IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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

RESPONSE AND REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES WENDY PAOLA DESTEFANO, IN HER INDIVIDUAL CAPACITY, AND WENDY PAOLA DESTEFANO AND ENRIQUE IBANEZ, AS PARENTS AND GUARDIANS OF MINOR APPELLANTS G.I. AND V.I.
TO:
1) CHILDREN'S NATIONAL MEDICAL CENTER'S CROSS-APPEAL;
AND
2)) CHILDREN'S NATIONAL MEDICAL CENTER'S BRIEF IN OPPOSITION TO THE APPEAL OF WENDY PAOLA DESTEFANO, ET. AL.

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I. THE DESTEFANO-IBANEZ FAMILY'S RESPONSE IN OPPOSITION TO CHILDREN'S NATIONAL MEDICAL CENTER'S APPEAL

A. Introduction

The Destefano-Ibanez family hereby responds, in opposition to Children's National Medical Center's (CNMC's) appeal of the April 22, 2013 jury verdict. The jury awarded $1.5 million dollars to G.I., against CNMC, jointly and severally with Colonial Parking, Inc. ("Colonial"). In 2009, when G.I. was six years old, he fell two stories down the open air shaft onto a concrete bottom in the Colonial operated garage located on at CNMC. He miraculously escaped death, but suffered substantial short and long term injuries. Colonial also appeals the $26,000 award to G.I.'s sister, V.I., then four years old, who was holding G.I.'s hand just before he fell and suffered post-traumatic stress disorder resulting from the accident. As set forth below, the verdict against CNMC was fully supported by well-established law in the District of Columbia, imposing a duty upon businesses to maintain their premises and in a manner that reasonably protects its customers -- in this case, patients -- from safety hazards.

B. CNMC's Appeal is Frivolous

Unlike Colonial, CNMC does not dispute that it had a duty to its patient, six year old G.I., as well as his mother and four year old sister, to maintain the hospital premises, including its garage, in a condition that is reasonably safe for them to walk through to get to and from G.I.'s doctor's appointment. In fact, CNMC only appealed the jury verdict after Judge Josey-Herring issued a June 24, 2013 Order (Dkt. # 1024 at 1, fn. 1), denying Defendants' *Joint Motion to Stay Collection of the Judgment* as moot and noting that they are free to file a renewed motion based on *their own* appeals (emphasis in Order).

Plaintiffs' appeal did not affect the underlying award and did not justify excusing either Defendant from paying the judgment while Plaintiffs' appeal was pending.

Although Judge Josey-Herring wrote the Order before CNMC ever filed a Notice of Appeal or otherwise indicated that it would file one. Since the judgment was joint and severally issued against both CNMC, without this appeal, CNMC would have had to pay the outstanding judgment, while this appeal was pending, even if Colonial had been excused from paying while its cross-appeal was pending. The Defendants therefore collaborated to file separate, frivolous cross-appeals for the sole purpose of delaying payment to the Destefano-Ibanez family and their counsel, to try to "starve" them into withdrawing their appeal and settling for whatever the Defendants decided they would pay. This abusive tactic should be sanctioned.

1. **Eric Woods' Testimony regarding Possible "Overtorquing" did not Constitute Reversible Error**

On page 40-43, Section IX of its Brief, CNMC complaints that former DCRA Building Inspector, Eric Woods, whom both Defendants deposed twice, did not specify, in either of his depositions that the screws in the in the vent covers appeared to be "overtorqued" and that "overtorquing" can strip screw threads. CNMC argues that this testimony was "unfair surprise" because Mr. Woods did not specify this *possible* reason -- among others -- for the vent cover to have become detached from the wall. CNMC has not explained how this testimony could possibly constitute reversible error, as opposed to harmless error, if it was error at all.

Indeed, Mr. Woods' testimony on possible "overtorquing" could not possibly constitute reversible error because the jury was never asked to determine why or how the vent cover became dislodged. Jury Question # 1 (JA 179) asked:

> Do you find, by a preponderance of the evidence, that Defendant Children's National Medical Center knew or reasonably should have known of the uncovered air vent opening and the danger it posed?
>
> Question # 2 asked:
>
> Do you find, by a preponderance of the evidence, that Defendant Children's National Medical Center was negligent with respect to the dangerous condition you identified in number 1?
>
> Question # 3 asked:
>
> Do you find, by a preponderance of the evidence, that Defendant Children's National Medical Center's negligence was the proximate cause of the injuries alleged by Plaintiff G.I.?

The jury answered all of these questions "Yes." (JA 179) That was the basis of the jury's finding of liability against CNMC. Whether the reason for the detachment of the vent cover was "overtorquing," removal by an employee or contractor for a repair, oscillation or vibrations working the screws out over time, or even a vandal, the evidence was undisputed that there was no cover on that air shaft for weeks, if not months, before the accident. Mr. Colindres' testimony, that he saw the hole in the wall for weeks before the accident, is undisputed. (JA 643-645 at 37:9-44:9) The abundance of trash (JA 2933-2945) and the rotting rat carcass (JA 2940, upper right hand corner) at the bottom of the air shaft prove that there was an opening through which trash was being thrown and a large rat could fit through to end up at the bottom.

As the owner of a business premises, CNMC had a duty to inspect the premises frequently enough to detect safety hazards. A duty to maintain a safe environment requires a commercial business to take *reasonable* steps to remedy a dangerous condition on the premises. *Safeway Stores v. West,* 180 F.2d 25 (D.C. Cir. 1950) (broken hinge on door in supermarket injured customer's eye, causing blindness); D.C. Standard Jury

Instructions regarding Premises Liability, §§ 10-3, 10-4. Particularly in a garage in a Children's Hospital, where sick, injured and disabled children, and their distraught parents, have to walk through to obtain medical treatment, the duty is paramount. The jury was appropriately instructed on the issue of constructive notice of safety hazards (JA 428) and "Slip and Fall" cases (JA 428-429). CNMC does not claim that these standard premises liability instructions were in error, in any way; accordingly, even if Mr. Woods' testimony on this minor point could be considered a "surprise," it could not possibly constitute reversible error to justify an appeal.

No amount of discovery can reveal every word that will come from the mouth of a witness. As CNMC states, Eric Woods testified both as a fact witness and an expert witness. It is undisputed that, in both of his depositions, Mr. Woods testified that screws were loose on vent covers throughout the garage. This fact was documented in the D.C. Regulatory Agency's (DCRA's) Notice of Violations and Notice to Abate, issued to the hospital on the day of the accident. (JA 2892) CNMC also concedes that Mr. Woods also testified that the screws for the missing vent cover for the air shaft that G.I. fell through could not even be located, such that CNMC employees had to find new screws.

After Mr. Woods provided trial testimony that mirrored his deposition testimony, CNMC's counsel, Mr. Smith, asked Mr. Woods whether he had any additional ideas, looking at the photographs of holes in the metal frame of the open air shaft, regarding why the grille "*may*" have become detached from the wall. (JA 675-676 at 166:3-20) After a hesitation -- which is actually reflected in the transcript by Mr. Woods' "thinking out loud" expression of "Well, the -- the -- screw holes..." indicate that he was studying the photo and trying to be responsive to Mr. Smith, with respect to any new thoughts he

had about it. More importantly, Mr. Woods did not testify that the screws "were" overtorqued; he only testified that they "*might have been* overtorqued." Mr. Woods testified that the vent cover was off because the screws were off and then provided *several possible theories* as to how the screws could have come off, or been removed. (JA 679 at 180:1-182:3)

The "overtorquing" *possibility* was not inconsistent with Mr. Woods' previous testimony. Plaintiff's counsel pointed out that Mr. Smith was free to try to impeach Mr. Woods with his deposition testimony. (JA 676 at 167:3-14) To the extent that this minor point could possibly be characterized as "surprise" testimony, Defense counsel had every opportunity to impeach the witness and otherwise discredit him on this point. In any case, there is nothing about this testimony that would have changed the fact that CNMC had a responsibility to inspect for safety hazards in its garage and that it's failure to detect this deadly hazard of an open air shaft, constituted constructive notice of the hazard. Even if the Court's decision could be construed as error, it would, at most, be harmless error. CNMC does not even allege that Judge Josey-Herring's ruling on this point constituted reversible error; accordingly, there is no basis to reverse the jury award -- as CNMC acknowledges through its silence on this crucial point.

2. The Limited Evidence Admitted Regarding the Condition of Other Air Shaft Vent Covers in the Garage did not Constitute Reversible Error

As discussed in the Destefano-Ibanez family's Opening Brief, at 36-37, the trial court improperly excluded evidence of the condition of other vent covers in the garage. The fact that screws were missing from vent covers throughout the garage, and that one vent cover even came out in Mr. Woods' hands when he inspected it, constitutes evidence

that CNMC did not regularly or properly inspect or maintain the air shaft covers and the Colonial did not properly perform its inspection duties. Although Mr. Woods did not independently recall which of the many vent covers were loose, or missing screws, CNMC produced a list of these vents in discovery, along with other correspondence with DCRA, in order to prove that the required repairs had been made.[1] There was therefore no issue of which vent covers were deficient; instead, Judge Josey-Herring precluded Plaintiffs from entering into evidence any evidence related to any vent cover other than the one that should have been on the hole that G.I. fell through; yet, after Mr. Woods was precluded from testifying regarding any other vent covers, CNMC's expert, Mr. Dinoff, proceeded to violate the Court's order and gave his expert opinion about the sufficiency of the vent cover on the other side of the hole that G.I. fell through -- based his opinion on a photograph of the inside of the vent, rather than any personal inspection of it.

Mr. Dinoff's opinion of the sufficiency of the *other* vent cover was offered to provide his opinion that the vent cover that should have been on the hole that G.I. fell through *must also have been similarly attached and therefore sufficient!* After Mr. Woods had expressly been prevented from testifying regarding the *insufficiency* of other vent covers in the garage, and the Destefano-Ibanez family had been prevented from introducing the DCRA Notice of Violations issued to CNMC, the *least* that the Court could do as a remedial measure, was to allow the to family to read portions of the DCRA Notice of Violations to the jury documenting that other vent covers in the garage were *insufficiently* attached to the walls. This evidence was necessary to rebut Mr. Dinoff's "expert" testimony that he offered as evidence that the vent cover in question was

[1] These documents were excluded from trial, as post-accident remedial measures.

sufficiently attached to the wall -- that is, before it was not attached to the wall. Certainly, Mr. Dinoff's testimony *did* open the door for this rebuttal evidence -- even if it had been properly excluded in the first place.

As with CNMC's first basis of appeal, even if the Court's decision could be construed as error, it would, at most, be harmless error. Again, CNMC does not even allege that reversible error; accordingly, there is no basis to reverse the jury's finding of liability against CNMC. CNMC acknowledges it through its silence on this crucial point.

3. **V.I.'s $25,000 Award for Negligent Infliction of Emotional Distress was Justified under the "Bystander Rule" and *Hedgepeth***

CNMC and Colonial seek to reverse the jury's award of $26,000 to G.I.'s sister, V.I., who was four years old at the time of the accident and was standing next to her brother, holding his hand, at the time of the accident. The jury expressly found, as a matter of fact, that: 1) V.I. was in the zone of danger when her brother fell down the uncovered air shaft (JA 181, Verdict Form, at 4, Question # 9); and 2) the accident caused V.I. to fear for her own safety (JA 181, Question # 10). As discussed below, Defendant CNMC's own psychiatrist diagnosed V.I. with post-traumatic stress disorder caused by the accident and two additional licensed clinical social workers also reached the same diagnosis and causation.

The jury's award to V.I. was clearly supported by the evidence of record -- as the trial Court held at least *five times* -- culminating in Judge Josey-Herring's June 24, 2013 Order affirming the full judgment in V.I.'s favor. (JA 463). In assessing Defendants' pre-judgment motions for judgment on V.I.'s claim, Judge Josey-Herring considered that Plaintiffs had presented:

1) undisputed testimony by Ms. Destefano that V.I. was standing right next to G.I. -- which turned out to be right in front of the open air shaft -- just before her fell;

2) that CNMC's administrator, Patricia Johnson, referred V.I. for psychological counseling specifically because she expressed to Ms. Johnson a preoccupation with death after the accident -- including her own, saying she thought that *she* had died, saying, that in her thoughts, "*I died;*"[2]

3) after the accident, V.I. had nightmares and fear of the dark, cars and holes, which indicated fear of harm to herself, not just her brother; and

4) V.I. told Debra Jenkins, Licensed Clinical Social Worker (LCSW), that she was holding G.I.'s hand just before he fell, indicating that she was close enough to the hole -- indeed, attached to her brother, such that she was in danger of falling in with him. (JA 1088-1089 at 76:15-78:1.)[3]

Ms. Destefano testified, using a life sized cardboard replica of the wall, car and vent cover, along with mannequins representing the children and a stroller of the same model that she used on the day of the accident. (JA 2990-2992, photos of model used at trial) Using this model, Ms. Destefano demonstrated how small the space was between

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[2] Dr. Parr, a child psychiatrist, was employed by CNMC at the time that she examined and diagnosed V.I. Dr. Parr testified that she interpreted V.I.'s statements to Pat Johnson and her nightmares to indicate that *V.I. feared for herself* as well as for her brother. Dr. Parr testified about it, reading the excerpt in which she reported that V.I. shared her thoughts, saying "*I died*" and discussed what she understood death to be. (JA-886 at 52:10-25. Debra Jenkins, LCSW, testified that, after the accident, V.I. reported repeated nightmares about her brother, her mother and herself drowning -- again, indicating her fear of her own safety. (JA 903 at 121:13-122:18)

[3] *See also* Judge Edelman's June 12, 2012 *Memorandum Opinion*, at 16-21 (JA 347-352, discussing and denying both Defendants' Motions for Summary Judgment on V.I.'s negligent infliction of emotional distress claim because it is a factual issue for the jury. This Order was supplemented by Judge Edelman's June 16, 2012 Order correcting erroneous statement in *Memorandum Opinion* regarding V.I., Dkt. # 419.

the car and the wall, how close the children were to each other and to herself and explained that the children were holding hands before she turned from them and looked toward the car to try to open the door. (JA-765 at 101:9-103:15; JA-805 at 71:8-11, JA 810 at 91:18-92:9, JA 813 at 106:5-6). In addition, CNMC's own surveillance video showed the family walking in the garage toward the parking space, with G.I. and V.I. holding hands, approximately one minute before the accident.

Although the focus was clearly on rescuing G.I., V.I. held onto the wall above the hole to prevent herself from falling and grabbed her mother to prevent her from falling into the hole. This conduct clearly indicates that V.I. recognized that she and her mother were both at risk for falling in to the hole while they were standing next to it, and particularly, when trying to rescue her brother. In addition to medical records, the testimony of medical professors and V.I.'s mother, the jurors were permitted to use their own life experiences and knowledge to assess from the circumstances. This jury of laypersons, of varied life experiences, was capable of assessing V.I.'s conduct and understanding that a four year old child would reasonably experience fear that she too, would fall into the hole that had just "swallowed" her brother.

In *Williams v. v. Baker*, 572 A.2d 1062, 1067 (D.C. 1990), this Court explained the appropriateness of awarding damages to a bystander, who was in the "zone of danger," where the physically injured party is a member of the plaintiff's immediate family.

> Where the plaintiff was within the zone of physical danger and as a result of defendant's negligence feared for his or her own safety, however, it is reasonable to permit the plaintiff to recover as an element of damages mental distress caused by fear for the safety of a member of the plaintiff's immediate family who was endangered by the negligent act. Having breached a duty of care to the plaintiff, the negligent tortfeasor should be

> held liable for all resultant damages. *Accord, Bovsun v. Sanperi*, 61 N.Y.2d 219, 229, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357, 361 (1984) (footnotes omitted).

572 A.2d at 1069.

V.I. experienced post traumatic stress disorder related *both* to her own fear of falling into the hole *and* because she witnessed her brother actually fall into it and suffer serious injuries. In fact, the two are inter-related because her brother's injuries served to illustrate what *could* have happened to her. In addition, as the "survivor" of the open air shaft, V.I. experienced feelings of guilt, blaming herself for the accident because she let go of G.I.'s hand just before he fell. (JA 794 at 27:8-28:4)[4] V.I. was therefore entitled to a damage award for all of her emotional distress from the accident -- including her fear for herself and her distress over witnessing her brother's injuries. Certainly, the meager $25,000 that she was awarded did not exceed that entitlement.

II. THE DESTEFANO-IBANEZ FAMILY'S REPLY TO CHILDREN'S NATIONAL MEDICAL CENTER'S AND COLONIAL PARKING, INC.'S OPPOSITION TO THEIR APPEAL

A. Ms. Destefano's Claim for Negligent Infliction of Emotional Distress was Improperly Dismissed

1) Judge Edelman's Dismissal of Ms. Destefano's Claim was Based on his Erroneous Conclusion that Ms. Destefano Could not Fit through the Three Foot Wide, by Two Foot High Hole in the Wall

CNMC and Colonial complain that the Destefano-Ibanez family's Brief cites some evidence summary judgment and other pre-trial proceedings, rather than restrict their evidentiary citations to only evidence produced at trial; however, Ms. Destefano's

[4] *See also* discussion of *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011), in the family's Opening Brief, at 18-21 Section II, A, 2, below. Even if V.I. had not qualified for compensation under the bystander rule, the special relationship that she had with Colonial, as a customer, and as the child sister of a child patient of the hospital, entitles her to a greater duty of care than would a "stranger" to either of the Defendants.

dismissed claims of negligent infliction of emotional distress was decided by Judge Edelman, based on the evidence cited in summary judgment filings. In appealing his decision, it would be completely improper to cite Ms. Destefano's *trial testimony* -- which Judge Edelman never heard. The Destefano-Ibanez family was precluded from presenting Ms. Destefano's claim at trial;[5] accordingly, the parties MUST cite the evidence of record that was before the Court at the time that these decisions were made, irrespective of whether this evidence was presented at trial. In support of its motion for summary judgment regarding Ms. Destefano's claim, CNMC and Colonial argued that Ms.

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[5] CNMC and Colonial claim that, at trial, Ms. Destefano did not testify that she almost fell into the hole; however, she this is not true. Ms. Destefano testified describing how G.I. fell and how she reached in to save him using a life-size model of the scene of the accident, re-assembled in a portion of the courtroom (not pictured) where it was difficult to hear her. (JA 765 at 101:9-1-3:23) Ms. Destefano clearly testified that G.I. and V.I. were holding hands at just before G.I. fell. (JA 765 at 102: 21-22) Ms. Destefano stuck her head and torso in the hole in the model wall, to demonstrate how reached for G.I., which made it difficult to hear her describe what she was doing, but the record (JA Ja 765 at 103:12-19) documents that, at trial, Ms. Destefano again testified that she was in danger of falling into the hole.

> That's the moment when I turned around and I said V.I. I said G.I., G.I., and at that point, the key fell down, I had to go over here **because otherwise I would have fallen.** All I could hear was G.I. I kept looking for G.I. because I could hear him, but I could not find anything, and I left running. I started shouting, but I did not see anyone. I did not see anyone, and then I was shouting and two people from that side came over.... (*Emphasis added*)

Ms. Destefano was also crying at this point in her testimony, just as she broke down in her deposition at the same point. Both the interpreter and court reporter repeatedly stated they were unable to hear her. (*e.g.*, JA 765) Although efforts were made to have Ms. Destefano speak up and repeat portions of her testimony, the transcripts do not reflect her entire testimony in that remote section of the courtroom (which was the only place the exhibit would fit). Since Ms. Destefano's claim had been dismissed two years before the trial, details regarding how she almost fell into the hole herself were irrelevant to any question before the jury; therefore, the focus of her testimony was not about her own feelings or fear for herself at the time of the accident, but rather, what happened to her children. Plaintiffs' trial time was quickly running low to present the claims of both children -- who were the only plaintiffs at trial.

Destefano *could not fit through the hole in the wall* that her son fell through and therefore, was not in the "zone of danger;" however, it is absolutely clear, from the evidence that Judge Edelman had before him at the time, including the dimensions of the hole in the wall (Family's Opening Brief at 13-16), photographs taken by Ms. Destefano on the day of the accident (Opening Brief at 13), photographs taken by CNMC (Id.), deposition testimony of Eric Woods (*Id.*), the affidavit of parking attendant Freddy Sanchez (*Id.*), Ms. Destefano's deposition (Id.), and her affidavit, attached as an exhibit to your deposition, that Colonial's factual assertion is blatantly false.

The *sole* piece of "evidence" that CNMC and Colonial offered to support their assertion that Ms. Destefano could not fit through the hole was an out of context excerpt from Ms. Destefano's own deposition. In the context of explaining how she lunged into the hole to try to save her son, Ms. Destefano stated, *while she was crying*,[6] that she had wanted to go into the hole to reach him, but she "couldn't." No one asked her "why" she "couldn't" go into the hole because it was obvious. As stated in the family's Opening Brief, at 14, *she could not walk on air*. CNMC and Colonial seized upon this small excerpt, out of her entire deposition, to falsely imply that Ms. Destefano had *admitted* that she could not fit into the hole.[7] CNMC and Colonial then argued that this purported

[6] The fact that Ms. Destefano was crying during this portion of her testimony is significant. The deposition video was provided to Judge Edelman.

[7] In her deposition, Ms. Destefano testified she was in the air shaft up to her waist looking for G.I., lunging forward in a way that caused her to drop her keys in the air shaft. (JA 2775, Destefano depo at 172:11-20) Ms. Destefano's initial impression was that there was a floor on the other side of the wall that was level to the floor she was standing on, so she thought that G was near her feet, so that she could reach or even step into the hole and retrieve him (JA 2757-2758 at 101-102:7); however, as she lost her balance and the keys clearly flew well out of her reach as they fell to the ground, she realized that she could not step into the hole. (Id.) This is when she realized that G had had fallen to some unknown place below and she began to scream for help. (Id.)

"admission" rendered it an *undisputed* fact that Ms. Destefano could not have fit through the hole in the wall and therefore, could not have been in the "zone of danger."

On page 5-6 of Colonial's Brief, footnote 4, Colonial states that in her *Statement of Undisputed Material Facts*, Ms. Destefano "did not reference scene photographs or proffer affidavits or testimony regarding the hole's dimensions;" however, Ms. Destefano's and V.I.'s April 4, 2012 *Opposition*, page 3, clearly stated the dimensions of the hole. It would have been completely inappropriate to include proof of the hole's dimensions in a *Statement of Disputed Material Facts* because the dimensions of the hole were *never disputed*.[8] Colonial *again* attempts to mislead and confuse this Court by implying that Judge Edelman did not have evidence of the dimensions of the hole when he ruled on the parties' respective motions for summary judgment. In fact, the Destefano-Ibanez family included this information in *each* of their motions, oppositions and their *Statement of Undisputed Material Facts* --where this information belonged. The family's own March 30, 2012 *Statement of Material Undisputed Facts*, filed with their own *Motions for Summary Judgment*,[9] cited the photographs, affidavits and deposition testimony by witnesses of all parties depicting and/or describing the hole and the air shaft. (JA 1401, "Facts"[10] at pages 5, 6 and 8) The *Exhibit List* for G.I.'s March 30, 2012

[8] A *Disputed Statement of Facts* is filed only to dispute specific factual allegations made by the opposing party in its *Statement of Undisputed Material Facts*. Colonial never alleged dimensions for the hole in its *Statement of Material Undisputed Facts*; accordingly, there was no allegation regarding the dimensions of the hole to dispute.

[9] On April 2, 2012, Ms. Destefano and her daughter, V.I., filed a *Joint Motion for Summary Judgment*, separate and apart from the *Motion for Summary Judgment* that had already been filed on behalf of G.I. Their *Joint Motion for Summary Judgment*, page 6, expressly states the hole was "3 feet wide by 2 feet high, beginning 1 foot up from the ground. (Facts ¶ 28)." (JA 1405) Neither Colonial nor CNMC ever disputed this fact.

[10] "Facts" refers to the *Statement of Undisputed Facts* that was filed with *G.I.'s Motion for Summary Judgment*, and was adopted in the *Joint Motion for Summary*

Motion for Summary Judgment, incorporated into *Ms. Destefano and V.I.'s Motion for Summary Judgment*, clearly lists the photographs taken by the hospital as the Exhibit K series, Ms. Destefano's photos as the Exhibit M series, and DCRA's photos as the Exhibit N series. Each photo in each series is numbered.

CNMC and Colonial argue that this Court should ignore photographs that were taken on August 23, 2012, because they were taken *after* Judge Edelman dismissed Ms. Destefano's claim, and were therefore not considered in his June 12, *2012 Memorandum Opinion;* however, these photos taken on August 23, 2012, discussed in the family's *Opening Brief*, at 13-16, demonstrate that Defendants cannot, in good faith, continue to maintain that Ms. Destefano could not fit through the hole.

Particularly in light of Mr. Smith's and Ms. Singleton's own personal experience and observations, they were ethically required, as officers of the Court, to retract their statements to the trial Court that Ms. Destefano could not fit through the hole; but they did not do so. Instead, they are arguing, in circles, on appeal, trying create technical holes in the irrefutable argument that Judge Edelman erred when he ruled that Ms. Destefano could not fit through the hole and dismissed her claim on the basis of the Defendants' fraudulent representations to the Court and Judge Edelman's erroneous adoption of their false assertions as fact.[11]

Judgment, at page 3, under heading number "I," entitled "**Incorporation of G's Motion."** (Plaintiffs attempted to consolidate the summary judgment filings because each Defendant filed multiple separate motions for summary judgment -- on negligence, on punitive damages and on the individual claims of each of the three plaintiffs.)

[11] Judge Edelman's June 12, 2012 Opinion contains additional factual errors. See Opening Brief at 15-15 regarding his mistaken conclusion regarding a "sham affidavit." The undersigned filed a timely June 18, 2012 *Motion for Reconsideration* (Dkt. # 422), pointing out these factual errors and noting that his Opinion referring to Ms. Destefano's affidavit as "sham" unfairly and inaccurately portrayed Ms. Destefano as a liar and the

Colonial and CNMC argued -- and Judge Edelman accepted as fact -- that a child could fit through the hole, but an adult could not; however, this is not a situation where a child *walked* through hole, upright. This was not a hole that was his height, from foot to head.[12] The hole was only *two feet* high. It began approximately one foot up from the ground and extended to three feet up from the ground. There was no hole at G.I.'s feet, or even up to his calves; accordingly, he did not, and could not, have backed into the hole, or walked into the hole, standing straight up. Even a child the size of G.I. had to "bend in the middle" to fall through the hole. He had to "bend" so that his feet were pulled up from the ground over the one foot of wall blocking the air shaft from the floor up to the grate. Parking attendant Freddy Sanchez actually observed G.I. fall backwards into the

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undersigned as an unethical attorney who created and filed a "sham" affidavit. Judge Edelman did not correct his errors. To the contrary, Judge Edelman responded by stating that his statements about the undersigned did not create a "professional catastrophe" (JA 355, fn. 1) and that it is common for parties to make inconsistent statements; however, that Ms. Destefano's statements were not *inconsistent* or contrived after her deposition. They were consistent and asserted prior to her deposition, at least twice. In addition to the two factual errors discussed above, Judge Edelman mistakenly stated that "Defendants contended that Plaintiffs' V's pre-existing neurological condition contributed to any distress resulting from the incident and therefore Plaintiff V could not establish a serious and verifiable injury." (JA 351) Defendants never made any such argument and there is no dispute that V.I. never had any pre-existing or post accident "neurological condition." V.I. is a very healthy and intellectually able little girl, with no medical issues. Judge Edelman was clearly confused on a number of facts of this case. The undersigned filed a Motion to amend the Opinion to correct this error (Dkt. # 418). Judge Edelman did issue a short, separate Opinion acknowledging the error (Dkt. 419), but this did not remedy the harm. The June 12, 2012 continues to be circulated and cited while the short Opinion with the correction is obscured and un-noticed.

[12] G.I.'s medical records show that, at the time of the accident, he was 3 feet, 6 inches tall. When G.I. stood in front of the hole, he was six inches taller than the top of the hole. His head extended 6 inches above the highest opening of the hole and his the hole began behind him at the level of his thighs. This means that, when he backed up against the wall, at the level of his feet and lower legs, with nothing bracing his back and upper legs, he stumbled and fell backward into the hole -- buttocks first.

hole. (JA 2873, 2877 ¶ 9) Although the jury did not hear Freddy Sanchez' testimony, Judge Edelman had Mr. Sanchez' Affidavit before him in the summary judgment filings.

In making his determination that Ms. Destefano could not fit through the hole, even when she bent down looking into the hole attempting to rescue her son, Judge Edelman "assum[ed]" that this Court of Appeals would adopt the "danger invites rescue" doctrine as part of the bystander rule, as argued by the Destefano-Ibanez family. *See*, *Colombini v. Westchester County Healthcare Corp.*, 808 N.Y.S.2d 705, 709 (N.Y. App. Div. 2005) (jury question whether father came within the zone of foreseeable danger when he entered the room to help extricate his son from the MRI machine"), *Wallace v. Parks Corp.*, 629 N.Y.S.2d 570, 577 (N.Y. App. Div. 1995) (husband and two sons of a woman on fire attempted to enter the kitchen to rescue her when they heard her screams, although they could not see her); *Hass v. Manhattan & Bronx Surface Transit Operating Auth.*, 612 N.Y.S.2d 134, 135 (N.Y. App. Div. 1994) (a mother placed herself in the zone of danger by trying to rescue her daughter from under the wheel of a bus); *Clohessy v. Backelor*, 237 Conn. 31, 675 A.2d 852 (Conn. 1996) (mother held and comforted 7 year old son, in the path of traffic, after he was hit by car while walking next to her), citing *Thing v. Chusa*, 771 P.814, 257 Cal. Rptr. 865 (1989).[13] *See also Restatement of Torts* (Second) §§ 313 and 436.

The "danger invites rescue doctrines" is part of the "zone of danger" rule where the plaintiff attempts to rescued an immediate family member is thereby placed in the

[13] In *Thing*, the plaintiff arrived on scene after accident and saw her son lying on the ground, injured and bloody, appearing dead). The Court held that, even in the absence of physical injury or impact to the plaintiff herself, damages for emotional distress were recoverable if the plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury; and (3) as a result, suffers emotional distress beyond that which would be anticipated in a disinterested witness.

"zone of danger." *Hass*, 612 N.Y.S. 2d at 135. This "danger invites rescue" doctrine has been upheld by every jurisdiction that has expressly considered it, including New York. This Court expressly relied on New York cases when it initially adopted the "bystander rule."[14] Since then, New York has expanded its analysis as different facts patterns have been brought before it, including the "danger invites rescue" rule.

Ms. Destefano was clearly at risk of falling down the air shaft as she lunged into the hole in the wall, waist deep, reaching for her son. She demonstrated that she was aware of this risk when she grabbed the wall to stop herself from falling and backed out of the hole, calling for help, since she "couldn't" enter the hole herself without falling to into a then unknown place. Neither Colonial nor CNMC produced any evidence to contradict Ms. Destefano's account of her attempt to rescue G.I. from the air shaft; accordingly, this was an undisputed fact that should have entitled Ms. Destefano to summary judgment -- not Defendants. At a minimum, her claim should not have been dismissed and should have proceeded to trial before a jury.

In addition, Ms. Destefano was in the "zone of danger" even before she attempted to rescue her son, as she stood in front of the hole attempting to get her children into the car. An adult could also have stumbled and fallen, particularly one as petite as Ms. Destefano. Ms. Destefano is 5 feet, 2 inches tall (JA 2778 at 184:17-22), slightly more than a head taller than her son, again, as can be seen from the CNMC surveillance photos. (JA 2914) She had to *bend over* to take the toddler out of the stroller, help the children into the car, strap them into their car seats, put the stroller in the car and other tasks that

[14] *See also* the California rule of the "relative bystander" test, set forth in *Dillon v. Legg*, 441 P.2d 68 Cal. 2d 728 (Cal. 1968) (mother was crossing the street with her young daughter when car hit and killed her), *citing Thing*.

required bending in the small, two feet wide space between the car and the hole in the wall; accordingly, in addition to the clear danger of falling that she experienced while reaching into the hole to try to get G.I. out, Ms. Destefano was also in danger of falling into that hole as she maneuvered attending to the children in the parking space. She was standing directly in front of the hole while she performed most of these tasks. In her deposition, Ms. Destefano expressly testified that she could have stumbled and fallen into the hole. (Opening Brief at 14, JA 2765-2766, Destefano depo at 133:15-134:15) At a minimum, this question is within the province of a jury, which should not have been usurped by the Court.[15]

2) Under *Hedgepeth,* CNMC and Colonial had a Special Duty to Ms. Destefano to Protect her against Conditions in the Hospital's Garage that would Cause her to Witness her Son Fall Down an Open Air Shaft and thereby Cause her Severe Emotional Distress

As discussed above, Ms. Destefano met the criteria for her claim to proceed to a jury under the classic, and long-standing "bystander rule;" however, even if she had not been a "bystander" in the legal sense, this Court's supplemental rule to the bystander rule, in negligent infliction of emotional distress cases, offers and alternative basis for her claim. This Court's Opinion in *Hedgepeth* succinctly states the question posed in the present case.

[15] Judge Josey-Herring made it clear that she would not address issues already addressed by either of the two previous judges on the case, so a second *Motion for Reconsideration* would have been futile, untimely, and arguably, sanctionable as duplicative. Ms. Destefano filed an appeal in this Court (Appeal No. 2012 CV 956), but it was deemed premature and dismissed without prejudice. On November 26, 2013, Ms. Destefano filed *a Motion for Summary Reversal in this Court.* Defendants argued that it should be denied in favor of "a full briefing." The Court denied the motion. Because of the many issues on appeal, the dispositive motions and responses are actually more thorough than the Briefs permit, due to page limits.

> In this case, we are tasked with determining the scope of the duty to avoid causing emotional distress that results from negligence.

22 A.3d at 817.

Colonial argues that the Destefano-Ibanez family's brief misrepresented footnote 39 in *Hedgepeth*; however, contrary to Colonial's assertion, the family's Brief does not claim that this Court specifically held that the listed relationships included the duty of one party to protect the emotional well being of another. The family cited the footnote to rebut Judge Edelman's holding that Ms. Destefano was "stranger" to Colonial, with no special relationship and no duty at all. The family argued that, like a carrier-passenger relationship, or an innkeeper-guest relationship, Colonial controlled the environment that Ms. Destefano and her children had to pass through to get to the hospital. Essentially, they were a "captive audience" in the garage, just as a guests are in a hotel or passengers are on a train. The Court did not specify which of these relationship, under what circumstances, would include a duty to avoid negligently inflicting emotional distress on a hotel guess or passenger on a train. To the contrary, *Hedgepeth* expressly holds that such a duty will be determined on a "case-by-case basis." 22 A.3d at 812, 818-819. Colonial argues that *Hedgepeth* doesn't list the parking garages-customer relationship as including such a duty; however, this Court also did not preclude a conclusion that there is such a duty, under certain circumstances.

In *Hedgepeth*, 22 A.3d at 804, this Court cited *Muntz v. United Hosps. Med. Ctr. Presbyterian Hosp.*, 379 A.2d 57, 58 (N.J. Super. Ct. App. Div. 1977), as an example of a case that recognized that a parents may have had an implied contract with a hospital to avoid inflicting emotional distress on them where the hospital negligently informed them of the death of their child). In another New Jersey case, *Portee v. Jaffee*, 417 A.2d 521

(N.J. 1980), *citing Muniz*, the New Jersey Supreme Court upheld a mother's claim of negligent infliction of emotional distress where she watched her 7 year old son became trapped between the outer door of an elevator and the elevator wall and was dragged up several floors still wedged between the door and the wall. The boy's mother was called to the scene and helplessly watched her son suffer, moan and cry, while rescuers tried to free him. He suffered bone fractures and massive internal bleeding and died of these injuries. His mother sued the landlord of the building and the elevator company, jointly and severally, for negligent infliction of emotional distress. The *Portee* Court explained why the emotional distress experienced by a loving parent, like Ms. Destefano, where she is forced to witness her child suffer grave injury is a compensable injury, where the child's injury was caused by negligence.

> In the present case, the interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe and whole is the deepest wellspring of emotional welfare. Against that reassuring background, the flashes of anxiety and disappointment that mar our lives take on softer hues. No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure. The law should find more than pity for one who is stricken by seeing that a loved one has been critically injured or killed.

417 A.2d at 526.

The *Portee* Court provided safeguards to prevent opening the "floodgates" for lawsuits alleging negligent infliction of emotional distress, limiting the claims as follows.

> The cause of action we approve today for the negligent infliction of emotional distress requires proof of the following elements: (1) the death or serious physical injury of another caused by defendant’s negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress. We find that a defendant’s duty of reasonable care to avoid physical harm to others

> extends to the avoidance of this type of mental and emotional harm. As Chief Justice Weintraub stated:
>
> > Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution. (Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583, 186 A.2d 291, 293 (1962) (emphasis in original))
>
> Our inquiry has led us to conclude that the interest in personal emotional stability is worthy of legal protection against unreasonable conduct. The emotional harm following the perception of the death or serious injury to a loved one is just as foreseeable as the injury itself, for few persons travel through life alone. Ultimately we must decide whether protecting these emotional interests outweighs an interest against burdening freedom of conduct by imposing a new species of negligence liability. We believe that the interest in emotional stability we have described is sufficiently important to warrant this protection. At the same time we are confident that limiting judicial redress to those inflicted on intimate emotional bonds by the death or serious injury of a loved one serves to prevent liability from exceeding the culpability of defendant's conduct.

417 A.2d at 528.

The duty that CNMC and Colonial owed to Ms. Destefano should be deemed to be at least as great as the duty of the landlord and elevator company to the plaintiff mother in *Portee*. Colonial concedes, as *Hedgepeth* holds, that the doctor-patient relationship is one that imposes a duty of care on the doctor, or medical institution, to take reasonable steps to avoid emotional distress *to the patient*. Where the patient is a child, however, it is *the parent* who chooses the doctor and/or medical facility that will treat his or her child and *contracts* with that doctor and/or institution for the child's medical treatment. It is the parent who communicates with the medical professionals, administration and staff. It is the parent who pays the medical bills, otherwise makes payment arrangements or remains liable for the bills, even if unpaid. It is the parent who drives or otherwise transports the child to appointments. At the time of the accident, Ms. Destefano was the personal representative of her son, G.I., with respect to his relationship

with CNMC. A medical institution must treat the parent, or personal representative of the child patient, as the patient, with respect to confidentiality and fiduciary duties. 45 CFR 164.502(g). In fact, at trial, CNMC's counsel specifically argued that Ms. Destefano "stands in the fair shoes" of her children, with respect to the hospital, because she "is in control of getting them to and from places." (JA 1208, at 18:18-19 and 19:10-12)

The doctor-patient relationship for a Children's Hospital requires that the parent, or parents, requires a special relationship with the patient-child's parent(s). G.I. was a six year old boy who had lost some of his speaking ability due to a brain hemorrhage that he experienced as newborn. He could not speak for himself in any extended form of conversation. He could not consent to treatment, understand treatment or drive himself to doctor's appointments, the parents stand in the shoes of the child.

Recognizing the reality of special relationships between hospitals and the parents of their minor patients, CNMC describes itself as offering "family-centered care." http://childrensnational.org/choose-childrens/visiting-staying/patient-family-rights. CNMC elaborates on this point by stating as follows.

> Our internationally recognized pediatric specialists provide the best possible care, and we offer a variety of services that support the entire family.
>
> **Children's Child-Centered Vision**
> Feedback from our families helps us refine our first child-centered vision, which looks at the hospital experience through a child's eyes. Healing a child's body, mind, and spirit takes more than medicine: it takes a team to fulfill a family's dream.

CNMC holds itself out not only to have a doctor-patient relationship with not only the child patient, but represents that this relationship includes a "special relationship" to the child's family as well. CNMC boasts:

> We treat children and families with respect and compassion, and create an experience designed with children's unique physical and emotional needs in mind.[16]

http://childrensnational.org/about/what-we-do?sc_lang=en.

CNCM expressly represents to parents of child patients that it will provide a *safe* environment for both parents and children.

In its *Statement of Patient and Family Rights,* page 3, on its website, CNMC lists the right "to receive care in a safe setting and to be free from all forms of abuse and harassment." HIPPA_Eng_v2_pages.pdf. Elsewhere on its website, CNMC acknowledges its obligation to maintain premises that are safe for the patient-child and that child's family members.

> At Children's National, we strive to make *you and your child's* visit or extended stay both *safe* and comfortable. (Emphases added)

http://childrensnational.org/choose-childrens/visiting-staying.

CNMC's purported commitment to safety cannot end for "patients and their families" as they exist elevator door at the garage level on the way to their cars, while still on CNMC premises -- particularly since CNMC pays, supervises, monitors and can "fire" the company that manages the garage for breaching its agreement with it to manage the garage in a manner acceptable to CNMC. This is particularly true where, as here, CNMC, on its website, expressly *directs patients and their families* to park on its

[16] Unfortunately, CNMC leadership has failed to extend "respect" or "compassion" to the Destefano-Ibanez family in favor of using every possible strategy to escape liability for the injuries that the dangerous conditions in its garage caused for this family. CNMC and Colonial have done everything from challenging their immigration status to blaming Ms. Destefano for her son's fall down the open air shaft. CNMC and Colonial argue that they should escape liability to Ms. Destefano based on their blatantly false representations that she could not fit through a hole that CNMC's own attorney fit through and face no consequences for this fraud upon the Court.

premises, *for a fee*, and offers a "discount voucher" to *parents and guardians* of patients. http://childrensnational.org/choose-childrens/visiting-staying/transportation-parking.

CNMC and Colonial ask for the most restrictive reading of *Hedgepeth* possible and the most stringent application of the bystander rule -- despite this Court's tendency, and the trends of other jurisdictions, to expand the rule as proposed by the Destefano-Ibanez family. CNMC also filed an *Amicus Curiae* Brief in *Hedgepeth*, in support of the Defendant hospital and doctors, arguing that the doctors who negligently told Mr. Hedgepeth that he was HIV positive, when he was not, were not liable to him for the emotional distress that he suffered for years, believing the false information and acting accordingly, with respect to his family, employment, drinking and other issues. Fortunately, this Court rejected CNMC's position in *Hedgepeth* and expanded the bases for negligent infliction of emotional distress claims. The family respectfully asks this Court to reject CNMC's argument -- as it did in *Hedgepeth*, regarding the criteria for such claims in present case and restore Ms. Destefano's claim of negligent infliction of emotional distress.

As earlier stated, Colonial's President and CEO, Andrew Blair, expressly acknowledged that Colonial customers at the CNMC site consist primarily of "patients and their families." (JA 2811-2812 at 98:1-102:3). On its website, Colonial states:

> Hospitals present the most difficult environment for parking operations and success. Our customers are made up of patients, their families and visitors and caregivers—all important and many under time or emotional stress. As such, the parking experience must be efficient, friendly and accessible. The keys to Colonial's approach to Hospital and Healthcare parking include:
>
> - Employees who genuinely care about the people in the cars, not just the cars.

- Systems that are easy to understand, which allow customers to come and go with ease.
- Managers who view themselves as part of the overall delivery of care.
- Technologies that allow Colonial to monitor usage and report accurately to the institution.

Examples of Colonial's experience in Hospitals and Healthcare include:

- The National Institutes of Health (Bethesda Campus)
- Children's National Medical Center
- Holy Cross Hospital
- Suburban Hospital
- Our customers are made up of *patients, their families,* visitors and caregivers -- all important and *many under time or emotional stress*. (*Emphases added*)

http://www.ecolonial.com/clients/industries-served/?indTab=1; see also (Dkt # 2811, at 100:11-22)

Colonial is keenly aware of its customer base at CNMC and fully recognized that patients and their families are people who would be particularly vulnerable, both physically and emotionally. It is absolutely foreseeable that a parent walking through the garage would be severely emotionally distressed to witness his or her sick or injured child suffer a serious accident in the garage of the hospital. Under these circumstances, there is a special relationship that requires both the hospital and Colonial, as the company that the hospital delegated its duties to operate the garage on its premises, to take reasonable steps to protect emotional well-being of *patients and their families.*

B. G.I. is Entitled to Damages for Pain and Suffering for Post-Concussive Syndrome after April 22, 2013

As discussed in the family's Opening Brief, at 21-24, they appeal the Court's April 17th, 2012 Jury Instruction at pages 16-17, # 13.01(4) and (7) (JA 429-430), prohibiting the jury from awarding any damages to minor Plaintiff G.I. for "ongoing," or permanent, post concussive syndrome. The family responds to *both* Defendants' Opposition Briefs in the consolidated form below, in order to avoid repetition.

1) G.I.'s Pre-Existing Condition did not Cause his Violent Outbursts

CNMC and Colonial attempt to obscure the issue of law by demeaning and belittling the little boy who was injured by their negligence. CNMC and Colonial have done their best, in their Briefs -- as they did at trial -- to portray little G.I. as "damaged goods" -- or something less than a "*real*" child -- to try to convince this Court that, prior to the accident, G.I. did not even understand enough to feel pain and suffering, or to interact with others in a meaningful way. CNMC and Colonial describe G.I. as functioning at the level of a two year old, disruptive, violent, "largely non-verbal," incapable of learning or enjoying life, and even incapable being traumatized by his own physical pain, in puddles of his own blood, while trapped in the bottom of the air shaft for twenty minutes; however, this description of little G.I. contradicts his medical and school records, as well as the testimony of everyone that actually *knew* him -- as opposed to CNMC's paid expert, who never met him.

G.I.'s teachers, treating physicians, therapist and parents all portrayed G.I. as a social, loving and happy little boy, although he was developmentally delayed and had epilepsy. Dr. Woodruff -- who was the only expert who read and correctly recalled G.I.'s school records and all depositions in the case related to G.I.'s medical condition, education and behavior. Dr. Woodruff testified that G.I.'s school and medical records reflected *no significant behavior problems prior to the accident*, but rather, only isolated, minor instances of mis-behaving that is completely normal for children. (E.g., JA 732-733 at 183:7-186:25) G.I. had no history of violent outbursts or suspensions from school prior the accident. He had no history of any disciplinary action in school. In fact, the last record of even G.I.'s mother noting any misbehaving was *two and a half years before the*

accident, when G.I. was four years old, noting an occasion when he hit his sister. (JA 733 at 184:20-185:20) Dr. Woodruff testified that his own children hit each other and that this behavior between siblings is normal. (JA 733 at 186:21-22)

Dr. Parr, who was employed by CNMC when she treated G.I. after the accident, considered G.I.'s school records, medical records and reports from his mother regarding his behavior, his play patterns with his sister and other children, as well as his favorite television show, "Dora the Explorer." (JA 878 at 24:2-25:2) Dr. Parr testified that a typical symptom of post concussive syndrome is behavior changes that include outbursts, such that a person gets upset easily. (JA 879 at 27:5-13)[17] Dr. Parr found no record indicating that G.I. had had any outbursts of violence or other behavior problems at school. (JA 878-879 at 22:9-25:2; *see also, e.g.,* testimony of Dr. Gaillard, JA 916 at 172:12-25; and Debra Jenkins, LCSW, at JA 893 at 83:3-24). Dr. Parr also testified that post concussive syndrome results from an impact to the head that injures brain cells. Dr. Parr testified that post concussive syndrome may resolve within a short period of time or be long term. (JA 879 at 27:15-22).

Colonial's expert, Dr. Franz, and CNMC"s expert, Dr. Watkin, were completely unaware that G.I. had been removed from his neighborhood school. In fact, Dr. Watkin thought that he had simply been moved to a smaller classroom and that then, "everything

[17] When Plaintiffs' counsel asked her whether post-concussive syndrome can be permanent, CNMC's attorney objected, stating that Dr. Parr could not answer this question because she was a "fact witness" and not an expert and the Court upheld this objection, precluding Dr. Parr from answering this question (JA 879-880 at 27:21-28:7); yet, Defendants were permitted to ask questions of other treating physicians of G.I., who are employees of CNMC, as if they were experts and have cited these doctors, such as Drs. Gaillard and Dean, regarding general trends and statistics regarding the duration of concussions for children who, primarily, received minor concussions from typical sports injuries, such as soccer, falling onto grass the length of their own height.

was fine." Neither Dr. Franz nor Dr. Watkin was familiar with G.I.'s school records or his behavior in school after the accident. Since they both began their "analyses" from their respective client's insistence that G.I. never had post-concussive syndrome in the first place, neither Dr. Franz nor Dr. Watkin followed G.I.'s progress to assess when the post-concussive syndrome ended -- if ever, and if not resolved, when it would end.

Dr. Woodruff is the only expert who discussed G.I.'s post concussive syndrome up to and including the date of trial. Like Dr. Parr, he characterized G.I.'s symptoms as "ongoing." (See Opening Brief at 7, 12, 23-26) Dr. Woodruff explained that G.I. continued to exhibit symptoms of post concussive syndrome, at home and at school. (*Id*.) Dr. Woodruff referred to G.I.'s school records, documenting that G.I. he was removed from the neighborhood school, special education program, where he attended for the year prior to the accident and for nearly a year thereafter, until they could no longer handle or accommodate the unpredictable, violent outbursts that he had begun to exhibit after the accident. (*Id*.) In addition to G.I.'s medical and school records, Dr. Woodruff had read the depositions of G.I.'s teachers, neurologists, psychiatrists, social workers, therapists and both of his parents. (*Id*.)

Ms. Woughter, who had taught G.I. for two years, testified that G.I. had to be removed from the neighborhood school, where he was popular and loved, to a "special school," Independent Hill, for children whose violent behavior posed a danger to themselves or others, and even included a padded room, as a temporary "holding place" for children who were so violent or uncontrollable that they had to be removed from the classroom. (JA 785-786 at 183:17-184:6) Ms. Woughter's testimony, as well as G.I.'s school records, documented his continued violent outbursts at school after the accident,

which posed a threat to G.I., as well as to his classmates and even his teachers. (JA 948-967 at 102:12-177:24)

Ms. Woughter, described the "pre-accidence" G.I. as follows.

> G.I. a very social child. Very dear boy. He wasn't necessarily the party starter, but once there was something going on, he wanted to be involved. he liked his classmates very much, he was well liked by them. He could be stubborn, he could be obstinate. But we were always able to find the motivator or lessons. He was a little boy, a nice little boy.

(JA 947 at 96:12-19)

Ms. Woughter testified that G.I. was "chatty" in the hospital the day after the accident, when she brought him a "Dora the Explorer" book. (JA 949 at 102:12-104:10) The jury also saw a video of G.I.'s 4th birthday party, which showed him playing, talking, running, and jumping into a "moon bounce," with his sister and other children. (JA 724 at 152:9-154:11) In medical records, Dr. Gaillard, who was G.I.'s treating physician at CNMC for three years before the accident, described G.I. as "a very pleasant child" who speaks Spanish better than his speaks English and laughs at Dr. Gaillard's jokes. (JA 916 at 172:12-173:23) Dr. Gaillard testified that there was no record of any violent episodes or any problems in school that would cause him to be suspended, prior to the accident. (*Id*.) Ms. Woughter testified that, although G.I. did not usually speak in formal sentences, with pronouns and proper tenses, but he communicated in incomplete sentences in a manner that he was understood by his teachers and peers. (JA 948 at 100:21-948:8. Ms. Woughter also testified that, prior to the accident, she never observed any incidents wherein G.I. became violent or hurt another child or teacher. (JA 948 at 101:9-13. Other witnesses provided similar testimony regarding G.I.'s interactions with others prior to the accident. G.I.'s greatest developmental delay, or difficulty, is with

respect to speech, particularly in developing complete sentences, since the stroke that he had when he was thirteen days old damaged the section of the brain that affects speech. (JA 844 at 82:3-15, Woodruff testimony)

2) Dr. Woodruff's Testimony, and Medical and School Records Demonstrating that G.I.'s Post Concussive Syndrome is "Ongoing," without a Predictable Termination Date, Constitutes Sufficient Evidence of Future Pain and Suffering from the Condition

Defendants' strategy of demeaning and "blaming the victim" -- a beautiful, much loved little boy who was coming to the hospital for help, to live his life to its fullest and healthiest potential -- is particularly disgraceful for a *Children's Hospital* that portrays itself to the public as being nurturing and sensitive to the needs of children with disabilities.[18] The issue on appeal is not whether G.I. was actually functioning at the level of a two-year old, as argued by CNMC -- despite no such diagnosis by any doctor;[19] rather, the issue is whether Judge Josey-Herring appropriately removed the question of future damages for post-concussive syndrome from the jury, simply because Dr. Woodruff explained G.I.'s symptoms from post-concussive syndrome as "ongoing" and explained what he meant by "ongoing," rather than using the "magic word" "permanent." Defendants have cited no case requiring that the word "permanent" be used.

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[18] It is precisely because Defendants used this tactic at trial that the Washington Post reporter, Petula Dvorak, entitled her article discussing her observations of the day she observed the trial as *"After son's fall in hospital garage, the nightmares continue in the courtroom*." (JA JA 2895)

[19] CNMC cites Dr. Dean's testimony for this point, but on cross-examination, Dr. Dean admitted that his testimony was a hearsay statement from someone whom he could not identify and that he did not conduct his own evaluation or even speak to G.I. after rescuing him from the air shaft. (JA 759-780 at 76:19-81:16) Nowhere in G.I.'s medical or school records is there an evaluation by a medical or education professional that estimates G.I.'s mental age at two years old when he was six years old. To the contrary, his school records and the testimony of Ms. Woughter showed that he functioned at a much higher level than a two year old; however, his initial brain injury that caused his epilepsy affected his ability to speak.

CNMC cites *Curry v. Giant Food*, 522 A.2d 1283, 1291 (D.C. 1987), for the proposition that a jury must be precluded from awarding future damages for pain and suffering without expert testimony that the injury is permanent; however, the word "permanent" does not appear in the *Curry* decision. In *Curry*, this Court simply held that future lost income could not be awarded where there was no evidence that the plaintiff earned any less income after the accident than before the accident. The suggestion is that, if the plaintiff had shown lost income form the date of the accident, for a period of years after the accident, he could have been awarded damages for future lost income.

Since the entire basis for precluding the jury from awarding future damages for G.I.'s injuries is based on the fact that Dr. Woodruff used the word "ongoing" instead of "permanent," the definitions of these words should be compared. The on-line Merriam Webster dictionary defines "permanent" as: "lasting or continuing for a very long time or forever : not temporary or changing."[20] As examples of the appropriate use of the word "permanent," Merriam Webster provides the following:

1. She made a *permanent* home in this country.
2. Prolonged exposure to the sun can cause *permanent* skin damage.
3. The museum's *permanent* collection includes works of art from the 18th century.

Similarly, the on-line Oxford Learner's Dictionary defines "permanent" as "lasting for a long time or for all time in the future; existing all the time."[21] Examples of proper usage listed by Oxford include:

a permanent jobpermanent staff.
They are now living together on a permanent basis.
The accident has not done any permanent damage.

[20] http://www.merriam-webster.com/dictionary/permanent.
[21] http://www.oxfordlearnersdictionaries.com/us/definition/english/permanent_1

A permanent fixture (= a person or an object that is always in a particular place)
The gallery hosts various exhibitions and a permanent collection.

The definition and use of the word "permanent" demonstrates that, in order for a condition to be "permanent," it does necessarily have to last "forever," but is ongoing and will last into the foreseeable future. A person can change their "permanent" place of residency, or job, or living arrangement. A museum's gallery collection can change. The word "permanent" is simply used to indicate a long-term condition with no expectation of change. That is exactly what Dr. Woodruff described when he used the word "ongoing" to characterize G.I.'s condition of post concussive syndrome -- as is clear by the detail in which he described what he meant by "ongoing," citing G.I.'s medical and school records to provide examples of G.I. violent outbursts that were preventing him from living his previous life, and how it affected his education, family relationships and relationships with peers and teachers.

Similarly, the word "ongoing" is as defined by Merriam-Webster, on-line, "continuing to exist, happen, or progress : continuing without reaching an end."[22] Indeed, the meaning of the word "ongoing" is synonymous with "permanent," in the context explained by Dr. Woodruff. Dr. Woodruff testified extensively about G.I.'s "ongoing" post concussive syndrome -- which was life-changing. (JA 724-734 and 1075, transcript pages 150:5-189:10 and 24:12-25:1)

3) Dr. Woodruff and G.I.'s Treating Physicians, Established that he that G.I. Suffered Post Concussive Syndrome from the Accident

Both CNMC and Colonial attempt to mislead this Court by arguing that G.I. did not have a concussion because he was never unconscious in the air shaft, his skull was

[22] http://www.merriam-webster.com/dictionary/ongoing.

not cracked open (although he scalp was split open in three places), his MRI, EEGs and X-rays did not show brain damage and his Glascow coma score was within his normal range; however, *these are not the measures of a concussion or the means by which concussions are diagnosed*. (JA 723-734 at 147:3-150:4) A concussion is a traumatic brain injury caused by a blow to the head, commonly without cracking the skull. (JA 760-761 at 83:20-85:12, testimony of CNMC's Dr. Dean) It is a forceful or the sudden movement of the head in such a manner that the brain hits the skull, causing injury to the brain. (Id.0-761 at 83:20-85:12, testimony of CNMC's Dr. Dean) Concussions can be caused by "whiplash" in a car accident. (JA 761 at 85:1-4) The only physical "test" that can currently be conducted to determine whether a victim has suffered a concussion is a dissection of the victim's brain -- which can clearly only be conducted once the victim is dead. (JA 724, Tr. 148:5-150:4; JA 866 at 167:5-168:2)

Concussions on living people are diagnosed based on objective symptoms of the patient, including, but not limited to, changes in behavior, such as violent outbursts that the patient did not exhibit prior to the concussion. (JA 733 at 184:20-186:25) The force of the blow to the head, the height of the victim's fall and the number of times that the victim's head hit a hard substance, are all factors in assessing the severity of a concussion. (JA 1019 at 179: 8-19, testimony of CNMC's Dr. Watkin) G.I. fell 24 foot fall to the concrete bottom of the air shaft. He suffered post-concussive syndrome, from the date of the accident, March 11, 2009, up to and including the trial, with no indication that the condition had subsided or would subside at any point in the future.

4) No Witness Offered as an Expert on Post Concussive Syndrome Disputed the Treating Physicians' Diagnosis of Post Concussive Syndrome Resulting from the Accident

CNMC and Colonial argue that more experts testified that G.I. did not have permanent, or "ongoing," post-concussive syndrome resulting from the accident, than the Destefano-Ibanez' family's one expert, pediatric neurologist, Dr. Woodruff. This argument is misleading for two reasons. First, the Court limited number each party to one expert witness on the subject of G.I.'s post-concussive syndrome. There was only one expert witness who testified in support of G.I.'s claim for damages for post-concussive syndrome because that was all the Court would allow. There were two expert witnesses who testified on behalf of Defendants because there were two Defendants, CNMC and Colonial. Second, the Court properly provided the jury with Standard Jury Instruction §3.02, which states that jurors may not accord credibility or weight to the number of witnesses, but should evaluate the substance of each expert witness' testimony independently. Certainly, the Defendants should not be able to ask this Court argue, on appeal, what was properly prohibited from arguing at trial.

Defendant relies on Dr. Antell's testimony regarding post concussive syndrome; however, per Judge Josey-Herring's Pre-Trial Order, and express reminder of that order during trial, Dr. Antell was permitted to testify *only* as an expert on post traumatic stress disorder (JA 976 at 4:7-7:17); accordingly, any citation to her testimony regarding post concussive syndrome is improper and should be disregarded.[23]

[23] In addition, Dr. Antell, could not cite one instance in which G.I. had ever had any violent outbursts or endangered or caused harm to anyone, at home or at school, prior to the accident. (JA 1000 at 102: 7-16) Dr. Antell first testified that G.I. was suspended from school prior to the accident for bad behavior, but when confronted with G.I.'s school records, she had to admit that *he had never been suspended prior to the accident* and that

5) No Expert Witness Contradicted Dr. Woodruff's Testimony that G.I.'s Post Concussive Syndrome is "Ongoing," with no Foreseeable End

Colonial's expert, Dr. Franz, and CNMC's expert, Dr. Watkin, were the only expert witnesses offered to testify regarding post concussive syndrome. When asked whether he agreed with the diagnoses of CNMC's Drs. Parr and Gaillard, who were G.I.'s treating physicians after the accident and diagnosed him with post concussive syndrome, Dr. Franz responded: *"... I guess I don't have an opinion on that."* (JA 1017 at 169:22-170:4) **Colonial's expert, therefore, failed to offer an "expert" opinion on the very subject he was called to testify about as an expert.** Since Dr. Franz had *no opinion* regarding whether G.I. had post concussive syndrome in the first place, he certainly could offer *no opinion* about how long it lasted. All Dr. Franz offered was general testimony about concussions and statistics on how long it takes, *on average,* for a typical concussion to resolve. **Dr. Franz provided no testimony specific to the child at issue**.

Like Dr. Franz, Dr. Watkin testified about generalities and statistics regarding childhood concussions, but he never provided any opinion that G.I. had a concussion that resolved at any given point in time. When asked specifically about *G.I.'s concussion*, rather than the statistics and generalities regarding child concussions, CNMC's expert, Dr. Watkin, did not provide a direct response to this question, but instead, spontaneously

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she had mistakenly noted that he had been suspended, when, in fact, he had been sent home due to an epileptic seizure. (JA 1001 at 104:9-12) Not only did Dr. Antell misrepresent illness as misconduct, but she did not even understand that, after the accident, G.I. had been expelled from his neighborhood special education program to a school reserved for children with uncontrollable, violent behavior, nor did she understand that the only reason he could not return to his neighborhood school, special education program, was because of his ongoing violent behavior. (JA 1001-1003 at 105:22-112:11)

proclaimed that he wanted to "go on record" as stating that the accident was "a horrific event" and it was "miraculous" that G.I. survived it/ (JA 1021 at 186:23-187:2)

Drs. Woodruff, Watkin, Franz and Parr all testified that most children who suffer concussions have those concussions "resolved" within a short period of time; however, the "most children's concussion resolution" argument itself acknowledges that *some* children who suffer concussions suffer long-term post concussive syndrome. What children, suffering what accidents, fall within the category of children who suffer long-term post-concussive syndrome? *Even Colonial's expert, Dr. Franz admitted that some people who suffer post concussive syndrome never recover from it.* (JA 866 at 168:3-6).

The statistics on child concussion resolution developed primarily from "typical" child concussion cases, resulting mostly from playing sports, does not constitute evidence of the condition of this particular child -- G.I. G.I.'s accident was *not* a typical child "sports" situation concussion. G.I.'s diagnosis and prognosis cannot be opined by statistics -- as if G.I. fell four feet (his own height) onto on a grassy field playing soccer, or fell from his bicycle, wearing a helmet. G.I. fell down *two stories -- 24 feet*, onto a *concrete floor*, with *no head protection*.

Defendants claim that Dr. Parr, one of the CNMC doctors who diagnosed G.I. with post-concussive syndrome (JA 877-879 at 18:21-19:4, 20:17-23), provided a prognosis that indicated that G.I.'s post concussive syndrome would resolve within a short period of time; however, Dr. Parr *actually* testified that G.I.'s post-concussive syndrome was "**ongoing**" as of the last time that she saw him (JA 878 at 22:5-8) and that his prognosis for recovery was only "**fair**" -- even with "continuing treatment, therapy, behavior modification and monitoring." (JA 880 at 28:9-19) Despite Defendants'

attempt to redefine the word "fair," the meaning of the word is clear to anyone who has ever received a credit report. G.I.'s prognosis for *ever* recovering from post concussive syndrome -- assessed by his CNMC treating physician -- was not "excellent" or even "good," but rather, only "fair," even with the best of therapy and treatment.

Dr. Parr expressly testified that post concussive syndrome may be long term (JA 879 at 27:15-22); however, when Plaintiffs' counsel asked Dr. Parr whether post concussive syndrome is sometimes permanent, Defendants objected and Judge Josey-Herring sustained the objection, since Dr. Parr was called as a treating physician and not an expert witness. (JA 879-880 at 27:23-28:7).[24] It is undisputed that Dr. Parr never saw G.I. after 2009 and that she did not follow his progress beyond her last visit with him and therefore could not comment on his condition in 2013, at the time of trial.

Colonial and CNMC provided absolutely no testimony or evidence regarding a date in the past when the post-concussive syndrome had ended or the prognosis for how long into the future he would suffer from his "ongoing" post concussive syndrome; accordingly, Dr. Woodruff's testimony, that G.I. continues to suffer from post-concussive syndrome, and that there is no predictable end to it in the future, *is undisputed*. Since the testimony that the condition is "ongoing" is undisputed, *Underwood v. National Credit Union*, 665 A.2d 621, 654 (D.C. App. 1995), applies to this case, holding that the jury can *infer* permanent injury where the condition has been ongoing for years -- *even without medical testimony that the condition is permanent* -- even if Dr. Woodruff's testimony is not deemed to constitute testimony that his condition is permanent, to a

[24] As is clear from the Briefs of both CNMC and Colonial, however, Judge Josey-Herring permitted the same question to be asked of treating physicians who were still employed by CNMC.

reasonable degree of medical certainty. Pursuant to *Underwood*, the jury should have been permitted to infer permanence since there was medical testimony establishing causation and the condition was "ongoing" even four years after the accident, with no indication that there would be any end to it. (See Opening Brief at 24-25)

6) Even though Judge Josey-Herring Understood Dr. Woodruff's Testimony to Mean that G.I.'s Post Concussive Syndrome is Permanent, she Refused to Allow the Jury to Reach the Same Conclusion

Judge Josey-Herring precluded the jury from awarding damages to G.I. for future pain and suffering for post concussive syndrome *solely* based on the Defendants' argument that "ongoing," did not mean "permanent," and therefore, did not constitute sufficient evidence for the jury to award damages for future pain and suffering-- even though, Judge Josey-Herring *herself* initially interpreted Dr. Woodruffs' testimony to mean that G.I.'s post concussive syndrome was permanent. (JA 412) The Order stated:

> At the charge conference on April 15, 2013, the Court determined that it would be appropriate to allow a damage instruction with respect to future damages related to Post-Concussive Syndrome based on a finding that Dr. Woodruff's testimony that G.I.'s Post-Concussive Syndrome was caused by the accident and that the symptoms of that diagnosis were "ongoing." The Court inferred from that testimony that Dr. Woodruff meant that G.I.'s course of Post-Concussive Syndrome was permanent.

Despite her own understanding of Dr. Woodruff's testimony, in its entirety and context, as stating his medical opinion that G.I.'s symptoms from Post-Concussive Syndrome are permanent, Judge Josey-Herring changed her mind and *prohibited the jurors from reaching the same conclusion of fact that she initially reached, holding that there was insufficient evidence for a reasonable jury to reach the same conclusion that she initially reached.*

As discussed in the family's Opening Brief, at 21-26, Judge Josey-Herring expressly considered the issue of whether the jury should be permitted to award G.I. damages for future pain and suffering from post-concussive syndrome a very close question; she entertained argument on this issue numerous times during the trial and actually *changed her mind* on the issue, even after she had provided instructions to the jury allowing the jury to consider future damages. On April 15, 2014, after substantial argument on this issue, Judge Josey-Herring ruled *in favor of Plaintiffs on this issue*, agreeing that Dr. Woodruff's testimony was sufficient to allow the jury to consider "*future damages*" for G.I.'s "ongoing" post concussive syndrome; yet, that same evening, Judge Josey-Herring e-mailed the parties ordering them to re-argue the issue.

Although none of the parties presented any new case, evidence or arguments, on April 17, 2013, Judge Josey-Herring reversed her own ruling on the jury instruction -- even though she had already read it to the jury. Even if there had been a dispute, among the experts, regarding how long G.I.'s post-concussive syndrome lasted, *or will last*, this would have been a factual dispute that should have been submitted to the jury -- particularly in light of Judge Josey-Herring's own vacillation on this issue and apparent lack of confidence in her own decision.

7) Even if Dr. Woodruff's Testimony is Deemed Insufficient to Prove Permanence, it Established Future Damages Beyond April 22, 2013

Dr. Woodruff clearly testified, and summarized the supporting evidence that was also before the jury, that G.I. continued to suffer from post concussive syndrome from the date of the accident, through the date of the trial. These "ongoing" symptoms were the reason that G.I. was being kept in Independent Hill School. His neighborhood school could not protect him, his classmates or even his teachers from his violent outbursts that

erupted *only* after the accident -- changing the boy that they had known as loving, popular and cooperative, into a boy that they could no longer handle in a normal school setting.

At trial, G.I.'s counsel, the undersigned, argued as follows.

> MS. MARTIN: The exact quote that you read says, "The medical expert's testimony is necessary to establish causation." And the point is that Dr. Woodruff testified that it's ongoing. And if we're not permitted to argue "permanence," -- and Underwood v. National Credit Union, 665 A.2d 621 at 654 D.C. Appellate 1995, specifically says that, where the injury has been ongoing for years, the jury can infer permanence. And to do otherwise in this case, Your Honor, would be to deceive the jury into believing that, you know, as of tomorrow, he's fine. And he remains in the school with the padded room.
>
> MR. HASSELL: It's a matter of whether it's permanent.
>
> MS. MARTIN: When does it end? What date into the future do we predict? I mean he's going to be in the school tomorrow. It's ongoing. And Underwood permits the inference that it will continue to be ongoing. Dr. Woodruff also testified and so did Dr. Tuttle, actually, with respect to no available medicine, that there's nothing that they can give him to stop these violent episodes. So, right now, there is no cure.

(JA 1256 at 29:10-30:5)

On appeal, CNMC and Colonial appear to argue that the jury was free to award G.I. some future damages for post-concussive syndrome, as long as it was not for *permanent* post-concussive syndrome; however, this assertion is contrary to Defendants' arguments at trial. Both CNMC and Colonial argued that the jury should not be able to award G.I. damages for *any* "future" pain or suffering from post concussive syndrome. The instruction itself is confusing -- as illustrated, for example, by the Defendants' fluctuating interpretations. At a minimum, this jury instruction created juror confusion -- particularly since the jury was read one jury instruction and the trial judge changed it before she sent the jury to begin their deliberations.

Colonial argues that the trial court's instruction prohibiting the jury from awarding G.I. any damages for post concussive syndrome for "future" pain and suffering was harmless error because he was awarded $1.56 million; however, an award that included his future pain and suffering, physical and mental, as well as the loss of enjoyment of life, regarding his ability to function, educationally, socially and in any type of employment, would have required a multi-million dollar award. The comparatively meager $1.56 million dollar award (minus attorneys' fees and out of pocket litigation costs for these five years of contentious litigation), leaves G.I. with a relatively small amount of money for his future.[25] It is even a conservative award for his past pain and suffering, considering the severity of his undisputed physical injuries and post traumatic stress disorder, also diagnosed by CNMC doctors and confirmed by additional doctors and licensed clinical social workers.[26]

Colonial attempts to play with semantics by arguing that Judge Josey-Herring's preclusion of a jury award for future damages for "permanent" post-concussive syndrome

[25] Since Judge Josey-Herring refused to shift $195,870.07 of $247,553.91 of Plaintiffs' actual litigation costs to CNMC and Colonial (see family's Opening Brief at 47-54), this reduces amount he will receive by nearly $200,000.

[26] Judge Josey-Herring's exclusion of evidence, such as the actual photograph of G.I. that was taken as he was being transported to the Emergency Room (family's Opening Brief at 19-20), is an example of evidence that was improperly excluded that would have provided the jury with a more accurate description of his damages than the testimony of biased doctors employed by CNMC and trying to keep their jobs, or Ms. Destefano, whom the Defendants worked tirelessly to portray as a liar. Jurors would expect a mother to be biased or to perceive her own child's injuries as more severe than others would perceive them. The photo was clearly the "best evidence" available of G.I.'s pain, as was apparent in the photo, showing his face. The cliche that "a picture is worth a thousand words" is applicable here. Anyone viewing this photo of this boy's blood covered face, can see that he is crying, terrified and in horrible pain. G.I. was unable to testify for himself, due to his age, his language limitations and his the concern of therapists that such discussion would cause him to relive the trauma. This photo, therefore, was his once chance to "speak" to the jury. He was denied that opportunity.

did not preclude the jury from awarding damages for future "inconvenience;" however, "inconvenience" is not the same as "pain and suffering," further delayed or impaired learning due to the change in his schools, the inability to socialize with others as he did prior to the accident, or the overall loss of enjoyment of life. "Inconvenience" is a vague word that indicates trivial impositions, rather than the life-changing effects that G.I. suffered, and continues to suffer, from post concussive syndrome. The jury awarded "zero" for such vague "inconvenience," in light of the Court's express instruction and Verdict Form expressly prohibiting them from awarding G.I. any damages for 'future" pain and suffering from permanent post concussive syndrome.

On page 12, fn. 7, of its Brief, CNMC claims that the Court offered the Plaintiffs the opportunity to offer alternative language, but they failed to do so. This is not true. Plaintiffs were willing to accept the compromise language that the Court used to instruct the jury before she reversed her own order and adopted the express exclusion of damages for permanent post-concussive syndrome insisted upon by Colonial. (*See* Opening Brief at 23-26) Although Judge Josey-Herring's compromise instruction on this point abandoned the Standard Jury Instruction §12-2, it at least would have permitted the jury to acknowledge that G.I.'s symptoms were "ongoing" and continuing into the future, whether or not they would end up being permanent.

The jury should have been able to award damages to G.I. for his future pain and suffering, even if they did not conclude that this suffering would be for the rest of his life, based on Dr. Woodruff's testimony, and G.I.'s school records, documenting that he was continuing to have violent episodes and being deprived of an education and socialization at the neighborhood school solely due to the violent episodes that resulted from the post-

concussive syndrome. The Verdict Form, as written, precluded such an award, or at least left jurors believing that they were precluded from awarding such damages.

8) Judge Josey-Herring Abused her Discretion by Denying Dr. Woodruff to Clarify his Testimony on Re-Direct

Dr. Woodruff travelled from Michigan to provide his testimony at this trial. (JA 1354-1355) The trial began behind schedule and continued behind schedule, due to Judge Josey-Herring's extremely detailed interrogation of potential jurors, over a two-day period, as well as permitting repeated arguments over the same issues that were purportedly decided pre-trial. Dr. Woodruff was scheduled for a family vacation, out of the country, and had to return to Michigan on the night of his direct testimony. (Id.) Judge Josey-Herring threatened to strike Dr. Woodruff's testimony if he did not complete his cross-examination (JA 740 at 212:2-9). Plaintiffs' counsel did her best to ask him the most important questions on direct and to allow time for Defendants to cross-examine him. Judge Josey-Herring interrupted CNMC's cross-examination of Dr. Woodruff, at 4:45 p.m., because it became clear that he could not be properly examined before the end of the day (JA 738 at 206:14-18). CNMC's counsel, Mr. Smith, cross-examined Dr. Woodruff regarding G.I.'s medications, brain scans and the effect of his stroke, when he was thirteen days old. (JA 735-738 at 193:9-206:8) Mr. Smith used a chart of G.I.'s medications, both before and after the accident, up to the date of trial, as well as models and photographs of brains. (Id.) The chart, photos and models were admitted as exhibits. (*Id*.) The purpose of these exhibits and the surrounding questions was clearly to imply that G.I.'s violent outbursts were either from his medications or from his pre-existing condition of epilepsy and the stroke he suffered as an infant. Colonial had not yet conducted cross-examination of Dr. Woodruff. The parties agreed that Dr. Woodruff

could return on April 9, 2013, to complete his cross-examination and re-direct testimony. (JA 738-740 at 206:14-213:13)

When Dr. Woodruff returned on April 9, 2013, to continue his testimony, Defendants waived any further cross-examination. (JA 1354-1355) Plaintiffs' counsel attempted to conduct redirect, based on CNMC's cross-examination of Dr. Woodruff and the charts and photos admitted as exhibits; however, Defendants objected to nearly every question as outside the scope of cross-examination. (JA 1074-1078 at 20:14-35:24) G.I.'s counsel, the undersigned, argued that Mr. Smith's questions regarding G.I.'s medications required re-direct to rebut the suggestion that G.I.'s violent outbursts were due to his medications, rather than to post-concussive syndrome. (Id.) The undersigned attempted to ask Dr. Woodruff questions about whether these charted medications on G.I.'s current and future behavior and whether there were any medications he could take that would change his behavior or "cure" the post-concussive syndrome. (JA 1074-1080 at 20:14-43:22)

Judge Josey-Herring sustained nearly all of the Defendants' objections and even threatened to fine Plaintiffs' counsel if she asked one more question that the Court deemed outside the scope of cross-examination. (JA 1078 at 35:12-18) Although Plaintiffs' counsel believed that her questions were appropriate, in light of CNMC's cross-examination, she accepted the Court's rulings, as she had to do, and argued, instead, that, in the interests of justice and clarification, Plaintiffs be permitted to re-open their case for the limited purpose of completing Dr. Woodruff's testimony, in light of the scheduling chaos that existed at the time of his direct testimony. (JA 1078-1079 at 35:19-41:1)

Judge Josey-Herring refused, stating that it would be reversible error for her to re-open direct (JA 1079 at 40:2-13)[27]

Judge Josey-Herring stated that the Defendants would be prejudiced because they could not bring their experts back to refuse anything that Dr. Woodruff would say; however, as Plaintiffs' counsel pointed out, Plaintiffs had accommodated Defendants' expert witnesses by allowing him to testify during Plaintiffs' case in chief (JA 1079 at 38:20-22). Since Colonial's expert, Dr. Franz, was expected to testify before Dr. Woodruff anyway, therefore, Colonial could not be prejudiced by allowing Dr. Woodruff to continue his direct testimony on April 9, 2013. (JA 1354-1355) Plaintiffs also offered to allow Dr. Watkin, who is local, to return to rebut any testimony provided by Dr. Woodruff, in order to a void any possible prejudice to Defendants. (JA 1354-1355) Defendants refused this offer in favor of preventing Dr. Woodruff from clarifying any issues that might have been unclear in his forced "rushed" direct testimony. Plaintiffs' counsel stressed the importance of clarifying Dr. Woodruff's testimony, since he was the only expert permitted to testify on G.I.'s behalf, regarding post concussive syndrome, and the damages that he obtains in this trial. Plaintiffs' counsel stressed, "This is a little boy's life." (JA 1079 at 39:7-10)

To the extent that Dr. Woodruff's testimony was not completely clear on the issue of permanence, or at least that G.I.'s injuries were continuing beyond the date of the trial, Judge Josey-Herring abused her discretion and acted against the interest of justice when there was a clear opportunity to clarify the testimony of the only expert witness on this

[27]It was clearly possible for Judge Josey-Herring to exercise her discretion to re-open direct. She did re-open direct testimony with another witness, Belete Belete, later in the trial. (JA 840-841 at 66:2-67:7)

subject that G.I. was permitted -- although Defendants had "two shots" at expert testimony on this issue, since there were two Defendants, and Defendant CNMC controlled almost all of G.I.'s treating physicians, as their employer. The equities, prejudices and interests of justice compelled permitting Dr. Woodruff to clarify and elaborate on his testimony regarding G.I.'s future pain and suffering.

C. The Jury should have been Permitted to Award Punitive Damages

1. Punitive Damages are not Restricted to Intentional Acts, but are also Awarded for a Defendant's "Reckless Disregard" for the Safety of Others

Despite the rulings of the two previous judges on this issue, [28] at trial, Colonial again argued that the Destefano-Ibanez family was required to prove intentional acts by Colonial officers or directors in order to sustain their claim for punitive damages. As set forth in the family's Opening Brief, at 28, and as acknowledged by CNMC, in its Brief,

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[28] The first and second judges who were assigned this case at the trial court level, Judge Bartnoff and Judge Edelman, both sustained the Destefano-Ibanez' family's claim for punitive damages based on their allegation that Colonial managers (*not "*officers" or "directors") acted with "reckless disregard" for the safety of others, in their maintenance of the garage. On April 30, 2010, and May 4, 2010 (Dkt. #s 10 and 15), respectively, CNMC and Colonial filed separate *Motions to Dismiss Plaintiffs' Claim for Punitive Damages*, arguing, as they argue on appeal, that Plaintiffs were required to allege "intentional" or "willful" acts in order to obtain punitive damages. Judge Bartnoff denied both Defendants' motions on August 27, 2010, holding that punitive damages may be assessed against defendants for conduct that is not necessarily "intentional," but that amounts to "reckless disregard" for the safety or rights of others. Judge Bartnoff held that the Complaint was sufficient to sustain claim of punitive damages for, is sufficient as initias proposed Amended Complaint. Judge Bartnoff did not require Defendants to Answer the proposed Amended Complaint, but accepted it as "a more definite statement." (August 27, 2010 Hearing, Dkt. # 53, 54 and 55) Judge Barnoff also held that the Plaintiffs only need show that the reckless actors were "managers" of Colonial, not necessarily officers or directors. (Id.) After discovery, Defendants filed renewed *Motions for Summary Judgment on Punitive Damages*. Judge Edelman, denied that motion, agreeing with Judge Bartnoff, that punitive damages may be awarded for conduct by Colonial managers that amounts to reckless disregard for the safety of others. (JA 352, at 21)

page 23, this is simply not the standard. Punitive damages may be awarded where a defendant has acted with "reckless disregard" for the safety of others. Under District of Columbia law, "punitive damages are properly awarded where the act of the defendant is accompanied by fraud, ill will, **recklessness**, wantonness, oppressiveness, willful disregard of the plaintiff's rights, **or** other circumstances tending to aggravate the injury." (*Emphases added*.)[29]

Judge Josey-Herring reversed the holdings of the two previous judges, acknowledging that "caution" favored allowing the jury to consider punitive damages and letting the parties argue regarding whether a punitive award should be vacated (Opening Brief at 27-28; JA 1345 at 53:7-13); yet, in consideration of the "harm to Defendants' reputation," Judge Josey-Herring precluded the jury from considering punitive damages because the family did not prove that the accident was caused by *intentional* acts of Colonial's directors or officers -- facts that the family never alleged in the first place.

2. CNMC's Managers Acted with Reckless Disregard for the Safety of Others and Conducted a "Sham Investigation" or "Cover Up"

The jury should have been permitted to assess punitive damages against CNMC. The jury heard sufficient evidence to find that CNMC managers and/or officers acted with reckless disregard for the safety of its patients and their families customers and that

[29] *District Cablevision Ltd. Partnership v. Bassin*, 828 A.2d 714, 726 (D.C. 2003); *Mitchell v. DCX, Inc.*, 274 F.Supp.2d 33, 52 (D.D.C.2003) (citation and internal quotations omitted); *see also Pitt v. District of Columbia*, 491 F.3d 494, 508 (D.C.Cir.2007). *See also Standardized Civil Jury Instructions for the District of Columbia,* No. 16.01[1], quoted in family's Opening Brief, at 28. Judge Josey-Herring bifurcated the trial regarding punitive damages. She heard arguments on this subject over and over and repeatedly delayed her decision. Literally, as the jury was knocking on the courtroom door with their verdict on the issues of liability and compensatory damages, Judge Josey-Herring was delivering her decision on the issue of punitive damages. (JA 1347 at 61:10-12)

this reckless disregard resulted in the air shaft to remain open for weeks, if not months before the accident. Had Roberta Alessi bothered to even read the "check sheets" that Colonial provided her, asked for them when they were not provided, or delegated the duty to supervise Colonial to someone under her direction, CNMC would have discovered the open air shaft long before little G.I.'s appointment with Dr. Gaillard on March 11, 2009 and this accident would never have occurred.

Despite its own Press Release to the public, promising, and representing that it conducted a "thorough investigation" of the accident (Dkt. #64-75, *G.I.'s Motion for Summary Judgment,* Exs. JJJ and KKK), CNMC instead conducted a "sham" investigation, or "cover up." "Sham" investigations merit punitive damages. *Daka Inc. v. McCrae*, 839 A.2d 682, 696-697 (D.C. App. 2003) As discussed in the family's Opening Brief at 16-17, Judge Edelman expressly precluded the Destefano-Ibanez family from making the "sham investigation" argument and Judge Josey-Herring expressly excluded evidence of the "sham investigation at trial;" however, discovery revealed that:

1) CNMC removed its own Safety Director, Patty Needham, from the investigation of the accident, after she declared it a "sentinel event" (*Id.*, Ex. J, Needham depo at 172:17-197:11, 181:16-182:14; *see also* 68:17-16 describing her duties, including training and supervision regarding safety on the CNMC premises);

2) CNMC's General Counsel, Rebecca Cady, testified that CNMC did *not* interview parking attendant Freddy Sanchez, when, in fact, there were two written statements from him and he was interviewed by both CNMC and Colonial managers and attorneys (Dkt. #64-75, *G.I.'s Motion for Summary Judgment,* Ex. JJ, Cady depo at 77:13-16; 80:15-20, 120:5-130:11);

3) Ms. Cady instructed the Director of Facilities, Robert Beckwith, to close the vent back up, with the trash and dead rat in it, and to leave it there -- which constituted spoilation of evidence, preventing any testing or inspection of the trash to determine how long it had been deteriorating at the bottom of the air shaft or how long the shaft had been open (Id., Ex. II, Beckwith II depo at 8:20-14:19, 19:5-25:16).

4) CNMC did not review its own surveillance videos to determine whether Colonial employees had conducted any inspections of the garage prior to the accident, or to determine whether anyone removed the vent cover in question, or any other grille in the garage, but only reviewed the videos to identify every "clip" of Ms. Destefano and her children, throughout the hospital, to try to find a reason to blame them for the accident.

The jury should have been informed of CNMC's conduct constituting a "sham" investigation and instructed on the law with respect to punishing such conduct.

CONCLUSION

The Destefano-Ibanez family respectfully requests that this honorable Court:

1) deny CNMC's Appeal and order CNMC to immediately pay to the Destefano-Ibanez family, through their counsel, the judgment ordered by the trial court, including the jury award of $1,586,000, plus $247,553.91 in costs, plus interest;

2) impose sanctions on CNMC for filing it a frivolous appeal;[30]

3) restore Ms. Destefano's claim for negligent infliction of emotional distress and remand her claim for trial;

4) remand the case for a trial on the issue of G.I.'s claim for future damages for pain and suffering from post-concussive syndrome, with an instruction that the jury may

[30] Sanctions should include interest loans necessary to litigate this case.

infer permanence from expert testimony and medical/school records that indicate that the condition is "ongoing," with no indication that it will end in the foreseeable future;

5) remand V.I.'s claim for negligent infliction of emotional distress for re-trial, with appropriate time allocations and evidentiary rulings;

6) remand the case for a trial on the issue of punitive damages against CNMC and Colonial, with an instruction that punitive damages may be awarded for conduct by any Colonial "manager" that constitutes "reckless disregard for the safety of others;

7) order that no "gag" or other improper infringement on First Amendment Rights order shall be imposed upon the parties or their counsel on remand;

8) the following evidence shall not be excluded from the trial on remand:

a) the March 11, 2009 photo of G.I. in the Emergency Room;

b) evidence regarding the condition of all vent covers in the garage;

c) evidence of CNMC's negligent training and supervision with respect to safety in its hospital, including its garage; and

f) the testimony of the Freddy Sanchez.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 11th day of August, 2014, a true copy of the foregoing *Response Brief of Appellants-Cross-Appellees,' Wendy Paola Destefano, et. al., in Opposition to Children's National Medical Center's Cross-Appeal, and Reply Brief of Appellants to Colonial's Opposition to their Appeal,* was served upon the persons named below, by e-mail, by consent.

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