[it] is for the court to consider the relevant evidence and make a decision on the pleadings, on summary judgment, or, where necessary, after a hearing.")

[6] Plaintiffs' Brief (at 14-15) relies on evidence not before Judge Edelman at summary judgment (namely, photographs taken in August 2012, after reconsideration of summary judgment was denied). Appellate courts generally cannot consider evidence not considered by the court below. *See Jane W. v. President & Directors of Georgetown College*, 863 A.2d 821, 826 (D.C. 2004); *accord*, *Drexel v. Union Prescription Centers*, 582 F.2d 781, 784 (3d Cir. 1978), and cases cited therein; *see generally* 10 *Wright & Miller, Federal Practice & Procedure* § 2716, at 435. Such evidence should not be considered here. *See Riley v. Titus*, 190 F.2d 653, 655-56 (D.C. Cir. 1951); *Dodd Ins. Services v. Royal Ins. Co.*, 935 F.2d 1152, 1156 n.3 (10th Cir. 1991).

Reconsideration, Judge Edelman ruled that "the evidence in the record creates no dispute of fact as to whether Plaintiff Wendy Destefano was in the applicable 'zone of danger,' *i.e.*, whether she was at risk of *unintentionally* falling into the open hole" in the wall. (JA. 354-356, 7/11/2012 Order, at 2 (court's emphasis).) When G.I. fell, his mother was standing erect near their car, and could not have fallen through the two-foot-high hole even if she had backed up to the wall. (*Id*.)

In the District of Columbia, a plaintiff cannot recover for emotional distress by merely being a "bystander" who witnesses physical harm to a third person, even when that person is the plaintiff's child.[7] The doctrine underlying those decisions was created in *Williams v. Baker*, 572 A.2d 1062, 1069-1070 (D.C. 1990), and reaffirmed in *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 798 (D.C. 2011). As the *Hedgepeth* court stated: "Because *Williams* limits recovery to 'direct' victims of the tortfeasor's negligence, *i.e.*, those who are distressed by 'fear of his [or her] own safety as opposed to the safety of a third party,' we have subsequently denied claims brought by bystanders who witnessed harm to another but did not fear for their own safety."

Thus, for Ms. Destefano to have been in the relevant zone of danger here, she would have had to have been at risk of accidentally falling through the hole, and that risk simply did not exist. As Ms. Destefano testified at deposition, after she realized her son had fallen: "I stuck my head out through that hole or into that hole, 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."[8] (JA.2758, Destefano Dep. Tr., at 102:1-4.) Thus, Ms. Destefano's own statements clearly fail to show that there was

[7] *See Johnson v. District of Columbia*, 728 A.2d 70, 77 (D.C. 1998) (denying emotional distress damages to a mother who witnessed her young daughter being scalded); *McKethean v. W.M.A.T.A.*, 588 A.2d 708, 718 (D.C. 1988) ("there can be no recovery for mental distress and its consequences resulting exclusively from observation of harm or danger to a third person.").

[8] According to Plaintiffs' Brief (at 16-17), that testimony explained her earlier affidavit statement that "the 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." (JA.1469-1478, ¶ 17.)

any chance that she could have accidentally fallen into the hole while she was standing next to her car at the moment when her six-year-old son fell into the hole. Instead, at minimum, she would have had to intentionally bend over and place herself in front of the hole to risk falling in, and even then the danger would not have been the same. Thus, she was not in the zone of danger, let alone in objective fear for her own safety, and the trial court correctly so held.[9]

2. Appellee Colonial Had No "Special Relationship" with Ms. Destefano.

Plaintiffs' Brief (at 17-19) also argues that Ms. Destefano is entitled to recover NIED damages because of a "special relationship" that imposed a duty on Colonial to avoid inflicting emotional distress, in reliance on this Court's opinion in *Hedgepeth*. Incredibly, Plaintiffs posit that the sort of special relationship described and found in *Hedgepeth* is present here, but neither the facts of *Hedgepeth* nor that court's discussion supports any such conclusion. Instead, *Hedgepeth* recognized a narrow exception to the *Williams* rule (*id*., 22 A.3d at 810-11):

> A plaintiff may recover for negligent infliction of emotional distress if the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being, (2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff.

Here, Plaintiff failed to show any sort of "special relationship" between Colonial and Ms. Destefano "of a nature that necessarily implicates [her] well being." *Id.* The relationship between the patrons and operators of a parking garage is not of the "special" sort envisioned by the *Hedgepeth* court. *Id.* at 812; *see also id*. at 812-815 ("many other relationships, even if they

[9] In contrast, D.C. cases holding that a NIED plaintiff was in a zone of danger rely on evidence clearly showing the plaintiff's actual exposure to the danger. *See District of Columbia v. Evans*, 644 A.2d 1008, 1018-19 (D.C. 1994) (firefighter pushed the plaintiff, whose son was shot by unknown assailant, to the ground "in order to protect her from stray bullets"); *see also Jones v. Howard University, Inc.*, 589 A.2d 419, 421-25 (D.C. 1991) (mother who underwent diagnostic x-ray and surgery while pregnant could recover for verifiably severe mental distress).

involve fiduciary obligations, generally will not come within the rule because neither the purpose of the relationship nor the fiduciary's undertaking is to care for the plaintiff's emotional well-being; rather the object of the engagement is to obtain [some other specific] objective, even if its non-attainment due to the fiduciary's negligence is emotionally distressing to the client").[10]

Plaintiffs' Brief (at 18) quotes only part of footnote 39 in the *Hedgepeth* opinion in an effort to support Plaintiffs' argument that the relationships identified in the quotation are examples of relationships that create the *Hedgepeth* duty. Plaintiffs' argument is not only incorrect, but also blatantly misleading, as the full context of footnote 39 makes clear.[11] The *Hedgepeth* opinion elsewhere describes cases that can involve this "special relationship" and the related highly likely injury – such as cases involving certain doctor-patient relationships or the sensitive relationship between a funeral home and its bereaved client. *See id.* at 805-807.

Here, unlike *Hedgepeth*, the garage patron's emotional health is not implicated by the relationship between a garage operator and its patrons. Therefore, this Court should decline to extend *Hedgepeth* to include the garage-patron relationship here.

---

[10] *Accord*, *McDevitt v. Wells Fargo Bank, N.A.*, 946 F. Supp. 2d 160, 170-71 (D.D.C. 2013) (as to mortgagor and mortgagee); *Clark v. Computer Science Corp.*, 958 F. Supp. 2d 208 (D.D.C. 2013) (as to employer and previous employee). They seem to be the only published cases on the issue of "special relationship" since *Hedgepeth* was decided. *See* note 13, *infra*.

[11] Specifically, that footnote actually states exactly the opposite of what Plaintiffs' Brief contends. Indeed, the excerpted quotation in Plaintiffs' Brief (at 18) is missing the key first sentence and citation to the source of the quoted relationship's list (*Hedgepeth*, 22 A.2d at 813 n.39):

> As we explain in the text, 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. *See Undertakings and Special Relationships*, *supra*, at 49 & n.1 (referring to relationships involving "(1) carrier-passenger, [and so forth] . . . .

Clearly, this footnote in the *Hedgepeth* opinion was not meant to name relationships that do give rise to a NIED-related duty, and rather points out that each of the listed relationships – while perhaps "special" in some historical or other context – do not thereby qualify as "special" in the NIED context. Thus, Plaintiffs' Brief should not have tried to rely on *Hedgepeth* in this way.

3. Plaintiffs Failed to Show that V.I. Suffered Any Emotional Injury Attributable to a Fear of Imminent Physical Injury.

Without cognizable evidence actually showing that four-year-old minor Plaintiff V.I. feared for her own safety when her brother G.I. fell through the hole in the wall and into the air shaft, the trial court erred in allowing the jury to consider the question of whether she was entitled to NIED damages from witnessing her brother's fall. In the District of Columbia, a zone-of-danger plaintiff must also be in actual fear of imminent physical injury to recover NIED damages. *See Hedgepeth*, 22 A.3d at 796-97. In contrast, NIED damages cannot be predicated on fear for another's safety. *Williams*, 572 A.2d at 1069. The evidence presented in the record and at trial makes it clear that V.I.'s distress reflected concern for her brother, but not fear for her own safety. In effect, the trial court erred by allowing the jury to simply assume that V.I. feared for her own safety, and to award $26,000 in damages in reliance on that assumption.[12]

At trial, V.I.'s social worker, Ms. Radding, opined that V.I. was afraid for G.I. and that G.I.'s pre-existing neurological condition contributed to V.I.'s symptoms and concern for her brother. (JA-770-71 & 775, Trial Tr., at 123:5-8, 125:3-9, 126:11-18 & 144:1-19.) Ms. Destefano, who testified about the actual incident, also testified about V.I.'s reaction to it. (JA.783-84 & JA.794, Trial Tr. at 175:23 - 176:4 & 176:16-19; & 27:1-15 & 28:16 - 29:1.) No other evidence was presented concerning V.I.'s perception of the incident – nothing supporting the contention that V.I. had an actual, immediate fear of injury to herself and resulting residual distress.[13] Rather, the relevant testimony shows only that her emotional distress resulted from

[12] Colonial adopts and incorporates by reference the arguments in CNMC's Brief on this issue.

[13] Plaintiffs' Brief (at 41-42) argues that "[t]estimony regarding V.I.'s injuries was limited," referring to her father, Mr. Ibanez, who testified at deposition about V.I.'s nightmares and other distress. In fact, the trial judge was willing for Plaintiffs to call the father. (JA.392 & JA.791, Trial Tr. at 16:10 - 17:25.) The father's testimony could not show that V.I. feared for her own safety during the accident, because he was not present during the accident, and such testimony

seeing her brother's fall, as well as later anxiety and perhaps guilt about what happened to him. Thus, allowing the jury to award NIED damages for V.I.'s injury was prejudicial error.

B. Plaintiff G.I. Is Not Entitled to Future Pain and Suffering Damages for Post-Concussive Syndrome.

The trial court correctly precluded the jury from awarding future damages from post-concussive syndrome ("PCS") to Plaintiff G.I., because Plaintiffs' medical expert failed to opine to a reasonable medical certainty that G.I. would suffer such future damages.[14]

Especially for injury that is subjective, expert testimony may be required to support a claim for permanency of an injury and related future damages.[15] Far from aiding their position, the cases in Plaintiffs' Brief (at 22) would require explicit expert testimony about permanency of G.I.'s PCS-related injury, because Defendants' experts testified such injury was not permanent. As this Court has stated:[16]

> In *McQueen* . . . , we opined that, "'when the bad effects of an injury have continued for years, laymen may reasonably infer permanence' even in the absence of expert medical testimony, if there is no contrary testimony that the injuries are temporary." . . . Because there was no testimony that appellant's condition was temporary, we are satisfied that she proved entitlement to damages for future pain and suffering.

Thus, the jury below could not properly infer permanency without expert testimony on Plaintiffs' behalf, since Defendants' experts testified that G.I.'s PCS problems were not permanent.[17]

---

would be cumulative to the mother's and social worker's testimony.

[14] Colonial incorporates by reference the arguments set forth by CNMC in its Brief on this issue.

[15] *See Marzullo v. J.D. Pavement Maintenance*, 975 N.E.2d 1, 8-9 (Ohio Ct. App. 2011), *citing Day v. Gulley*, 191 N.E.2d 732, 734-35 (Ohio 1963); *accord*, *President & Directors of Georgetown College v. Wheeler*, 75 A.3d 280, 293 (D.C. 2013) (as to future medical expenses).

[16] *Underwood v. National Credit Union*, 665 A.2d 621, 643-44 (D.C. 1995) (citations omitted) (*quoting American Marietta Co. v. Griffin*, 203 A.2d 710, 712 (D.C. 1964)).

[17] As those cases make clear (*see id*.), proof of "causation" is not the same as proof of "permanency," and so the citation in Plaintiffs' Brief (at 22 (Plaintiffs' italics) to the trial judge's conclusion that Plaintiff "had established causation '*for sure*'" has nothing to do with establishing permanency of a particular kind of soft-tissue injury.

As a result, D.C. Standard Jury Instruction No. 13-2 is just a starting point here and is not applicable as written without modification. In cases like *Underwood*, where the defendants did not offer expert testimony on the issue of non-permanency, trial courts could allow juries to infer future injury from continuing injury at trial. *See id.* Here, however, Plaintiffs' expert testimony from Dr. Woodruff – referring to continuing but not permanent PCS injury and admitting that even its continuation is hard to predict (JA.718, Trial Tr. at 126:14-23; JA.723-731, id. at 145-180, esp. JA.729-730, *id*. at 172:18-173:2 & 173:25-174:15) was legally deficient, in light of the testimony from Defendants' experts that such injury was not permanent, and required the trial judge to withdraw that issue from the jury.

As the court stated in *American Marietta*, 203 A.2d at 712: "On the other hand, [i]f respectable physicians testify without contradiction that an injury is temporary, reasonable laymen can hardly say it is permanent." Furthermore, that PCS may be a well known kind of injury does not mean that its potential for permanent injury is within the ken of lay jurors. Therefore, the trial judge correctly exercised discretion in holding that PCS-related permanency claim should not go to the jury.[18] As Plaintiff's Brief (at 22-23) confirms, their own experts' testimony was legally inadequate and the trial judge correctly withheld the issue of PCS-related permanency from the jury.[19] *See id*. As shown in CNMC's Brief, this is a medically complex issue, and ordinary lay jurors would have to speculate about PCS permanency here.

---

[18] *See Robinson v. United States*, 50 A.3d 508, 523 (D.C. 2012); *Irick v. United States*, 565 A.2d 26, 31 (D.C. 1989).

[19] Any error in taking permanent PCS-related injury from the jury was harmless. The jury awarded Plaintiff G.I. damages of $1.56 million for all damages, including future inconvenience (*see* JA. 430 - 431), but did not award damages for "*permanent* Post-Traumatic Stress Disorder." (JA.181, Item 8, at 4 (original italics).) Furthermore, Plaintiffs did not submit evidence differentiating the effect of any PCS-related permanent injury from G.I.'s overall future inconvenience, or his severe pre-existing neurological condition.

C. Plaintiffs Are Not Entitled to Punitive Damages.

1. Proof for Punitive Damages Must Meet an Exacting Standard.

Courts award punitive damages to punish defendants for extreme and shameful conduct and to deter defendants and others from future misconduct. *See generally Restatement (Second) of Torts* § 908 (2005). Extreme and shameful conduct is behavior that is "malicious, wanton, reckless or in willful disregard for another's rights." *Vassiliades v. Garfinckel's*, 492 A.2d 580, 593 (D.C. 1985). Such damages are not awarded, however, for "mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." *Keshishian & Sons v. Washington Square, Inc.*, 414 A.2d 834, 842 (D.C. 1980). Punitive damages are not favored by law or the courts (*id.*; *see Knippen v. Ford Motor Co.*, 546 F.2d 993, 1002 (D.C. Cir. 1976)), and thus are reserved for "extreme cases." *Queen v. Postell*, 513 A.2d 812, 817 (D.C. 1986). Moreover, a punitive damages award must have a "sufficient legal foundation" in law and the evidentiary record (*Vassiliades*, 492 A.2d at 593), and the basis for a punitive damages claim must be established by clear and convincing evidence. *See, e.g., Dalo v. Kivitz*, 596 A.2d 35, 40 (D.C. 1991) (quoting *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989)); *see Roberson v. District of Columbia Board of Higher Education*, 359 A.2d 28, 31 (D.C. 1976).

The punitive damages claimant must show both "egregious tortious conduct" and aggravating "legal malice." *See Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (1995), *as modified by id.*, 681 A.2d 1097 (D.C. 1996). "Legal malice" requires intentional injury or conscious or extremely reckless disregard for the victim's rights. *Knippen*, *supra*, 546 F.2d at 1002. Thus, the right to punitive damages depends on proof of *scienter*, which is a legal – if not actual – malicious state of mind.[20] *See Modern Management Co. v. Wilson*, 997 A.2d 37, 55

[20] The *Woodner* case clarified that punitive-damages claimants must prove both: (a) the

(D.C. 2010) (*citing Chatman v. Lawlor*, 831 A.2d 395, 400 (D.C. 2003)).

Moreover, to recover punitive damages from a corporation, Plaintiff must prove that officers, directors or "managing agents" of the corporation authorized, participated in, or ratified the egregious act. *See Jonathan Woodner*, 665 A.2d at 938. Mere negligent hiring, training or supervision is insufficient, and, in this regard, D.C. Standard Jury Instruction 16-02[1] states:

> . . . First, you must conclude that the employee defendant's act was the sort that deserves punitive damages under the rule [in Instruction 16.01] I just gave you.
>
> Second, you must conclude from clear and convincing evidence that the officers, directors or managing agents of the corporation participated in the act, authorized the act, or approved [ratified] the act [egregious] before or after it was done.

Accord, Snow v. Capitol Terrace, Inc., 602 A.2d 121, 127 (D.C. 1992); *Woodard v. City Stores Inc.*, 334 A.3d 189, 191 (D.C. 1975). There must be clear and convincing evidence of "legal malice" by the corporation, not just by some non-managerial employee.[21] *See Chatman* 831 A.2d at 400; *Railan v. Katyal*, 766 A.2d 998, 1012 (D.C. 2001).

District of Columbia courts have not fully addressed the concept of "managing agent" as used in the punitive damages context.[22] However, courts elsewhere have discussed definitions

---

commission of an egregious tortious act and (b) legal malice, in the form of "fraud, ill will, recklessness, wantonness, oppressiveness, [or] willful disregard of the Plaintiff's rights . . . ." *Id.*, 665 A.2d at 938; *Washington Med. Center, Inc. v. Holle*, 573 A.2d 1269, 1284 (D.C. 1990). That is, the prescribed test has both an objective part – egregious behavior – and a subjective part – legally malicious state of mind. *Id*. Thus, punitive damages may be awarded only upon proof of the outrageous nature of the act and the scienter with which the act was done, but not because the actual damages were severe. *See Robinson v. Sarisky*, 535 A.2d 901, 906 (D.C. 1988).

[21] Plaintiffs claimed negligent training and supervision, but not negligent hiring. Notably, courts have properly awarded punitive damages against a corporation only if: (a) the principal authorized the doing or manner of the egregious act, or (b) the principal recklessly hired an unfit agent, (c) the agent was employed in and was acting within the scope of a managerial capacity; or (d) the principal or a managing agent of the principal ratified or approved the egregious act. *See generally Restatement* § 909(d). Plaintiffs' evidence fails to meet that test.

[22] In discovery and evidentiary context (*e.g.*, under Rules 26(d)(2), 30(b)(6) and 32(a)(2)), this Court observed "[a] managing agent, as distinguished from an employee, is one invested by his corporation with general powers to exercise his judgment and discretion in dealing with

that may guide the Court here, and it is a high, restrictive standard. *See e.g.*, *Cruz v. Homebase*, 99 Cal. Rptr. 2d 435, 437 & 439-40 (Cal. Ct. App. 2000) ("managing agent" is an employee with authority to set broad rules of general application governing corporate conduct), *citing White v. Ultramar, Inc.*, 88 Cal. Rptr. 19, 23-24 (Cal. 1999) (statutory definition of "managing agent" in punitive-damages context); *Petock v. Thomas Jefferson University*, 1986 U.S. Dist. LEXIS 30246, at *21 (E.D. Pa. 1986) (quoting *Moore's Federal Practice*, § 32.04) (managing agent, as distinguished from one who is merely an employee, is a person invested by the corporation with general powers to exercise judgment and discretion in dealing with corporate matters).[23]

In sum, the standard for an award of punitive damages in the District of Columbia was aptly summarized in *District Cablevision Ltd. Partnership v. Bassin*, 828 A.2d 714, 726 (D.C. 2003). As Judge Glickman wrote for the Court (citations omitted):

---

corporate matters, who does not act under close supervision or direction of a superior authority, and has the corporate interests so close to himself that he could be depended on to give testimony in conformity with his employer's direction." *See Napier v. Safeway Stores, Inc.*, 215 A.2d 479, 482 (D.C. 1965). Similarly, the District of Columbia Circuit Court of Appeals has observed that "the law concerning who may properly be designated as a managing agent is sketchy," and that, "because of the vast variety of factual circumstances to which the concept must be applied, the standard, like so many others in the law, remains a functional one to be determined largely on a case-by-case basis." *Founding Church of Scientology, Inc. v. Webster*, 802 F.2d 1448, 1452-53 (D.C. Cir. 1986), citing *Petition of Manor Investment Co.*, 43 F.R.D. 299, 300 (S.D.N.Y. 1967); *Kolb v. A. H. Bull Steamship Co.*, 31 F.R.D. 252, 254 (S.D.N.Y. 1962). The *Webster* court further reasoned that, "[a]s in the arena of corporate liability, the focus begins with the character of the individual's control." *Id.*, 802 F.2d at 1453. As the *Webster* court emphasized, the persons considered a "managing agent" in the New York cases exercised "'supreme' authority within the corporation." *Id.*

[23] Plaintiffs' Brief (at 30-31 & 33) relies on cases addressing punitive damages in contexts that are not at issue here. *See Brown v. Argenbright*, 782 A.2d 752, 759-60 (D.C. 2001) (claim of negligent supervision against food store arising from claim of intentional sexual misconduct by store guard provided by independent contractor); *also see Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1500 (10th Cir. 1994) (insurance coverage for punitive damages in negligent hiring context), and other cases from the *Magnum Foods* opinion cited in Plaintiff's Brief (at 31 n.16), each of which are cited for the proposition that a "corporation is directly liable . . . to provide its employees with a safe place to work." Even less relevant is *McWilliams Ballard, Inc. v. Broadway Management Co.*, 636 F. Supp. 2d 1, 9 (D.D.C. 2009) (discussing defendant corporate officer's potential vicarious liability for corporate fraud).

> Punitive damages are "form of punishment." . . . Their purpose is "to punish unlawful conduct and to deter its repetition." . . . Punitive damages are, accordingly, to be awarded **only** in cases of outrageous or egregious wrongdoing where the defendant has acted with evil motive, actual malice, or in willful disregard for the rights of the plaintiff. . . . To obtain an award of punitive damages, moreover, the plaintiff must prove egregious conduct and the requisite mental state by clear and convincing evidence. . . .

Under this strict standard, as well as the additional prerequisite applicable to corporate defendants, the court below ruled correctly in dismissing Plaintiffs' claims for punitive damages.

2. Plaintiffs Failed to Proffer Evidence Showing "Egregious Conduct," "Legal Malice" and "Corporate Participation."

Plaintiffs failed to proffer any facts capable of clearly and convincingly supporting their allegation that any officer, director or managing agent of Colonial acted with reckless disregard or other legal malice by authorizing, participating in, or ratifying any negligent act by Colonial employees that caused the Plaintiffs' alleged injuries. First, and foremost, Plaintiffs did not proffer evidence clearly and convincingly showing malicious intent by Colonial concerning inspection or maintenance of the air shaft and ventilation covers in the parking garage, and Plaintiffs' Brief does not actually assert otherwise.[24] Instead, Plaintiffs demand punitive damages because Colonial allegedly failed to exercise special care on premises where "children with infirmities" are exposed. Yet none of the record evidence even implies that Colonial acted with reckless disregard for the safety of children, and thus Plaintiffs could not satisfy the requirement for "clear and convincing evidence."[25]

In this regard, Plaintiffs' Brief (at 24-36) relies on eight factual contentions – none

[24] In fact, Plaintiffs conceded at trial that "[w]e have certainly never alleged any intentional or malice. Nobody is alleging that either of the defendants intended for a child to fall into the air shaft and be injured. So it was always been [sic] off the table, and really shouldn't be a point of discussion." (JA.1334, 4/22/13 Trial Tr., at 9:11-15.)

[25] *Dalo*, 596 A.2d at 40 (quoting *Zanville v. Garza*, 561 A.2d 1000, 1002 (D.C. 1989)); *see Roberson*, 359 A.2d at 31.

sufficient alone or together – to support their demand for a trial on punitive damages:

(a) Plaintiffs' Brief (at 26) asserts "it was the 'custom' and 'practice' of Colonial to fail to inspect the garage for safety hazards and to falsify records claiming that it did perform the inspections." The first part of that assertion is rebutted by the fact that there is no clear and convincing evidence that Colonial ever failed to conduct a walk-around assessment called for by its own internal policy, let alone any action required by some actual industry standard. Instead, Plaintiffs' Brief only cites misleading testimony that one parking attendant, Mr. Belete, did not conduct inspections prior to Plaintiffs' accident,[26] and that was because he was not assigned to do so. Similarly, Plaintiffs' evidence about falsifying records is limited to misconduct of just two employees, at this one location, that occurred after Plaintiffs' accident, and there is no evidence any other Colonial employee ever did such a thing. Thus, there is no clear and convincing evidence of "customary" misconduct, let alone management involvement.

(b) In particular, Plaintiffs' Brief (at 29 & 31-32) points to evidence that a garage project manager, Isaac Song, and an assistant manager, Mussie Mengiste, tried to get a subordinate garage attendant to sign backdated Manager's Daily Facility Checksheets after Plaintiffs' accident, and then forged the attendant's name to those forms when he refused to comply. Plaintiffs' Brief asserts that this was a "manager's" conduct, but in fact those employees at a single garage location clearly were not "managing agents." Furthermore, those men were not acting within the scope of their limited authority, in preparing backdated Daily

[26] In asserting that Mr. Belete "testified that he never inspected the garage or completed any of the Manager's Daily Facility Check Sheets or conducted any inspection of the garage until after the March 11, 2011 accident," Plaintiff's Brief (at 31-32) is misleadingly ambiguous. In fact, Mr. Belete did not have any such job responsibility before the accident, and so asserting that Mr. Belete did not perform any pre-accident inspections is not the same thing as saying that no Colonial employee performed inspections. (*See* JA.817-824.) Furthermore, only Colonial supervisors at the garage were responsible for daily inspections before Plaintiffs' accident, and Mr. Belete was not a supervisor. (JA.565 at p. 51:19-23.)

Facility Checksheets, and Plaintiffs did not connect that unauthorized misconduct to Colonial's corporate management. Thus, that wrongful employee misconduct did not cause Plaintiffs' injury and was not authorized, participated in, or ratified by Colonial's management.

(c) Plaintiffs' Brief (at 29-30 (their italics)) also cites deposition testimony by Colonial's President, Andrew Blair, "that Colonial's website, which promises 'safety' to its customers in all of its locations, was only meant to promise *safety for cars – not people* and that Colonial has no legal duty to its own paying customers to provide [and maintain] a safe parking environment . . . for them to walk through while getting to or from their cars."[27] All such evidence was irrelevant or immaterial to the liability, as well as for punitive damages.[28] As the trial court ultimately concluded (JA.1047-1048), reference at trial to the website and related deposition testimony was irrelevant, as well as unduly prejudicial under Rule 403. Moreover, as

---

[27] Before the court dismissed the punitive damages claim, Plaintiffs tried to get the website statement and Mr. Blair's deposition into evidence, but the trial court properly excluded it as irrelevant to negligence and punitive damages. Before making that ruling, however, the court allowed Plaintiffs' counsel to ask Mr. Blair about his state of mind – presumably with the goal of impeachment using his deposition testimony and the website statement. Specifically, Plaintiffs' counsel asked: "Isn't it your view that, at least as of February 18, 2013, that Colonial has an obligation to protect the safety of the cars parked in the garage but not the people who are parking in the garage." Over objection – in Colonial's view erroneously – the trial court required Mr. Blair an answer. (*See* JA.1042, at 26:1-120.)

Similarly unavailing is the assertion from Plaintiffs' Brief (at 30) that Colonial was not safety-conscious at the time of Plaintiffs' accident because Mr. Blair, who is now 58 years old, was unaware of the opinion in *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969), a personal-injury case where the plaintiffs were injured when a garage attendant failed to take special precautions when a customer moved his own parked car. First, the negligence in that case involved Colonial's core responsibility – safely parking and moving cars – rather than inspecting for structural defects in the building. Second, Mr. Blair was 13 years old at the time of the *Becker* decision, and would not have been familiar with claims against Colonial Parking.

[28] That is, regarding liability, Mr. Blair's post-accident opinion neither determines nor changes the nature and extent of any duty or related standard of care. Thus, letting Plaintiffs' counsel to question Mr. Blair in the liability phase of the trial about his knowledge or views of Colonial's tort law obligations – especially in this sort of personal injury case – is the sort of serious error that could require reversal of the liability judgment. (JA.926, 4/4/13 Trial Tr. p. 13:19 to 14:9 & JA.1032, 4/8/13 (morning) Trial Tr. p. 19;10 to p. 21:19) *Also see* note 44, *infra*.

the trial judge finally realized, Mr. Blair's post-accident opinion testimony – either alone or in combination with the rest of Plaintiffs' evidence – does not amount to clear and convincing "evidence" that Colonial had a policy "of not protecting customers at garages it managed from dangers presented by structural defects in the owner's building."[29]

(d) In passing, Plaintiffs' Brief (at 31) mentions that Colonial's role as the operator of the parking garage was defined and thereby limited by its Contract with the building owner, CNMC. (*See* JA 257-274.) However, Plaintiffs' Brief quotes the Contract only to point out its reference to Colonial as the garage "Manager," asserting that it had "the right to operate a parking garage on the hospital's premises, along with the responsibilities related to that management." Despite Plaintiffs' innuendo, however, being contractually labeled the "manager" of the garage does not make any Colonial site manager or supervisor a "managing agent" of Colonial for punitive-damages purposes. Furthermore, as shown above, the Contract does not assign Colonial any responsibility for the air shafts or vent covers of the garage.

(e) Ignoring Colonial's lack of contractual responsibility for the air shafts and vent covers, Plaintiffs' Brief (at 34) asserts "reckless disregard" from the fact that Colonial "did not train or supervise its employees and [attendant] contractors to recognize the dangers of the parking garage ventilation system or the importance of ensuring that the vents remained covered to avoid the risk of a person falling into the air shaft." However, Colonial never agreed to take

[29] In this context, Plaintiff's Brief (at 30) refers to a comment by the trial judge showing concern about a "stigma" that a claim for punitive damages could impose. In fact, the "stigma" in question is the risk that jurors are more likely to find a defendant negligent if punitive damages are at issue. Plaintiffs' "stigma" argument is immaterial as well as baseless, because the judge bifurcated the punitive damages issue from the negligence and compensatory-damages issues (JA. 156, Doc. No. 928), and did not dismiss the punitive damages claim until after the close of the evidence at trial. (JA. 1331-1347) Thus, Plaintiffs' only complaint is that they did not get the benefit of any punitive-damages "stigma" during jury deliberations on negligence and compensatory damages, and yet they prevailed at trial without benefit of the improper "stigma."

on any such responsibility (JA. 2077, ¶14(b)), the Contract effectively disclaims any such role, and CNMC never asked Colonial to assume such a role. (JA.2037.) Thus, Plaintiffs' argument creates a meritless, false impression that Colonial somehow had training and supervision duties in this regard.

(f) In arguing that Plaintiffs' had a *prima facie* case for punitive damages, Plaintiffs' Brief (at 32-33 (citing JA.1337, Tr. 22:13-19)) asserts that Colonial's lead counsel "admitted, in open court," that its parking attendants somehow "were negligent in failing to report the hole in the wall." In actuality, that comment was made for sake of argument during the final debate before Judge Josey-Herring about dismissing the punitive-damages claim. That is, as Colonial's counsel put it, "[one] can argue that . . . [t]hat's a reasonable conclusion[:] that [the defendant] should have done something more." (*See* JA.1337.) However, that argument was not a "judicial admission" of any kind – especially given Colonial's unrelenting motions for judgment (summary, directed-verdict, and JNOV) on the grounds: (a) that its duties were limited by the terms of its Contract with CNMC and (b) that Plaintiffs' failed to offer expert testimony about any relevant national standard of care for parking garage managers.

(g) Plaintiffs' Brief (at 35-36) cites employment-discrimination cases as the basis for criticizing the trial judge's decision to exclude evidence proffered by Plaintiffs to show that Defendants "conducted 'sham' investigations of the accident, or a 'cover-up'." In other contexts, such as discrimination or retaliation cases, the subject of "sham investigation" might be relevant, but it has no place in the context of unique physical accidents. Notably, evidence regarding employee disciplinary measures and other post-accident activities are not admissible to show fault of any kind here,[30] because of the doctrine excluding evidence of post-accident remedial

[30] *See* Fed. R. Evid. 407, as discussed in *Graae & Fitzpatrick, The Law of Evidence in the*

measures. Likewise, because such evidence is inadmissible as a matter of sound public policy, arguments about the quality or integrity of a post-accident investigation are also irrelevant. Therefore, *a fortiori*, such evidence is not admissible to justify punitive damages.

(h) Finally, in reliance on the above-referenced contentions, Plaintiffs' Brief (at 30-32 (adding italics)) asserts that Colonial "maintained a *corporate culture* of reckless disregard for the safety of others." However, as highlighted below, nothing in Plaintiffs' proffer would be capable of showing such a situation here, especially by clear and convincing evidence.

First, Plaintiffs' Brief (at 30-31) asserts that potential deficiencies in the completion of Colonial's Daily Facility Checksheets during its walk-around assessments at the CNMC garage reflected a "corporate culture of reckless disregard for the safety of others." However, Plaintiffs' Brief ignores the facts that Colonial's self-imposed assessment procedures were not directed at

---

District of Columbia, art. 407 (1995 ed.), *citing Avery v. S. Kann Sons Inc.*, 91 F.2d 248, 248-50 (D.C. Cir. 1937) (excluding evidence of linoleum covering the top step of staircase where plaintiff fell); *Altemus v. Talmadge*, 58 F.2d 874, 878 (D.C. Cir. 1932) (same, re repair of defective sidewalk); *also see Daly v. Toomey*, 212 F. Supp. 475, 482 & n.10 (D.D.C. 1963) (same, as to erecting railing around stairwell).

Under Rule 407, evidence of subsequent remedial measures "is not admissible to prove negligence or culpable conduct" in connection with the injurious event. *Id.*; *see Woodward & Lothrop v. Hillary*, 598 A.2d 1142, 1149 & 52-53 (D.C. 1991). Notably, the term "culpable conduct" necessarily includes actions of people – not just the condition of land, products or other tangible property – and Rule 407 clearly encompasses "remedial measures" against employees, agents, contractors and others who were involved in alleged misconduct: discharge or other termination, suspension, demotion, pay reduction, reassignment, retraining, and so forth. *See* Fed. R. Evid. 407, Advisory Committee Notes ("The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, change in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them."); *accord*, *Alfieri v. Carmelite Nursing Home, Inc.*, 907 N.Y.S.2d 577, 578-83 (Civ. Ct. Richmond County 2010) (post-accident training), *citing Engel v. Union Traction Co.*, 203 N.Y. 321, 322-24 (1911) (discharge); *Bulger v. Chicago Transit Authority*, 801 N.E.2d 1127, 1134-36 (Ill. Ct. App. 2003) (violation of internal rules and related retraining); *Prue v. University of Washington*, 2009 U.S. Dist. LEXIS 40972, at *5-*6 (W.D. Wash. Apr. 29, 2009) (counseling and training); *Osbourne v. Pinsonneault*, 2009 U.S. Dist. LEXIS 33957, at *9-*10 (W.D. Ky. Apr. 20, 2009) (fact of internal audits, safety review determinations, counseling, re-training, and probation). Therefore, to the extent Colonial disciplined Mr. Song or others because of their role in connection with Plaintiffs' accident, that would be a "subsequent remedial measure."

structural flaws in the garage (JA. 565-566, 2/12/2013 Evid. Hearing, at 50:19 - 51:23, & 54:23 - 55:5), and that no parking garage worker at the CNMC garage was trained – either by Colonial or CNMC – to look for or report missing vent covers on the Checklist forms.

Second, Plaintiffs' only "evidence" in that regard is testimony of a single attendant (Mr. Belete) that he personally did not conduct any inspections or fill out forms until after Plaintiffs' accident. As Mr. Belete's full testimony makes clear, however, inspection simply was not part of his job until after the accident. (*See* JA. 818, April p. 124, line 18 to p. 125, line & JA. 819, p. 130:9-25.) As a result, Plaintiffs' "corporate culture" argument is based solely on the fact that Mr. Song and Mr. Mengiste, allegedly, falsified some inspection forms after Plaintiffs' accident. That certainly is not clear and convincing evidence of bad "corporate culture."[31]

Therefore, Plaintiffs' Brief fails to show how Colonial exhibited any "corporate culture" of disregard for customer safety in general or structural hazards at the CNCMC garage. Likewise, Plaintiffs' Brief fails to show how the garage project manager or any lower supervisor employed there could be a "managing agent" of Colonial in this punitive-damages context.

3. Plaintiffs' Arguments Here Are Based Primarily on Inapposite Case Law about Employment Discrimination or Corporate Fraud.

None of the cases cited in Plaintiffs' Brief (esp. at 28-29) actually aids Plaintiffs here, because those cases each involve some context where an immediate supervisor (*e.g.*, of a

[31] Illogically, Plaintiffs' Brief (at 32) asserts that Colonial's management somehow was actively responsible for a failure to observe and report the missing vent cover because of the mere fact that the Company created and used site-assessment procedures and forms before Plaintiffs' accident. Colonial's involvement in setting up certain safety-promoting procedures – whether at the highest level or at some intermediate level of management – is not evidence of corporate involvement in failure to report information. Likewise, that is not evidence of management-level failure to improve site-assessment procedures or forms, where as here there was not evidence that Colonial's management was on notice of any such potential need before Plaintiff's accident.

disgruntled employee) likely was a "managing agent" for purposes of the claim at issue.[32] Plaintiffs' Brief (at 24 & 28-29) primarily cites discrimination cases like *Daka, Inc. v. McRae*, 839 A.2d 682, 696-97 (D.C. 2003), which obviously are not like this case (*id*. at 697):[33]

> The evidence was overwhelming that Daka flagrantly ignored plaintiff's pleas for help in the work place; [and] that the wrongdoing inflicted upon the plaintiff was severe and was exacerbated by the defendant's failure to conduct even a rudimentary investigation into the allegations of harassment. As such, the jury could reasonably conclude that the company's conduct was as outrageous as that of the principal actor, Cordell

[32] For example, Plaintiffs' Brief (at 34-36) effectively asks the Court to equate the status of the parking attendants and their supervisors at one garage location with: (1) the management of BMW of North America, which set a policy of repainting and selling damaged cars as new (*id*. at 24); (2) claims executives at State Farm, who approved bad-faith guidelines for reducing claim pay-outs (*id*. at 29); (3) the owners of lead-contaminated rental housing, who ignored child-protective rules in building codes (*id*. at 26-27); and (4) the ship's captain of the giant oil tanker Exxon Valdez, who navigated his tanker near the coastal fisheries of Alaska while drunk. (*Id*. at 24.) Furthermore, each of the egregious acts that drew punitive damages awards in those contexts involved the offending agent's core responsibilities and related hazards, while the asserted negligence here occurred at just one of many garage locations it serviced and involved a site-specific problem at the periphery of Colonial's potential duties.

[33] *See, e.g., Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999) (gender-related employment discrimination); *Howard University v. Wilkins*, 22 A.3d 774, 781-85 (D.C. 2011) (gender-related retaliatory-termination); *Lazzaro v. Rite Aid Corp.*, 2010 U.S. Dist. LEXIS 84511, at 22-26 (W.D. Pa. Aug. 17, 2010) (age-related employment discrimination); *Clark v. MetroHealth Foundation, Inc.*, 90 F. Supp. 2d 976, 983-85 (N.D. Ind. 2000) (race-related retaliatory-termination); *also see* discrimination cases cited in Plaintiffs' Brief at 29 nn.13 & 14.

Plaintiffs' Brief (at 28) cites other cases expressly or implicitly involving discrimination or other intrinsically willful misconduct. *See Pitt v. District of Columbia*, 491 F.3d 494, 507-08 (D.C. Cir. 2007) (abusive police procedures); *McGaughey v. District of Columbia*, 2010 U.S. Dist. LEXIS 26885, at *14-*15 (D.D.C. Mar. 1, 2010) (abusive medical treatment), *citing Mitchell v. DCX, Inc.*, 274 F. Supp. 2d 33, 51-52 (D.D.C. 2003) (discrimination by taxi service); *also see Bains LLC v. ARCO Products, Co.*, 405 F.3d 764, 773-77 (9th Cir. 2005) (ethnic discrimination against subcontractors of Sikh ancestry); *also see Rogers v. Ingersoll-Rand Co.*, 971 F. Supp. 4, 12-13 (D.D.C. 1997), *aff'd*, 144 F.3d 841 (D.C. Cir. 1998) (product liability case where manufacturer was on notice of serious product failures long before the accident).

Such cases are misleading as cited here for several reasons. First, they all involve facts clearly showing intentional discrimination, not at issue here. Second, most of those cases involved persistence in discriminatory conduct in the face of demands for abatement. Third, application of a managing-agent test is fundamentally different in the employment contexts, where numerous supervisory employees may have the power to hire and fire. Fourth, discrimination claims are statutory, and the punitive-damages claims rely on statutory obligations for employers to take remedial action. *See Mitchell*, 274 F. Supp. 2d at 51-52 (D.D.C. 2003).

> Thomas. . . . The sham investigation by the company and the jury determination that plaintiff's termination was retaliatory was sufficient to support the jury's conclusion that defendant's conduct was malicious and motivated by ill will.

Similarly, Plaintiffs' Brief (at 25) cites *Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 164-67 (D.C. Cir. 2007), a case where the defendant residential guardian of a juvenile delinquent acted with deliberate indifference in failing to keep the youth on medication and ensure he stayed put, which led to his leaving the facility and returning to a dangerous area where he was murdered.

In marked contrast, there is no contractual or other evidence here that Colonial's management knew it was legally responsible for checking air-shaft vent covers, let alone that one was missing in the CNMC parking garage.[34] The accident here occurred at least in part because CNMC – which had special duties as the premises owner – neither clearly delegated those duties to Colonial nor made sure someone else was meeting them. However, it would be incorrect to conclude that Colonial assumed or recognized responsibility for the safety of air shaft vent covers, and so the facts here are not a suitable basis for awarding punitive damages.[35]

---

[34] Plaintiffs' Brief (at 26-27) also relies on litigation against landlords and rental managers involving lead-paint injury to children living in rental housing. *See Perry v. Frederick Investment Corp.*, 509 F. Supp. 2d 11, 12 (D.D.C. 2007); *Childs v. Purll*, 882 A.2d 227, 240 (D.C. 2005). In those cases, the defendants clearly had actual or imputed knowledge of the dangers to children presented by lead paint in rental housing, as enacted in Building Codes. In contrast here, avoidance of the hazard here was not Colonial's contractual or non-delegable code-based responsibility. Colonial thus did not have any reason to hire, train or supervise its garage workers to recognize and deal with potential building hazards, or indeed to list such hazards on its voluntary, internally generated Manager's Daily Facility Checksheets.

[35] In *Kolstad*, 527 U.S. at 545-46, an employment discrimination case, the Court was careful to point out that its analysis of agency principles was driven by the purposes of Title VII. Quoting a treatise, the Court stated: "In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished," and "the employee must be 'important'." *See McInnis v. Fairchild Communities, Inc.*, 458 F.3d 1129, 1137 (10th Cir. 2006), *quoting Kolstad*, 537 U.S. at 543. The *Kolstad* Court then applied this general principle in the specific context of employment-discrimination claims, in terms that are not relevant here. *See id.* Other employment-discrimination cases in Plaintiffs' Brief (at 29 nn. 13 & 14) are similarly inapposite here, and the discussion of "supervisor," "assistant store manager" or "plant manager"

Thus, Plaintiffs' Brief (at 24-35) fails to cite any case even suggesting that a company hired by contract to supply workers to handle parking-related operations at a client-owned garage should be held liable for punitive damages, just because a temporary parking worker noticed a missing wall vent cover and reported it to another, never-identified worker who reportedly said not to worry about it. More specifically, Plaintiffs' Brief fails to cite any case holding that such ordinary employees are "managing agents" for this purpose, especially when the company was not contractually responsible for the air shafts or any other garage structure.

For all those reasons, even if the Court were to affirm denial of JNOV for Colonial – on the theory that certain Colonial garage workers had sufficient notice of this structural hazard to acquire a common-law obligation to warn of the danger for which the standard of care could be inferred by the jury without expert testimony – allowing a jury to award punitive damages would impose an improper "hindsight" standard upon Colonial's management.

D. Plaintiffs Received a Fair Trial in All Regards, and Have Failed to Show Prejudicial Error in Any Evidentiary or Other Error at Trial Below.

Plaintiffs' Brief (at 39-43) is also incorrect in asserting that the court below failed to provide them a fair trial. First, the trial court did not abuse its discretion in limiting the length of the trial or the parade of witnesses, and imposed the same limitations on each party. As a result, any such error, at most, excluded cumulative evidence and did not unfairly prejudice Plaintiffs. For example, Plaintiff's assertion that the trial court excluded testimony by Mr. Ibanez is simply incorrect, but in any event his expected testimony would have been inadmissible (*e.g.*, lay opinions about PCS or PTSD) or cumulative (about his children's injuries). Second, allowing Colonial's counsel to ask "leading" questions during the cross-examination of its President, Mr. Blair, whom Plaintiffs' called in their case in chief, was proper, not an abuse of discretion,

---

as "managerial" in such cases does not shed light here.

harmless, or not preserved for appeal.[36] Third, the record does not reflect any cognizable limitation, placed on Plaintiffs' opening and closing arguments, and any overall time limitations in this regard were borne by every party. Fourth, the trial judge exercised sound discretion in barring Plaintiff's counsel from giving biased daily reports to reporters likely to violate the rule on witnesses and expose the jury to sequestration to avoid such publicity.[37]

E. The Trial Court Exercised Sound Discretion in Awarding Costs and Interest.

Under the sound rules set forth in the footnote, the trial court correctly discharged its responsibility to award costs as required or in its sound discretion.[38] After full briefing, the trial court issued a 28-page opinion (JA. 434-460), explaining the basis for allowing, disallowing or apportioning each item within 11 categories of requested costs. Plaintiffs' Brief (at 43-50) fails to show how any ruling below on costs was an abuse of discretion, or reflects a failure to exercise discretion. Instead, the trial court's opinion clearly explains its decisions in each regard, and nothing in the opinion reflects failure to exercise sound discretion. *See id*.

It is clear from Plaintiffs' Brief (at 43 & n.22) that they mainly are dissatisfied because they have to bear the disallowed expenses. However, "costs [are understood in the law] . . . to

---

[36] Plaintiffs generally assert that they called employees of Colonial and then refer to a single page of the trial record (JA.1057, 4/8/2013 Trial Tr., at 4-7) where the court supposedly "permitted Defendants to use leading questions to cross examine, but their Brief does not set forth any specific examination to which they claim error and does not cite any timely objection by Plaintiffs' counsel, or any related request for relief.

[37] The press did have access to the courtroom, Plaintiffs' likely do not have standing to raise this issue, and any trial-court error in this regard could not justify a new trial.

[38] Appellate courts must not substitute their own discretion for the trial court's discretion in awarding costs. *Mody v. Center for Women's Health, P.C.*, 998 A.2d 327, 335 (D.C. 2010), citing *Harris v. Sears Roebuck*, 695 A.2d 108, 110 (1997). "An appeal challenging an award of costs committed by law to the trial court's discretion will rarely be disturbed." *Del Rosario v. Wang*, 804 A.2d 292, 294 (D.C. 2002). The award of costs to the prevailing party under Super. Ct. Civ. R. 54(d) is within the trial court's discretion and may only be overturned upon our finding that the exercise of such discretion was an abuse." *Mody*, 988 A.2d at 335. This discretion turns on whether the items awarded as costs are authorized by statute or rule. *Id.* This discretion includes the allowance, disallowance and the apportionment of costs. *Id*. at 336.

mean something less than a litigant's total expenses in connection with the suit." *See Talley v. Varma*, 689 A.2d 547, 555 (D.C. 1997), *citing Robinson v. Howard University*, 455 A.2d 1363, 1370 (D.C. 1983). "Court fees and witness fees ordinarily are recoverable but, absent unusual circumstances, the parties must bear their personal expenses. . . ." *Id*. Plaintiffs have not set forth any unusual circumstance, or any lack of soundly exercised discretion, and indeed received a substantial award of costs with interest from the date of the award.

II. THE TRIAL COURT ERRED IN DENYING JNOV FOR COLONIAL, BECAUSE COLONIAL DID NOT ASSUME ANY LEGAL DUTY FOR THE BUILDING'S STRUCTURAL SYSTEMS AND PLAINTIFF FAILED TO OFFER AN EXPERT REGARDING THE STANDARD OF CARE FOR ANY SUCH DUTY.

A trial court should grant JNOV in situations where "no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party."[39] In reviewing a motion for judgment as a matter of law before or after a jury verdict, this Court applies the same standard as the trial court *de novo*. *See id*.

The trial court erred in denying Colonial JNOV on G.I.'s claim for ordinary negligence and V.I.'s NIED claim. In particular, as set forth in Section II.A, *infra*, Plaintiffs failed to establish a legal duty owed by Colonial in light of the specific contractual obligations it assumed in the Contract with CNMC. Plaintiffs likewise failed to offer any evidence of "custom and practice" under which Colonial might be deemed to have accepted plenary responsibility for safety of garage customers at the hospital.[40]

---

[39] *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 882-83 (directed verdict) & 896-97 (JNOV) (D.C. 2011); *Lively v. Flexible Packaging Ass'n*, 830 A.2d 874, 886 (D.C. 2003) (JNOV); *Oxendine v. Merrell Dow Pharmaceuticals, Inc*., 506 A.2d 1100, 1103 (D.C.1986).

[40] The standard for proving "custom and practice" is well settled. To be binding on the parties to a transaction, the asserted "custom" must be shown to be "definite, uniform, and well known" by "clear and satisfactory evidence." *E.g.*, *Howard University v. Best*, 547 A.2d 144, 151 (D.C. 1989); *Weaver v. DuPont*, 119 A.2d 716, 717 (D.C. 1956); *United States Shipping Board Emergency Fleet Corp. v. Levensaler*, 290 F. 297, 301 (D.C. Cir. 1923). Neither Plaintiffs nor

Alternatively, as set forth in Section II.B, *infra*, even if Colonial had a pertinent duty of reasonable care to customers within the scope of its actual business operations, Plaintiffs' verdict below was based on the jury's impermissible speculation as to breach of any standard of care, because Plaintiffs failed to submit expert testimony about any recognized standard of care in the parking management industry. In this jurisdiction, a party cannot be held liable for internal policies that might well exceed any established standard of care, and therefore the trial court erred in allowing the jury to rely on the Manager's Daily Facility Checksheet and related Employee Safety Guide internally promulgated by Colonial.

A. Defendant Colonial Had Only Limited Contractual Duties to CNMC And No Common-Law Duty to Plaintiffs to Protect Them from Structural Defects.

The issue of Colonial's negligence should not have been submitted to the jury, because Colonial did not have any legal duty to the Plaintiffs.[41] In denying summary judgment, Judge Edelman stated that "the existence of a common law duty of care serves as the beginning, rather

---

co-Defendant CNMC offered any expert or other relevant testimony about any custom and practice here, let alone clear and satisfactory evidence thereof. (*See* JA.553-606.)

Plaintiffs and CNMC tried to use Colonial's internal procedures and course of performance to prove custom and practice, but that effort was both legally improper and factually insufficient. Among other things, the Contract does not include any request of Colonial to inspect and maintain the ventilation shaft or inspect the structural integrity of the parking garage, and CNMC did not require Colonial to conduct inspections of the vent cover or the air shaft. (JA.560, Wainwright Evid. Hearing Tr., at 30:1-4; JA.565-66, Pelz Evid. Tr. 52:13-16 & 55:1-5; JA.580,Varle Evid. Tr., at 111:7-10; JA.597, Paris Evid. Hearing Tr., at 177:17-20.) CNMC was responsible for maintaining, repairing and cleaning the ventilation systems in the garage. (JA.578, Varle Evid. Hearing Tr., at 104:18-20; JA.591, Alessi Evid. Hearing Tr., at 154:13-16.) CNMC did not provide training to Colonial on the physical structure of the garage. (JA. 1066, Alessi 4/8/2013 Trial Tr. (afternoon), at 40:22 - 41:21.) CNMC conducted its own annual and random inspections of the garage, and Colonial was not on the inspection team. (JA.1037, Needham 4/8/2013 Trial Tr. (morning), at 41:25 - 42:13.) Last, no Colonial employee was even authorized to maintain or repair the air shaft or vent cover at issue here. (JA.1135-36, Beckwith 4/10/2013 Trial Tr., at 84:25 - 85:2.)

[41] Colonial pressed this issue below by summary judgment and evidentiary hearing; motions for judgment, as well as jury-instruction and verdict-form requests at trial; and JNOV motion.

than the end, of the analysis of the Colonial's potential liability in this case." JA.341-342, 6/12/2012 Mem. Op., at 10. Moreover, he acknowledged that "CNMC and Colonial contracted regarding their respective responsibilities for the management and operation of the garage, and the Court agrees with Colonial that [the Contract] has some impact on the duty owed by Colonial to Plaintiffs." *Id*. at 15. However, Judge Edelman viewed the Contract as potentially vague or ambiguous, and deferred decision until after an evidentiary hearing. *Id.* at 346.

At a February 21, 2013 evidentiary hearing, Judge Josey-Herring relied on *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969), in concluding that, as a parking lot operator, Colonial "has a common-law duty effectively to its customers, even though it's not the owner of the property." (JA.605, at 210:21 - 211:23.) While Judge Edelman stated that the issue is "what impact the contract has on this common-law duty," the resulting Order of the trial judge, Judge Josey-Herring, did not specify any Contract provision, or other evidence, that imposed on Colonial a duty to customers to protect them from structural defects in the garage. (*Id.* at 212:1-24.) The Contract terms do not require Colonial to inspect, maintain, repair or warn of defects in the garage's physical structure. Moreover, contrary to the trial judge's approach, the key question is whether the Contract affirmatively imposed such a duty, expressly or by clear implication, and not whether the Contract expressly excluded any such duty.

Similarly, in denying JNOV (JA. 476-479, *id*. at 8-11), Judge Josey-Herring relied on the above-quoted *dictum* in *Becker* for her "presumption" that Colonial was sufficiently in possession of the garage to be held responsible for the building and not just the parking operation. (*Id*. at 8-9.) In the JNOV opinion, Judge Josey-Herring mentioned Judge Edelman's view that the Contract with CNMC has some impact on Colonial's duty, but she misconstrued the Contract in asserting – both after the evidentiary hearing and after trial -- that nothing in the

Contract actually altered Colonial's common-law duty. *Id*. at 9. As her Order expressed it (at 10), while the Contract exempted Colonial from "the responsibility [to] make repairs or conduct maintenance with respect to the structure of the garage," it did not "remove Colonial's responsibility to 'exercise prudent care' with respect to the safety of customers," holding that "Colonial Parking, once it has notice of a hazardous condition, cannot ignore it due to the provisions of the contract."

In reaching that conclusion, the JNOV Order (JA.469-479) tried to distinguish other District of Columbia precedents holding that contractors on the property of others had only limited duties to third parties, including *Presley v. Commercial Moving & Rigging, Inc.*, 25 A.3d 873, 888-91 (D.C. 2001). First, the JNOV Order (at 9) asserted that the roles of the contractors in other cases were substantially different, in that Colonial "ha[d] been operating the parking garage below CNMC for many years," while the construction management consultant in *Presley* was "engaged as a contract compliance consultant" on a single project, and "[i]ts 'main responsibility' at the construction site 'was to assist the [contracting entity] with ensuring that the project was completed according to specifications, on time, and within budget'." *Id*., paraphrasing *Presley*, 25 A.2d at 878.

However, the Contract here makes it clear that Colonial's "main responsibility" was to "manage and operate the parking garage," and perform related housekeeping, as clearly defined there by reference to the tasks required, including maintenance of certain parking equipment, certain cleaning including oil spills, sweeping and trash disposal." In that regard, the Contract expressly states that such work "shall not include repairing, servicing, or maintaining major structural items" including "concrete surfaces" and "Building-related equipment," such as "air

handling systems" and "HVAC systems."[42] (JA.2064-2065, 2071 & 2074-75, Contract, ¶¶ 3(b)(i), 3(b)(iv), 7, 9(d) & 9(e).)

Most notably, the Contract (¶ 14(b)) states three things: (A) "**Owner shall determine** all policies and procedures that shall be in effect respecting the operation of said Parking Garage during the entire term except as herein otherwise expressly provided;" (B) "Manager shall not be requested to perform or provide any service hereunder other than with respect to the **parking and storage of automobiles and general housekeeping** maintenance of the Parking Garage," and (C) "**Manager** shall **not** be considered **Owner's agent for any purpose** whatsoever." That is, Colonial was not assigned or asked by CNMC to serve as its plenary manager for the building, or even its basement. Instead, Colonial's contractual duties were limited expressly to parking-attendant functions and general housekeeping. Thus, the trial court failed to see how plainly and clearly the Contract limits Colonial's duties, and so erred in ruling that Colonial had any duty to third parties with respect to care for the structure of the facility itself.

The JNOV Order (at 10) likewise erred in adopting argument from CNMC's February 1, 2013 brief addressing Colonial Parking's duty to Plaintiffs to support its conclusion that Colonial had assumed broad duties of a CNMC agent, instead of just "parking and storage of automobiles and general housekeeping maintenance." Similarly, the JNOV Order erred in relying upon CNMC's evidentiary Brief (JA.478, at 10) to support the conclusion that, "[t]o find that Colonial Parking did not have a duty to protect Plaintiffs from harm, therefore, would entail the very

[42] Furthermore, there is nothing about *Presley* making a longtime contractor more responsible to third parties than a single project contractor. Likewise, there is nothing in *Presley* differentiating the consultant's business goals there from the business goals that CNMC assigned to Colonial including "courteously" and "efficiently" handling traffic and parkers and "maximiz[ing] income and maintain[ing] service." (JA.2074-2075, Contract ¶¶ 9(a), 9(c) & 9(h).)

'restructuring of the contract' that *Presley* warned against."[43] Instead, it is Plaintiffs' and CNMC's arguments that entail "restructuring of the Contract," whose plain meaning expressly limits the scope of Colonial's obligations. The JNOV Order (esp. at 8-11) does not set forth any analysis of the Contract wording, and therefore nothing whatsoever in the JNOV Order reveals to this Court how the trial court actually construed the Contract. Fortunately, the meaning of a contract is a legal question for the courts, reviewable *de novo* by this Court in light of the applicable canons of contract construction.[44] *See Sacks v. Rothberg*, 569 A.2d 150, 155 (D.C.

[43] CNMC's 2/1/2013 brief from which the JNOV Order adopted certain arguments not only failed to consider the Contract as a whole, but also inundated the trial court with evidence that is inadmissible for purposes of contract construction here. For example, CNMC's brief (JA.2307-2314, at 8-15) offered pages of testimony and other statements in the context of construing the Contract here that are barred from consideration by the parol evidence rule, as well as multiple statements by adverse parties that admit nothing relevant. CNMC's brief (JA.2314-18, at 15-19) also made unjustified legal assertions about "custom and practice" in the parking industry in reliance on internal Colonial procedures and practices "because Colonial is a large company." CNMC's brief (JA.2318-2324, at 19-25) also erred in offering "course of performance" evidence – in an obvious effort to contradict the plain meaning of the Contract wording (not explain it) – to the effect that Colonial employees sometimes mentioned facility-related problems to CNMC officials and otherwise showed civic awareness beyond the scope of their contractual obligations.

[44] Under the District of Columbia's objective test of contract construction, the court's task is to "[d]etermine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. *Nest & Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1219 (D.C. 2011). That "reasonable person" is: "(1) presumed to know all the circumstances surrounding the contract's making; and (2) bound by usages of the terms which either party knows or has reason to know." *Id., citing Akassy v. William Penn Apartments Ltd. Partnership*, 891 A.2d 291, 299 (D.C. 2006). If contract wording is plain and unambiguous, courts must presume that the parties meant what they expressed. *Capital City Mortgage Corp. v. Habana Village Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000).

Courts should seek to construe the contract as a whole, giving effect to every meaningful part of the contract wording. *Wilson v. Hayes*, 77 A.3d 392, 402-03 (D.C. 2013). "Effect must be given to each clause," to avoid any interpretation that "casts out or disregards a meaningful part of the language of the writing unless no other course can sensibly and reasonably be followed." *See Clancy v. King*, 405 Md. 541, 557 (2008). In construing the meaning of an agreement, courts accord a word or phrase its plain, ordinary, usual or accepted meaning, "taking into account the context in which it is used," unless there is "evidence that the parties intended to employ it in a special or technical sense." *See Travelers Indem. Co. v. United Food & Commer. Workers Int'l Union*, 770 A.2d 978, 986 (D.C. 2001).

1990); *Dodek v. CF 16 Corp.*, 537 A.2d 1086, 1093-94 (D.C. 1988).

Similarly, the JNOV Order (at 10) reveals that Judge Josey-Herring erred in concluding, just from the Contract's statement (in ¶ 3(b)(iv)) excluding responsibility for costs relating to structural repair and maintenance, that the Contract "does not remove Colonial Parking's responsibility to 'exercise prudent care' with respect to the safety of customers." Not only does that statement reflect the erroneous approach of looking to the Contract for disclaimers of liability – rather than the description of the contractor's overall responsibilities – but it also reflects a failure to read the Contract as a whole. Upon the very first reading of this short Contract as a whole, it should be apparent that the scope of Colonial's obligations is expressly limited to "to the parking and storage of automobiles and general housekeeping maintenance." (*See* ¶ 14(b).) Read in light of paragraph 14(b)'s clear limitation upon the scope of Colonial's responsibility, paragraph 3(b)(iv) is neither incomplete nor ambiguous, and merely provides details consistent with overall limitations on Colonial's obligations set forth in paragraph 14(b).

Thus, in addition to the lengthy and potentially complex record here, this Court must reckon with the fact that the decisions below by both the motions judge and trial judge were

---

Whether a contract is ambiguous is a question of law, and thus subject to *de novo* review. *Sacks v. Rothberg*, 569 A.2d 150, 154 (D.C. 1990). Broad or otherwise general words and phrases – such as parking, patrolling, maintaining, repairing or housekeeping – are not necessarily ambiguous, and their meaning should be ascertained from the contract's overall wording and context. *See Holy Family Catholic Congregation v. Stubenrach Assocs., Inc.*, 402 N.W.2d 382, 385 (Wis. Ct. App. 1987). That is, isolated words and phrases are not ambiguous; instead, only contracts as a whole can be ambiguous, in the sense that the meaning of the contract cannot be determined from the contract wording exclusively. *Steele Foundations, Inc. v. Clark Construction Group, Inc.*, 937 A.2d 148, 153 (D.C. 2007).

District of Columbia law provides other relevant canons of construction, such as: (a) that specific provisions control over more general ones. *Winters v. Ridley*, 596 A.2d 569, 582-583 (D.C. 1991); (b) that express inclusion of listed things implies exclusion of other things. *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 427 (D.C. 2009); and, (c) when a general word or phrase relates back to a specific list, it will be interpreted to include only items like those expressly listed. *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 171 (D.C. 2008).

fundamentally flawed and the resulting conclusion that this Court must start its analysis from scratch. Equally problematic, in this regard, as addressed next below, is the fact that both judges below failed to apply sound principles of contract construction, especially in the initial steps of their analysis. In a nutshell, rather than focus first and foremost on what the Contract did say specifically, and on reading those various provisions together as a whole, both judges below erroneously focused on putative holes in the Contract – that is, what it did not say.

First and foremost, a full and fair reading of the Contract reveals that Colonial offered to provide – and CNMC knowingly accepted – a limited and well-defined set of services, as reflected in the kind of staff provided, the kind of tasks undertaken, the specific goals set, and the compensation for those services. Once one focuses properly on the clear statement in paragraph 14(b) – that "Manager shall not be requested to perform or provide any service hereunder other than with respect to the parking and storage of automobiles and general housekeeping maintenance of the Parking Garage" – it is clear not only how limited Colonial's obligations are, but also how clearly the Contract expressly excludes everything else.

Thus, the JNOV Order (at 11) was totally wrong in asserting that "the similarities between the role of Colonial Parking [here] and [the consultant] CRSS [in *Presley*] are fundamentally limited to the fact that both are contractors who were sued for a personal injury [that] took place at the locations their respective contracts regarded." In fact, both the construction-management consultant in *Presley* and the parking-attendant contractor here had tightly limited contractual duties. Likewise, in each case, the contracts in their own respective words (that is, phrased differently, but equally clear) show that they were not covering for the legal responsibility of the "contracting authority," and instead were providing a narrow set of services commensurate with their skill, staffing, goals, and pay under the respective contracts.

Significantly, *Presley* is not the only informative case here. *See Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, 1097-99 (D.C. 1994) (apartment building owner's and property manager's regular plumbing contractor called in to repair a broken water pipe in a building's crawl space did not have any duty to passing pedestrian who later slipped and fell on ice behind building, even though plumber knew there water in crawl space was over 3 feet deep and was leaking out in to the alley); *Frederick v. TPG Hospitality, Inc.*, 56 F. Supp. 2d 76, 78-80 (D.D.C. 1999) (security service provider following hotel's directions in guarding and patrolling the hotel did not have any tort duty to hotel patrons, even though contract specified nothing either broadening or limiting scope of agreed obligations beyond "security services").

As the *Haynesworth* opinion states: "It is first necessary to ascertain the scope of the defendant's undertaking, for the scope of the undertaking determines the scope of its duty." *Id.*, 645 A.2d at 1098. *Haynesworth* also states: "There is nothing to suggest that the plumber increased or added to the dangerous condition in the alley when he repaired the broken pipe. Additionally, this dangerous condition was not hidden from the general public's view. . . . Under these circumstances, we are unable to conclude that the plumber owed a duty to warn either . . . the management company . . . or [the plaintiff] about the hazardous condition in the alley." Notably, *Haynesworth* further states: "While it may have been helpful to report this situation, it appears that repairing the faulty plumbing was the plumber's only legal obligation." As *Haynesworth* explains: "Notwithstanding [the plaintiff's] claim that that the plumber's inaction increased the risk of harm to him, we note that it was the property manager's duty, not the plumber's, to maintain the common areas of the building." Finally, and aptly here, *Haynesworth* states: "By not having an agent on the premises, [the property manager], in effect, attempted to shift its duty to safeguard persons from perils in the common areas of the building

onto the plumber. Absent some express understanding between [the property manager] and [the plumber], we are not persuaded by the argument that the plumber entered onto the property as a plumber, but left as a maintenance man [for the property manager]." *Id.*

Similarly, as the *Frederick* opinion states: "In the absence of a showing that [the security service] assumed any duty to guests of the hotel, plaintiffs have failed to establish a tort claim against [the security service]." *Id.*, 56 F. Supp. 2d at 79-80. As that opinion clarifies, the duty contemplated under Restatement section 324A is expressly contingent on whether the contractor "has undertaken to perform a duty owed by the [owner] to the third person." *Restatement (Second) of Torts* § 324A. That did not occur here, and therefore the trial court erred in holding that Colonial assumed any duty under the Contract, as well as in holding that the Contract failed to expressly disclaim any such duty.

Against that backdrop, it is clear that the judges below misread *Presley.* In *Presley*, the Court held that no common law duty to an injured construction worker was created by virtue of a construction management consultant's contract with the owner of the premises. *Presley,* 25 A.3d at 891. Though the theory of liability was in tort, the contract between the consultant and the owner remained "central to our analysis of duty, as it defines the scope of the undertaking and the services rendered by [the consultant]." *Id.* at 889. Thus, this Court concluded that it was critical to review the contract to determine whether the consultant assumed an owner's or general contractor's duty that extended to the plaintiff construction worker. *Id.* The *Presley* court held that no duty was created for the following reasons (*id*. at 889-91):

1. The consultant undertook to perform limited duties under the contract;
2. There was no evidence that the consultant should have foreseen that its obligation under the contract included anticipating problems and monitoring safety compliance to protect the Plaintiff; and

3. Policy considerations of fairness disfavored imposing a duty where doing so would restructure the contractual relationship and the related obligations of each party.

Here, too, Colonial's limited duties were narrowly circumscribed under the Contract, which clearly limited Colonial's obligations "to the parking and storage of automobiles and general housekeeping maintenance" and did not require Colonial to anticipate problems or monitor safety compliance for the garage ventilation system. In effect, the trial court here "restructured the Contract" and its related obligations in forcing Colonial to trial and in denying JNOV.

B. Especially in Light of Colonial's Narrowly Conscribed Contractual Duties, Plaintiffs Failed to Prove Any Relevant Standard of Care under Which the Jury Properly Could Have Found that Colonial Breached Any Duty.

Colonial deserves judgment as a matter of law because the trial court erred in permitting the jury to find negligence without expert testimony about what a reasonable parking service company would do in these circumstances. That error was compounded by the trial court in permitting Plaintiffs to present legally insufficient evidence and argument on standard of care and its breach in the form of Colonial's internal policies and practices and violations thereof.

Assuming for argument's sake that Colonial had a tort duty here, it would be – as the trial court generally instructed the jury – to exercise the level of care that a "reasonable" person would provide in similar circumstances. (JA.424, ¶¶ 5.02, 5.04 & JA.1269, 4/15/2013 Trial Tr. (afternoon), at 81:18 - 82:13.) But it was Plaintiffs' evidentiary burden to establish what "reasonable" meant in this case. Specifically, D.C. law requires that Plaintiffs prove, by expert testimony, the relevant standard of care for a parking garage operator that Colonial needed to meet.[45] Moreover, the need for expert testimony here is substantial, because the scope of

[45] A plaintiff "bears the burden of proof on three issues in a negligence action: 'the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiff's injury'." *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988); *Meek v. Shepard*, 484 A.2d 579, 581 (D.C. 1984). Even if the court has already

Colonial's obligations under the Contract was so specific and so narrow (*see id*., ¶ 14(b)), and it is absolutely clear that the Contract did not impose any "express" obligation or responsibility for vent covers or other facility structures. Without expert testimony about the relevant standard of care against which to measure Colonial's conduct under this kind of Contract, lay jurors would be left to speculate about whether Colonial breached any "implicit" duty. Plaintiffs' failure to offer expert testimony thus is fatal to their case against Colonial.

Furthermore, this is not a case where jurors can properly perceive the correct standard of care in light of ordinary experience. The mere fact that a basement garage vent cover was off a side wall did not establish notice to Colonial of a serious hazard. Therefore, Plaintiffs left the jury to speculate about the issue of due care under the circumstances, when they failed to offer expert testimony about a recognized standard of care under which Colonial's conduct here would not have been "reasonable," and continued to rely on evidence of Colonial's internal practices and standards.[46] Colonial was not a plenary property manager, like the responsible defendants in *Haynesworth* and *Frederick*, or a construction general contractor, like the responsible defendant in *Presley*, let alone a building owner like Defendant CNMC. Instead, Colonial's role here was a

---

decided that a defendant has a duty to provide reasonable care, the next step is to determine what "reasonable" means on the facts of the case. *See Haney v. Marriott Int'l, Inc*., 2007 U.S. Dist. LEXIS 74872, at *9-*10 (D.D.C. Oct. 9, 2007) ("Marriott's duty to plaintiff under District of Columbia law was to exercise reasonable care under the circumstances and to ensure that the hotel room was free from any dangerous conditions. Thus, the first step in this inquiry is to determine precisely what 'reasonable care' entails under the circumstances of this case.").

[46] The trial court permitted CNMC's counsel to show Joseph Pelz, Colonial's senior operations manager, a photograph of the accident scene and ask him whether he considered the hole in the wall without the vent cover a safety hazard, as well as whether, if he had known about it, he would have blocked off the area and notified the hospital's engineering department, even though repairing the vent cover was not Colonial's responsibility. (JA.1145-1146, 4/10/2013 Trial Tr. (afternoon), at 7:8 - 8:3.) There is no evidence that Mr. Pelz knew about the missing vent cover, or that there was a vertical air shaft behind it, before the accident. Thus, asking Mr. Pelz such a speculative after-the-fact question is just another example of trying to bootstrap standard-of-care testimony using Colonial's internal standards in this case and employee's personal opinion.

narrow one, subservient to CNMC's overall responsibility for the building, much like the regular plumber in *Haynesworth* and the construction consultant in *Presley*. Also, like the security service in *Frederick*, Colonial's continuous presence at the hospital does not mean that Colonial had any general responsibility for facility safety.

Notably, none of those no-duty cases reached the issue of expert evidence on the standard of care, but the existence of a duty in the context of contract-limited obligations presumptively is just the first step in determining whether the plaintiff has made out a *prima facie* case. At trial, Plaintiffs' only liability expert did not offer any opinion on the standard of care in the parking industry. Without such expert testimony, Plaintiffs did not provide any legitimate basis for a jury to determine which, if any, of the purported omissions that Plaintiffs' cited at trial might have breached a valid standard of care. Given Plaintiffs' allegations, the evidence they submitted at trial, and the tenor of their opening and closing arguments, such expert testimony was essential to prevent the jury from speculating about a legal basis for Colonial's liability.[47]

There is an important reason why voluntary internal procedures by themselves cannot

[47] *See Jenkins v. WMATA*, 895 F. Supp. 2d 48, 76-78 (D.D.C. 2012), *citing Long v. District of Columbia*, 820 F.2d 409, 418 (D.C. Cir. 1988), and *Caldwell v. Bechtel*, 631 F.2d 989, 997 (D.C. Cir. 1980) where the Court stated (*id*. at 77):

> As in Bechtel, the Ansaldo-WMATA contract supplies only the basis of the duty of care and does not determine the standard of care required by that duty. In other words, while the compatibility of the circuit parts is relevant, the more pressing inquiry is how Ansaldo undertook and fulfilled its contractual duties, including, but not limited to, its assessment of compatibility. Although expert testimony may be required in a breach of contract action to ascertain the meaning of compatibility between track circuit parts, the expert testimony here concerns the standard of care resulting from the tort duty owed by Ansaldo to WMATA. And WMATA, Ansaldo, and the plaintiffs have all provided expert testimony as to the safety analyses that should have been employed by Ansaldo.

Thus, where the court already held that a defendants' contract was broad enough to include the contractor's assumption of the owner's full duty of care, *Jenkins* held that expert testimony on the tort standard of care still was required under this Court's *Toy-Meek* standard. *See id*.

prove the standard of care. As this Court explained in *Clark v. District of Columbia*, 708 A.2d 632 (D.C. 1997), holding a defendant liable for failing to meet aspirational internal practices "would create a perverse incentive for the [Defendant] to write its internal operating procedures in such a manner as to impose minimal duties upon itself[,] in order to limit civil liability rather than imposing safety requirements upon its personnel that may far exceed those followed by comparable institutions." *Id*., 708 A.2d at 636. "Aspirational practices do not establish the standard of care which the plaintiff must prove in support of an allegation of negligence." *Messina v. District of Columbia*, 663 A.2d 535, 538 (D.C. 1995) (depth of mulch or other padding under playground equipment recommended but not required by CPSC handbook; *accord*, *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 430-35 (D.C. 2000) (internal policies of D.C. Water Bureau did not show national standard of care).[48]

For the same reason, policy materials such as safety handbooks do not prove the standard of care. In *Varner v. District of Columbia*, 891 A.2d 260, 272 (D.C. 2006), Plaintiffs sought to hold Gallaudet University liable for failing to follow its Handbook for student misconduct. The court held, however, that the "Handbook does not represent a standard of care." *Varner*, 663 A.2d at 270. As that opinion emphasized, D.C. courts have often required expert testimony to establish the standard of care in cases involving safety issues, and consideration of internal policies and practices should generally be forbidden without expert testimony regarding the actual standard of care. *See id*. at 267.

Therefore, especially given the facts of this case, Plaintiffs were required to provide expert testimony against Colonial. *See Frazza v. United States*, 529 F. Supp. 2d 61, 696-70

[48] In *Arnold & Porter*, the court noted that the pivotal testimony of D.C. employees "focused on the policies and procedures of the Water Bureau" (*id.* at 431) and therefore "[did] not rise to the level of statute or regulation (*id.* at 435) or otherwise show a national standard of care. *See id.*

(D.D.C. 2008) (concluding that plaintiffs who slipped and fell on wet surface at White House failed to provide expert evidence on standard of care for use of floor mats). As this Court has graphically explained, trial courts should not leave "to a jury of tailors and haberdashers to pass judgment unaided by expert testimony on how to make a wet and rolling deck in a seaway a safe place to work." *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 200 (D.C. 1991). Furthermore, "[t]he failure to prove a standard of care is fatal because, in order to recover damages for negligence, 'the plaintiff must prove that the defendant deviated from the applicable standard of care'." *District of Columbia v. Carmichael*, 577 A.2d 312, 314 (D.C. 1990); *accord*, *Hughes v. District of Columbia*, 425 A.2d 1299, 1303 (D.C. 1981). "If the standard itself is not proven, then a deviation from that standard is incapable of proof." *Carmichael*, 577 A.2d at 314. Here, Plaintiffs did not designate any expert on parking garage management, and their only liability expert, Mr. Woods, did not offer any opinions against Colonial. (JA.1360 & JA.369-371.) Notably, since Plaintiffs called a liability expert against the owner, CNMC, it is fair to ask why they did not offer an expert against Colonial, and one reasonable inference is that no expert would testify to any national standard of care for Colonial here.

Moreover, what happened to Colonial at trial here was worse than the "mere" lack of a liability expert against it, because Plaintiffs relied so heavily on Colonial's own internal procedures – such as its Manager's Daily Facility Checksheet and its Employee Safety Guide – as their boot-strap basis for trying to prove the nature and extent of Colonial's standard of care. That is, while the defendant's internal procedures might have some bearing on the standard of care if Plaintiffs had submitted expert testimony, such testimony would have to show "that the [internal policies] . . . embodied the national standard of care and not a higher, more demanding one." *See Clark*, 708 A.2d at 636 (internal procedures may be "admissible as bearing on

the standard of care," but "expert testimony was still required to establish that the [internal policies] . . . embodied the national standard of care and not a higher, more demanding one;" a defendant "cannot be held liable for aspiring to efforts beyond an applicable national standard"); *Phillips v. District of Columbia*, 714 A.2d 768, 775 (D.C. 1998) (affirming directed defense verdict because internal directive "is not a standard of care and may not be relied upon as such"); *accord*, *Briggs v. WMATA*, 481 F.3d 839, 845 (D.C. 2007) (same, as to lighting standards for subway entrance) (citing numerous cases),[49] *Jones v. NRPC*, 942 A.2d 1103, 1108 (D.C. 2008) (Amtrak entitled to judgment as a matter of law because plaintiff did not offer expert testimony on national standard of care); *Hughes*, 425 A.2d at 1303 (same, as to prison's internal policies and documents).

As the JNOV Order reveals (JA.473-475, at 5-7 (court's italics)), the trial judge recognized the issue, but did not adopt the proper way to resolve it. That is, while the trial court purported to take the issue of "negligent training" away from the jury, it did so on the incorrect theory that, because Colonial employees "had received *some* training," therefore "an expert witness would have been required to testify as to whether that training was sufficient to meet the national standard of care."[50] (*See* JA. 1098-99, 4/9/13 (afternoon) Trial Tr., p. 21:6 to p. 23:8.)

[49] As the *Briggs* opinion notes, this Court has required expert testimony despite the fact that "the subject" was familiar to jurors: maintenance of leaning trees (*Katkish v. District of Columbia*, 763 A.2d 703, 706 (D.C. 2000)), application of hair relaxer (*Scott v. James*, 731 A.2d 399, 400 (D.C. 1999)), tightness of handcuffs (*Tillman v. WMATA*, 695 A.2d 94, 97 (D.C. 1997)), cushioning underneath playground monkey bars (*Messina*, 663 A.2d 535, 538 (D.C. 1995); maintenance of street lights to prevent falling light globes (*Rajabi v. PEPCO*, 650 A.2d 1319, 1322 (D.C. 1994)), time frame for ordering building materials on a construction project (*Lenkin-N Ltd. Partnership v. Nace*, 568 A.2d 474, 479 (D.C. 1990), response when an arrestee is found hanging in his cell (*Toy*, 549 A.2d at 7), and installation of "a crosswalk, instead of a stop sign, light, or crossing guard," *District of Columbia v. Freeman*, 477 A.2d 713, 719-20 (D.C. 1984).

[50] At one point, the trial court stated that an expert was not needed because "it's a hole" in plain sight and you don't need an expert to tell you that "you have a duty to make sure the premises are safe." (JA.1227, 4/15/2013 (morning), at 36:8 - 38:2.) In the next breath, however, the trial

There is no authority, however, for the proposition that expert testimony is required when the defendant "took *some* action" in a particular respect, but no need for expert testimony when the defendant "took *no* action." That faulty proposition is neither a substitute for nor a corollary for the correct test – "whether the need for any action or, if so, what kind of action is "so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson." *See id.*, at 6, *citing Messina*, 663 A.2d at 538. As a result, Colonial submits that the JNOV Order's conclusion (at 7) that Plaintiffs somehow were entitled to get to the jury without expert liability testimony against Colonial because it "took *no* action" in some pertinent regard is not a logical or otherwise legally tenable basis for dispensing with expert testimony.[51]

The only correct test for dispensing with expert testimony is whether "everyday experience makes it clear that jurors could not reasonably disagree over the care required." *Briggs*, 481 F.3d at 845. The many cases cited above show a strong trend toward requiring expert testimony about what kind and amount of care is required. Moreover, cases like *Haynesworth*, *Presley* and *Frederick* establish under D.C. law that the presence of a limited-services contract between a defendant like Colonial here and a landowner, tenant, or plenary property manager presents a special legal context, in which there may not even be a duty at all. Under such contractually special and therefore technical circumstances, the trial court was wrong

---

court stated that it was not Colonial's "duty" to know that a dangerous vertical air shaft existed behind the hole. (JA.1228, *id*. at 38:3-17.) The glaring inconsistency in those two statements about "care" and "duty" shows that the trial court misunderstood the legal issues it faced.

[51] The lack of jury guidance resulting from Plaintiffs' lack of expert proof impaired the trial court's effort to formulate jury instructions for Colonial's duty. (*See id.*, JA.1231-1232, at 52-54.) After considering and rejecting various proposed wordings for Colonial's purported duty (*e.g.*, to take "reasonable steps"), the trial court decided to avoid getting "into that fray" and to use even more general wording that left it to the parties to argue in closing what was reasonable. *See id*. at 54 ("rather than being specific, I will say they had a duty as I've indicated before to insure that the premises are reasonably safe or to maintain a reasonably safe environment for its customers, and I will let you argue based on what the evidence is in the case.").

in jumping to the conclusion that Plaintiffs did not need a liability expert here.

As a result, the trial court improperly allowed Plaintiffs to seek a verdict against Colonial on the basis of a purported failure to live up to its own internal procedures – for example, the mere fact that Colonial adopted some procedures and forms, but did not mention air shaft vent covers – and to contend in closing argument that those procedures were defective because they failed to protect the Plaintiffs in this case. Among other things, that contention is equivalent to the impermissible argument that the fact of the accident proves negligence. Furthermore, the gaps in Plaintiffs' evidence forced the jury to speculate about (a) whether Colonial's internal practices constituted a relevant standard of care, (b) whether Colonial's conduct failed to live up to those internal practices, and (c) whether those internal practices were inadequate because they did not prevent the accident. Therefore, Plaintiffs clearly failed to show any national standard of care, and so their case against Colonial was defective as a matter of law. *See Hughes*, 425 A.2d at 1303 (upholding a directed verdict where the plaintiff relied on prior conduct and internal operating procedures to establish the standard of care and did not present expert testimony).

In sum, without appropriate expert testimony, Plaintiffs lacked any legally sufficient evidentiary basis for making their negligence arguments against Colonial. It was not Colonial's burden at trial to provide a standard of care; it was Plaintiffs' alone. While the case may seem to be simply a matter of a hole in a wall, the standard of care repeatedly eluded clear definition here. Nothing prevented Plaintiffs from designating and calling an expert qualified about the regular practices of entities such as Colonial who contract to operate a garage owned by another entity that maintains the physical structure of the garage. Plaintiffs had multiple opportunities to identify a liability expert prior to the close of discovery, and yet they did not designate an expert

against Colonial. Without expert testimony about such a standard, there was no evidence from which reasonable jurors could conclude that Colonial breached any applicable standard of care.

CONCLUSION

WHEREFORE, Defendant Colonial Parking, Inc. asks that the Court deny Plaintiffs' appeal in its entirety and grant Defendant Colonial's cross-appeal in its entirety.

DATED: June 30, 2014

Respectfully submitted,

BONNER KIERNAN TREBACH & CROCIATA, LLP

Christopher E. Hassell, Esq. #291641
Andrew Butz, Esq. #933473
Dawn Singleton, Esq. # 468859
Megan Kinsey-Smith, Esq. #498125
1233 20th Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 712-7000
(202) 712-7100 (facsimile)
Counsel for Defendant Colonial Parking, Inc.

RULE 32(a)(5) CERTIFICATE

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

_____

Dawn Singleton

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2014, I filed with the Clerks Office of the District Court of Columbia Court of Appeals, via hand-delivery, the required copies of the foregoing Corrected Brief of Appellee/Cross-Appellant Colonial Parking, Inc., and further certify, that I served the required copies of the same, via U.S. Mail, postage prepaid, and, via email, one PDF copy upon:

Dawn V. Martin, Esq.
Law Office of Dawn V. Martin
1725 I Street, N.W., Suite 300
Washington, D.C. 20006
(202) 408-7040 / (703) 440-1417 (telephone)
(703) 440-1415 (facsimile)

Adam Smith, Esq.
Gary Brown, Esq.
McCandlish & Lilliard, P.C.
11350 Random Hills Road, Suite 500
Fairfax, VA 22030
(703) 409-8166 (703) 273-4592 (facsimile)

_____
Dawn Singleton