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) COLONIAL PARKING INC.'S CROSS-APPEAL;
AND
2) COLONIAL PARKING, INC.'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 COLONIAL PARKING, INC.'S APPEAL

A. Introduction

The Destefano-Ibanez family hereby responds, in opposition to Colonial Parking Inc.'s appeal of the April 22, 2013 jury verdict. The jury awarded $1.5 million dollars to G.I., against Colonial, jointly and severally with Children's National Medical Center ("CNMC" or "the hospital"). 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 verdicts against Colonial were fully supported by well-established law in the District of Columbia, imposing a duty upon businesses to operate on premises and in a manner that reasonably protects its customers from safety hazards.

B. **Colonial's Appeal is Frivolous**

As set forth below, Colonial's arguments on appeal is completely frivolous and contrary to controlling D.C. law, as well as the facts of the case. Colonial filed its cross-appeal for the purpose of obtaining a stay on the judgment in favor of the children, G.I. and V.I. , 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.

C. **Colonial had a Duty to the Ibanez Children, as Customers, to Maintain a Reasonably Safe Parking Environment**

1. Public Policy Mandates that Colonial not be Permitted to Turn all Established Premises Liability Law "On its Head"

This Court has held that "recognizing a duty is ultimately a determination grounded in public policy decisions." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 817 (D.C. 2011).

> It is well established that a claim alleging the tort of negligence must show: (1) that the defendant owed a duty to the plaintiff. (2) breach of that duty, and (3) injury to the plaintiff that was proximately caused by the breach. *See, e.g. District of Columbia v. Cooper*, 483 A.2d 317, 321 (D.C. 1984) (citing PROSSER, HANDBOOK OF THE LAW OF TORTS §30 (4th ed. 1971) (hereinafter, "HANDBOOK OF THE LAW OF TORTS")). The court's threshold determination -- namely, the existence of a duty is "essentially a question of whether the policy of the law will extend the responsibility of the conduct to the consequences which have in fact occurred." *Id*. at 321 (quoting HANDBOOK OF THE LAW OF TORTS § 42). Stated another way: "The statement that there is or is not a duty begs the essential question -- whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." *Id.* (quoting HANDBOOK OF THE LAW OF TORTS § 53).

22 A.3d at 793.

As the trial court held, several times, the body of law including, but not limited to, *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969), *Daisy v. Colonial Parking, Inc*., 331 F.2d 777, 780 (D.C. Cir. 1963); *Colonial Parking, Inc. v. Morley*, 391 F.2d 989 (D.C. Cir. 1968) and *Safeway Stores v. West,* 180 F.2d 25, 26 (D.C. App. 1950), imposes a duty on businesses in the District of Columbia -- including, specifically, this Defendant, Colonial Parking, Inc. -- to maintain premises that are safe for customers specifically, and the public, generally.

In *PMI v. Gilder,* 343 A.2d 51 (D.C. 1975), this Court also acknowledged the special relationship between a garage operator and its customers to exercise reasonable

care to prevent harm to the customer's car -- even if the harm is committed by a third party. PMI operated its garage on the property of the Hilton Hotel. This Court held that PMI exercised "control" over the garage, since it (like Colonial in the present case), was responsible for "housekeeping and general operations that might pertain to the parking industry." 343 A.2d at 53.

This Court held that a bailment relationship exists between PMI and its customer, even when the customer parked his own car and locked it. This Court held that the customer was not a "stranger" to PMI, but had a special relationship with PMI based on the implied contract, derived from the surrounding circumstances; accordingly, the parker had a reasonable expectation that PMI would exercise reasonable care to prevent tampering with his car. 343 A.2d at 54. "It is the operator, not the car owner, who is in a position to have the superior knowledge" of the conditions in the garage. *Id.*

Similarly, Colonial had superior knowledge to Ms. Destefano regarding hazards in the garage. She and her children had a reasonable expectation that Colonial would exercise reasonable care in maintaining the garage and directing her to a parking space, in a manner that did not place them in a dangerous situation. Colonial asks the Court to turn all premises liability law in the District of Columbia and all other jurisdictions "on its head," so to speak, by holding that a commercial business does not have a duty to its customers to provide a reasonably safe environment for them while they are conducting the business which they were invited to conduct in those premises.[1]

[1] If a hazard were so severe that it could not be blocked off, the occupier of the land, or commercial business, might even have a duty to its customers to close the garage until it is repaired. The commercial business would then be free to pursue the landowner for lost income, due to the landowner's failure to provide a safe parking structure; however, it could not keep operating in a dangerous premises.

If this Court were to reverse this long-standing body of premises liability law, it would create havoc in the District of Columbia and make shopping, parking, eating in a restaurant, or conducting any other type of business in the District a high risk, a potentially dangerous undertaking. Customers reasonably rely on businesses in the District to operate on premises that comply with D.C. Building Codes to ensure their safety. Shopping or parking should not require customers to walk through stores, garages -- particularly a garage in a Children's Hospital -- as if they are walking through "a mine field."[2] Public policy certainly mandates that the law continues to protect the public against dangerous business premises.

2. At Trial, Colonial's Counsel Admitted that Colonial had a Duty to Ms. Destefano and her Children Protect them from Open Air Shaft in the Garage

As the Destefano-Ibanez family stated in their Opening Brief, at page 11, Colonial's counsel, Mr. Hassell, actually *admitted* that Colonial's parking attendants acted negligently in failing to report the hole in the wall, adjacent to a designated parking space, through which little G.I. fell. (JA 1337 at 22:12-23). In his argument that the jury should be expressly prohibited from assessing *punitive damages* against Colonial, Mr. Hassell had the following exchange with Judge Josey-Herring.

MR. HASSELL:
....

[2] Not only does a commercial business owe a duty of safety precaution to its customers, but this Court has long abandoned even distinctions between business invitees, licensee and trespasser, replacing these categories with a simple rule of foreseeability. In the District of Columbia, "the applicable standard for determining whether an owner **or occupier of land** has exercised the proper level of care to a person lawfully upon his premises is reasonable care under all of the circumstances (*emphasis added*)." *Youssef v. 3636 Corp.*, 777 A.2d 787, 792 (D.C. 2001) (*quoting Sandoe v. Lefta Assoc.*, 559 A.2d 732, 738 (D.C. 1988).

> I will go back to the outrageous conduct, Your Honor. I mean I'm always a little bit unclear as to what outrageous conduct that is being alleged is.[3] There is Mr. Colindres, who saw the hole and I suppose Mr. Sancez and Mr. White Shoes. But I don't think that the plaintiff has ever arguable (sic) that his conduct was outrageous. He seems to have been, you know, just someone who was negligent. And I agree with that. You can argue that. That's a reasonable conclusion that she should have done something more. You know, we've argue (sic) that in front of a jury.
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> THE COURT: Or even may be grossly negligent.
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> MR HASSELL: It may even be grossly negligent.
>
> THE COURT: Okay.

As quoted above, Mr. Hassell even admitted that *Colonial's failure to report this safety hazard constitutes negligence, and may even constitute "gross negligence."* (*Id*.) In its Brief, Colonial claims that Mr. Hassell made this assumption, for the sake of argument, but that is clearly not the case. Mr. Hassell represented the conduct of Colonial agents as negligent, as a matter of fact. No matter how much the interpretation is strained, it is, at minimum, an admission that a jury could reasonably find that Colonial was negligent and liable to G.I. for the injuries that he sustained in his fall down the airshaft. *On appeal, Colonial argues that there was no basis, as a matter of law or fact, for the very jury verdict that Mr. Hassell admitted would be reasonable*, based on negligence law and the admitted, undisputed facts.

In order to be negligent, a party must have violated a duty of care (see, e.g., *Youssef v. 3636 Corp.*, 777 A.2d 787, 792 (D.C. 2001); accordingly, by admitting that Colonial's agents were negligent in failing to report the hazardous open wall, Mr. Hassell

[3] The Destefano-Ibanez family did not allege "outrageous" or "intentional" conduct. No such conduct is required to obtain punitive damages. The family has consistently alleged that Colonial managers and officials acted with "reckless disregard" for the safety of others -- which is a basis for awarding punitive damages.

has admitted that Colonial had a duty to the Ms. Destefano and her children to provide them with a reasonably safe passageway to the hospital, through the garage. Mr. Hassell's admission demonstrates that Colonial's entire appeal, based on its purported lack of any "duty" to Ms. Destefano or her children, is absolutely frivolous.[4] Colonial's conduct should be sanctioned to compensate the Plaintiffs and their counsel for the costs of its delayed payment of the judgment that was properly awarded on April 22, 2013.[5]

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[4] In a deposition, Colonial's President and CEO, Andrew Blair, did testify that Colonial had no duty under the contract with CNMC to maintain the premises in a safe condition (JA 2825-2827 Blair depo at 156:14-163:05). The deposition was cited in the Destefano-Ibanez family's Brief on the issue of Colonial's duty, which the Court decided, as a matter of law. Colonial did **not** present Mr. Blair as a witness in the February 21, 2013 evidentiary hearing on Colonial's duty. In fact, at trial, Colonial actually *objected* to the jury hearing any excerpts from Mr. Blair's deposition testimony wherein he claimed that Colonial had no such duty to its customers to maintain a safe working environment -- despite Colonial's website promising the same level of "safety" to Colonial customers in all of its parking establishments. (JA 924-931, Tr. 3:13-31:15) The Court excluded the testimony based on Colonial's objection. (*Id*.) *Now, on appeal, Colonial takes the very position that it would not allow its own President/CEO to state at trial*. Counsel for Plaintiffs stated that she was "perplexed" that CNMC joined Colonial's objection to this testimony, even though CNMC argued -- vehemently -- in its Brief for the February 21, 2013 hearing, that Colonial had a duty its customers to keep the maintain the garage in a safe condition, just as CNMC has argued in its *Supplemental Brief*, on appeal. (JA 929 Tr. 25:8-26:20)

[5] Colonial's appeal is an obstruction to justice and a waste of time and resources for this Court, Plaintiffs' counsel and CNMC. As was the case in *Tupling v. Britton*, 411 A.2d 349 (D.C. 1980), Colonial has filed and maintained this appeal, in bad faith, for the sole purpose of depriving the Ibanez children and their counsel of the judgment and fees owed to them, for more than a year since the verdict, to attempt to "pressure" them into withdrawing their own, meritorious appeal. The children are now *five years older* than they were at the time of the accident. This appeal has deprived them of compensation while they are still children, as well as of *the time and attention they need from their parents*, who are both working substantial hours to provide for them.

Colonial is also withholding payment of the judgment specifically to cause financial hardship to counsel for the Destefano-Ibanez family -- who has had to fund this litigation for more than five years, working without any compensation. Colonial's and CNMC's attorneys have been paid based their fees during the pendency of this case -- which have surely totaled millions of dollars by now. In contrast, the undersigned has incurred substantial debt, at substantial cost, to fund this litigation. Most plaintiffs' law firms face these circumstances with prolonged litigation.

3. Colonial Asks this Court to Hold that there was not even One "Reasonable Person" Among the Seven Jurors and the Trial Judge

On page 32 of its Opening Brief, Colonial asks this Appellate Court to set aside the verdict against it, in favor of Minor Plaintiffs G.I. and V.I., arguing that:

> no reasonable person, viewing the evidence in the light most favorable to the prevailing party, could reach a verdict in favor of that party.

In order to set aside the verdict in favor of the Plaintiff children, therefore, this Court would have make the determination that there was not even one "reasonable person" among the seven jurors who unanimously awarded the Ibanez children $1,586,000 or the trial judge who permitted the issue to proceed to the jury. In fact, in light of Mr. Hassell's own admission, as discussed in subsection 1, above, Mr. Hassell and his colleagues are also asking the Court to hold that *Mr. Hassell is not a reasonable person*, because, at trial, he also recognized his own client's negligence.

Colonial asks this Court to vacate a jury verdict -- with no evidence indicating that the jury acted unreasonably or case law indicating the trial judge improperly submitted the issue of liability to a jury. To the contrary, Judge Josey-Herring entertained repeated arguments, motions, Briefs and an evidentiary hearing exclusively on the issue of Colonial's duty before submitting this issue to the jury. The Court did so based on the clear and consistent body of D.C. law and elsewhere imposing the duty of maintaining a safe premises in a commercial place of business open to customers.

The Verdict Form set the highest standard possible for the Destefano-Ibanez family to establish negligence. The Form asked the jury whether Colonial "knew or reasonably should have known of the uncovered air vent opening and the danger it

posed." The jury answered "Yes." The trial record includes overwhelming evidence to support this finding.

4. The Destefano-Ibanez Family Concurs with and Adopts, by Reference, CNMC's *Supplemental Brief in Opposition to Colonial's Cross-Appeal*

The Destefano-Ibanez family concurs with, adopts and incorporates herein, by reference, CNMC's arguments, set forth in its May 27, 2014, *Supplemental Brief in Opposition to Colonial's Cross-Appeal.* CNMC has provided an excellent legal analysis of Colonial's common law duty to its customers and explanation of how its contract with Colonial reinforces Colonial's common law duty, including, but not limited to, the contract's provisions regarding inspecting, patrolling, housekeeping, golf cart for inspections and insurance coverage for accidents, including personal injuries, that occur in the garage. CNMC has also provided an excellent discussion of why expert testimony was not necessary for a jury to understand that Colonial was negligent by failing to report the open air shaft to CNMC and isolating the hazardous area until the repair was made.

Although Colonial's duty to Ms. Destefano and her children is *not* dependant upon Colonial's contract with CNMC, but rather, is based on Colonial's direct contract with Ms. Destefano, CNMC's analysis of its contract with Colonial provides an appropriate context for the "reasonable" actions that Colonial *should* have taken to eliminate this dangerous condition in the garage. The family adds to those arguments as follows.

5. The Trial Court Correctly Held, No Less than Eight Times, that Colonial has a Common Law Duty to Maintain a Reasonably Safe Parking Environment for its Customers

Defendants complain that the Destefano-Ibanez family's Brief cites the family's 2012 "*Statement of Undisputed Material Facts*" with respect to some facts, rather than

the April 2013 trial transcript; however, the facts as stated in the *Statement of Material Undisputed Facts*, supported by attached affidavits, depositions and documents, as meticulously and extensively cited, are appropriately cited with respect to all issues that were decided by the Court, pre-trial, as a matter of law. The evidence in support of those rulings were not before the jury and therefore, not in evidence at trial. For example, the entire issue on appeal by Colonial -- whether it has a duty to its customers to maintain a reasonably safe parking environment -- was decided by the Court, prior to trial; accordingly, the evidence that is cited with respect to this issue is the evidence that the Court had before it when it made this ruling. This included evidence cited in summary judgment filings, evidence of record cited in the parties' Briefs submitted in advance of the February 21, 2013 evidentiary hearing on this issue, and the evidence presented at that evidentiary hearing.

Judge Josey-Herring's June 24, 2013 *Opinion denying Colonial's Motion for Judgment*, at 8-11 (JA 476-479)**,** addressed Colonial's argument regarding duty in depth, attempting, once and for all, to put to rest Colonial's baseless and repeatedly rejected argument that it had no duty to the Plaintiffs to provide a reasonably safe parking environment, in detail.

> *Colonial Parking had a Duty to Plaintiffs*
> In the instant motion, Colonial Parking reiterates its oft-repeated contention that it had no duty whatsoever to the Plaintiffs in this case as a matter of law, and therefore cannot be held liable on a theory of negligence. This is at least the seventh time the Court has addressed this issue.4
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> 4 *See* Memorandum Opinion at 8-10, June 12, 2012 (Edelman, J.); Order [Denying Plaintiffs' Motion *in Limine* to Preclude Defendants from Arguing that they had no Legal Duty to Maintain the Garage in a Reasonably Safe Condition], Nov. 20, 2012; Order [Denying Plaintiffs' Motion for Reconsideration of the November 20, 2012 Order], Jan. 3,

2013; *generally* Transcript of February 21, 2013 Evidentiary Hearing; and Colonial Parking's Motions for Judgment as a Matter of Law at the close of Plaintiffs' evidence and at the close of all of the evidence.

As in the past, Colonial Parking contends that it had no duty to Plaintiffs, as it was merely a contractor on CNMC's property for a limited purpose, citing *Presley v. Commercial Moving and Rigging, Inc.*, 25 A.3d 873, 888 (D.C. 2011).

....

The question of whether a defendant owes a duty to the plaintiff in a given situation is a question of law to be decided by the Court. *See Tolu v. Ayodeji*, 945 A.2d 596, 601 (D.C. 2008) (citations omitted).

In this jurisdiction, "[a] parking lot operator, like other possessors of business premises, though not an insurer of the safety of his customers, does owe them a duty of reasonable care. [. . .] [T]he operator's obligation is to exercise prudent care, not only in his own pursuits but also to identify and safeguard against whatever hazardous acts of others are likely to occur thereon." *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969). Under *Becker*, "[Plaintiffs], as business customers of [Colonial Parking's] parking lot, were indisputably entitled to a full measure of that protection." *Id.* at 1134. As Judge Edelman noted in his Memorandum Opinion resolving the final set of pre-trial dispositive motions in this matter, "[u]ltimately, based upon the case law, it appears that Colonial [Parking], as operator and manager of the garage, had a common law duty toward Plaintiff Wendy Destefano and her children, as customers of the garage." Mem. Op. at 10 (June 12, 2012). However, Judge Edelman also noted that "CNMC and Colonial [Parking] contracted regarding their respective responsibilities for the management and operation of the garage, and the Court agrees with Colonial that that agreement has some impact on the duty owed by Colonial to Plaintiffs." *Id.* at 15. [6]

Accordingly, the Court proceeded to hold an evidentiary hearing on Colonial's duty under the contract; at the conclusion of that hearing, the Court determined that it had not heard anything at the hearing sufficient to absolve Colonial of its general duty to exercise reasonable care with

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[6] It may well be that Judge Edelman did not intend to infer that Colonial's "duty" to Ms. Destefano and her children, as customers, could be affected by the contract between Colonial and CNMC, in the technical, legal sense, but rather, that the contract between the parties might determine the "reasonable steps" that Colonial could exercise to fulfill that duty. For example, if a contract restricted Colonial's access to a particular area, it would not be reasonable for Colonial to be expected to inspect that area. Even then, however, Colonial's duty to its customers would not be abrogated. It would simply mean that Colonial would be able to seek indemnification or contribution from CNMC.

> respect to the safety of Plaintiffs – its customers. Accordingly, the Court, quoting *Becker*, determined that Colonial Parking's common-law duty was unaffected by the contract.
>
> In effect, Colonial Parking now challenges that determination, quoting *Presley*, and argues that it had no common law duty to Plaintiffs in light of its contract with CNMC. However, *Presley* and the instant case are entirely distinguishable. First, the roles of the consultant in *Presley* and Colonial Parking are substantively different. Colonial Parking has been operating the parking garage below CNMC for many years; the consultant in *Presley*, CRSS, was engaged as a contract compliance consultant. Its "main responsibility" at the construction site "was to assist the [contracting entity] with ensuring that the project was completed according to specifications, on time, and within budget." *Presley*, 25 A.3d at 878. In essence, although Colonial Parking was neither landlord nor tenant, it was the possessor, in the sense used in *Becker*, while, in *Presley*, CRSS was not. Moreover, the contractual provisions at play are substantially different.
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> ....
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> This contractual program is not ambiguous insofar as it absolves Colonial Parking of the responsibility make repairs or conduct maintenance with respect to the structure of the garage. *See id* (defining structural items and building-related equipment as including, *inter alia*, air handling systems, HVAC systems, and all concrete surfaces). However, this contractual provision does not remove Colonial Parking's responsibility to "exercise prudent care" with respect to the safety of their customers; in effect, Colonial Parking, once it has notice of a hazardous condition, cannot ignore it due to the provisions of the contract. *Becker*, 409 F.2d at 133-34.

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 at 26 (broken hinge on door in supermarket injured customer's eye, causing blindness); D.C. Standard Jury Instructions regarding Premises Liability, 10-3,[7]

[7] 10-3 PERSON LAWFULLY UPON THE LAND--DEFINITION OF AND DUTY TOWARD

If a person is lawfully upon a landowner's property, then the landowner owes a duty to that person to exercise reasonable care under the circumstances. This duty means, for example, that the landowner must exercise ordinary care under the circumstances to keep the premises reasonably safe and to avoid injuring that person. [The landowner has a duty to perform such inspections as a reasonable person would find necessary to detect or learn about any dangerous condition.] The landowner must repair dangerous conditions

10-4.[8] A management company may be held liable for negligence, where the owner has delegated or shared responsibility for operating the business or maintaining the premises. Id., *see also Haynesworth v. D.H. Stevens Co*., 645 A.2d 1095, 1096 fn. 1, 1099 (D.C. 1994) (management company for a building may be held liable for its failure to inspect and detect a foreseeable hazard to pedestrians walking by the property).

Most significantly, *Becker v. Colonial Parking, Inc*., 409 F.2d 1130, 1133-1134 (D.C. Cir. 1969), expressly holds that this very Defendant -- Colonial Parking, Inc. -- has a duty to provide a reasonably safe parking environment and passageway for its customers, *as a matter of law.* The *Beckers* were hit by another car as they were walking to their car through the route that a Colonial parking attendant directed them. The parking attendant had parked the other car very close to the Beckers' car and the garage allowed the other driver to retrieve his car on his own. When the other driver pulled out, he did so negligently, hitting and injuring the Beckers. The *Becker* jury determined that Colonial acted negligently by permitting the other driver to retrieve his car on his own and should have anticipated that he might do so without the requisite care to avoid an accident while parked so close to the Beckers' car. The Court relied, in part, on the *Restatement (Second) of Torts* § 344 (1965):

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which are known to the owner, or should be known to the owner, but would not be readily apparent to the person coming onto the property.

As an alternative, if a landowner does not repair a dangerous condition, then the landowner has a duty to warn that person of the existence of the dangerous condition.

When considering whether the landowner acted reasonably, you should consider the likelihood that the landowner's conduct would cause harm, the seriousness of the harm if it happened, and the cost or burden on the landowner to reduce or eliminate the risk of the harm....

[8] 10-4 OCCUPANT -- SAME DUTY AS OWNER

The person occupying or possessing a property owes the same duty of care as if he or she were the lawful owner of the property.

> "A **possessor of land** who holds it open to the public for entry for his **business purposes is subject to liability** to members of the public while they are upon the land for such a purpose, for physical harm caused by the **accidental, negligent, or intentionally harmful acts of third persons**[9] or animals, and by the failure of the possessor to exercise reasonable care to **(a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."** (*Emphases added*)

409 F.2d at 1134, fn. 10.

The *Becker* Court further explained that Colonial was appropriately held liable for the Beckers' injuries, even though the driver of the car was also negligent and jointly liable, and even though the parking attendant might not have seen the precise manner in which a customer might be injured by parking the car so close to another and by permitting the owner to retrieve his car from this "tight" spot on his own.

> "A defendant need not have foreseen the precise injury, nor 'should [he] have had notice of the particular method' **[**22]** in which a harm would occur, if the possibility of harm was clear to the ordinarily prudent eye." [36] We do not intimate that foreseeability is a *sine qua non* of causation, or that a defendant cannot sometimes be held accountable for unforeseeable consequences of negligent conduct. [37] All we need to say here is that if Whitehead should reasonably have been sensitive to a risk of some personal injury to the Beckers, appellee became liable although the specific sequence of events leading up to it remained obscure.

409 F.2d at 1137.

In another case against this same Defendant, *Daisy v. Colonial Parking, Inc*., 331 F.2d at 780 (D.C. Cir. 1963), the Court clarified that an occupier of land owes a duty of reasonable care to *any* foreseeable person who is injured on the land, irrespective of

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[9] Since Colonial is subject to liability for the accidental acts of third persons/entities, Colonial can be held liable to the Destefano-Ibanez family even if the open air shaft was entirely the fault of CNMC. Colonial could cross-sue CNMC, as it has done, and arguably, be indemnified by CNMC, in whole or in part; however, CNMC's negligence would not relieve Colonial of its duty to its own customers, such as Ms. Destefano and her children.

whether the person is a business invitee, a licensee or even a trespasser. *See also Colonial Parking, Inc. v. Morley*, 391 F.2d 989 (D.C. Cir. 1968) (Colonial could be held liable for injuries caused by driver of car stolen from Colonial operated parking lot). Colonial therefore owed Ms. Destefano and her children a duty of care to maintain the garage in a reasonably safe condition for its intended purpose: parking in a designated space and being able to walk through the garage to the hospital.

The D.C. Regulatory Agency (DCRA), which enforces the D.C. Building Code, has the statutory authority to issue Notice of Violation to management companies, and other occupiers of land, as well as to the owners of the land.

> **DISTRICT OF COLUMBIA**
> **CONSTRUCTION CODES SUPPLEMENT OF 2008**
> **DCMR 12A BUILDING CODE SUPPLEMENT**
>
> **CHAPTER 1A ADMINISTRATION AND ENFORCEMENT**
>
> **113.2 Notice of Violation, Infraction, or Order.** The code official is authorized to serve a notice of violation, notice of infraction, or order on the owner, **operator, occupant** or **other person responsible**, for the erection, construction, alteration, extension, repair, razing, demolition, **use, or occupancy of a building or structure** in violation of the provisions of the *Construction Codes* or *Zoning Regulations*, or in violation of a plan approved thereunder, or in violation of a permit or certificate issued under the provisions of the *Construction Codes* or *Zoning Regulations*. A notice of violation or order shall direct the discontinuance of the illegal action or condition and/or the abatement of the violation. (*Emphases added*)
>
> **113.2.1 Service of Notice of Violation or Order.** A notice of violation or order shall be served on the owner, **operator, occupant** or other person responsible for the condition or violation (the "respondent") by any one of the following methods: (*Emphases added*)

In addition to the Notice of Violation that DCRA Building Inspector Woods issued to CNMC, he could have issued a Notice of Violation to Colonial, as "an operator, occupant, or other person responsible for ... the use, or occupancy of a building or

structure in violation of the Building Code" (Dkt. #s 750-753, Ex. E of *Plaintiffs' Brief in Opposition to Colonial Parking, Inc.'s Brief, Denying its Duty to its Customers to Maintain a Reasonably Safe Parking Environment,* Woods depo II at 259:20-260:22, 264:6-9, 95:14-96:3, 82:16-86:24). Since CNMC accepted responsibility for the open air shaft, promised to fix it and did so without incurring a fine, Mr. Woods exercised his discretion in not issuing a Notice of Violation and Notice to Abate to Colonial as well. (Id.) Mr. Woods saw no reason to do so since CNMC had promised to immediately make the repairs that he had mandated (Id.); however, this does not mean that commercial businesses operating in the District of Columbia are free to operate on premises that violate the Building Code with impunity.

In another case involving negligent maintenance or securing of a ventilation cover, *District of Columbia v. Mitchell*, 533 A.2d 629, 641 (D.C. App. 1987), the Court of Appeals upheld the verdict in favor of the inmate, applying landlord-tenant cases to this prison premises liability case, stating that if prison management, "by the exercise of reasonable care, could have discovered a loose ventilation cover…", then the prison had "constructive notice of the condition and could be held liable for an injury caused by a negligent failure to make that condition safe."

Colonial argues that *Haynesworth v. D.H. Stevens Co.*, 645 A.2d 1095, holds that only the owner of a premises may be held liable for structural hazards on the premises of a commercial business; however, the jury properly rendered a verdict against *both* the *owner and the management company* for injuries to a pedestrian who passed by the building while it was leaking water, which froze. The pedestrian slipped on the ice. The

management company failed to inspect and report the leaking water to the landlord. It also failed to take precautions to avoid injuries to pedestrians until it could be fixed.

Colonial is misrepresenting itself as standing in the shoes of a plumber hired to perform a specific repair on a premises that he did not manage or otherwise possess or control. In *Haynesworth,* this Court properly held that *the plumber* did not owe a duty to persons passing by the building. Colonial clearly stands in the shoes of the management company -- not the plumber. *Haynesworth* therefore supports the Destefano-Ibanez' family's arguments -- not Colonial's assertions.

On page 6 of its "*Sur-Reply,* "footnote 12, Colonial claims that "Colonial merely provided parking attendants" for CNMC, and that "CNMC was in total control of the facility...." Similarly, on page 4, Colonial claims that "mere parking attendants that Colonial provided for CNMC's garage" should not be expected to know about the structure of CNMC's garage or dangers therein. Colonial has completely -- and deliberately -- misrepresented the contract and thirty-year relationship between itself and CNMC. Colonial did not "merely provide[]" parking attendants who operated under the direction of CNMC employees. Colonial "*operated and managed*" the garage and subjected its own employees to its own disciplinary procedures, codes of conduct, job descriptions, management and supervision. *See* CNMC's *Supplemental Brief.*

On page 8 of its *Sur-Reply*, Colonial contradicts its own earlier assertion that it merely provides parking attendants by claiming that Colonial *did* conduct inspections of the garage; however, this assertion is also false. Colonial Facilities Specialist Belete Belete testified that his Colonial Project Manager and Assistant Manager tried to get him to sign *Colonial's Manager's Daily Check Sheets* for a as far back as two months before

the accident, but he refused to do it. (*See* Opening Brief at 11, 29-32.) Mr. Belete's testimony revealed that the *Check Sheets* were *falsified* and that Mr. Belete's manager(s) *forged his name to them*. (Id.) At trial, Colonial's counsel, Mr. Hassell, even *admitted* that the forms were falsified (JA 1306, Tr. 19:24-20:1). If the inspections had been performed, Colonial would have the signature of the person who performed them on the forms and would have had no need to forge Mr. Belete's name on them.

On pages 11-14 of its *Supplemental Brief*, CNMC has provided ample precedent holding that, once a party undertakes a certain task for the safety of others, it has an obligation to exercise reasonable in the performance of that task. Indeed, it is basic, long-established tort law, not just in the District of Columbia, but in other jurisdictions as well. The *Restatement (Second) of Torts* § 323, states as follows.

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> > "(a) his failure to exercise such care increases the risk of such harm, or
> > "(b) the harm is suffered because of the other's reliance upon the undertaking."[10]

On page 5 of its "*Sur-Reply*," Colonial states that it only insured *itself* for accidents in the garage, *not CNMC*; however, this assertion too, is *boldly false*. The contract between CNMC and Colonial expressly obligates Colonial to purchase insurance

[10] *See also Nolde Bros. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980) (quoting *Glanzer v. Shepard,* 233 N.Y. 236, 135 N.E. 275, 276 (1922)) ("[i]t is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Accord Ring v. Poelman*, 240 Va. 323, 326, 397 S.E.2d 824, 826 (1990); *Cofield v. Nuckles,* 239 Va. 186, 192, 387 S.E.2d 493, 496 (1990).

for Colonial, as the first insured, *and by the hospital, as the secondary insured.* (JA 267-268 § 8; discussed in *CNMC's Supplemental Brief,* at 2 and 4) either way, however, the insurance covers injuries sustained by customers in the garage -- which includes the Ibanez children and their mother, Ms. Destefano.

On page 7 of its *Sur-Reply*, Colonial misplaces reliance on *Frederick v. TPG Hospitality, Inc*., 56 F. Supp. 2d 76 (D.D.C. 1999), wherein a security company hired and supervised by a hotel had no duty to the hotel's customers; however, unlike the security officers in *Frederick*, Colonial *contracts directly* with *each parking customer* that drives into that garage and take a *Colonial ticket*, from a Colonial dispenser, in the *Colonial operated* garage, obligating him/her to pay a fee to a *Colonial employee*, in a *Colonial uniform*, in a *Colonial labeled booth*, on the way out.

Perhaps the *most compelling* evidence of Colonial's duty to inspect and report safety hazards is the information that was disclosed in depositions of Colonial officers and managers and Project Manager's Isaac Song's personnel file. As of March 11, 2009, Isaac Song was Colonial's Project Manager at CNMC. The day after the accident, Colonial issued the following disciplinary action to Mr. Song:

> On Wednesday March 11, 2009 you were assigned to Children's National Medical Center as the Project Manager for the location. At approximately 9:00 AM., a 7 year old male entered the parking facility with his family and their vehicle was parked on the P-I East level. After the child exited the vehicle, he somehow fell into an open air shaft adjacent to the vehicle which resulted in him falling to the P-3-East level and suffering a number of serious injuries.
>
> Colonial Parking Policy requires that each parking facility be checked on a daily basis for hazards and other maintenance issues. It would appear that if the facility was checked as required, this particular area was missed and an extreme hazard not located, cordoned offend reported to the CNMC Maintenance Department.

> As the Project Manager on site, it is your responsibility to ensure that the facility is free from any and all hazards that may endanger any user(s) of the facility. In this instance, the fact that the air shaft grate had been removed and not discovered by you or your staff, or blocked off to prevent access to the area while the hospital was notified and repairs made.
>
> As a result of this incident, you will be subject to a Colonial Parking Disciplinary Action and received a Written Warning to your file. In addition, you have been verbally notified on numerous occasions by Anthony Tennant, Blair Taylor and myself regarding the operation and/or cleanliness of the facility, replacement of damaged or improper signage. As a result, you are hereby notified that you have a period of 2 weeks (March 18; 2009 to April 1, 2009) to resolve these issues. At that time the facility will inspected again for compliance and failure at that time to meet the expectations outlined above may result in further disciplinary action.

(Dkt. #s 750-753, Ex. DD of *Plaintiffs' Brief in Opposition to Colonial Parking, Inc.'s Brief, Denying its Duty to its Customers to Maintain a Reasonably Safe Parking Environment; also in record* as Dkt. #64-75, Ex. H of *G.I.'s Motion for Summary Judgment,* **filed under seal**)

Colonial's 2009 Evaluation of Mr. Song rated him on each of his job duties as Project Manager. These duties included, *inter alia,* including the following.

> I. Facilities Appearances (15%)
> ...
> C. Did the manager bring maintenance and cleaning deficiencies that are not Colonial's direct responsibility to the attention of the client and follow up?
> ...
> IV. Security and Loss Control (15%)
> ...
> A. Did the manager take proactive steps to control losses of all kinds at the facility?
> ...
> D. "Did the manager take steps to ensure a safe and hazard free work environment?
> ...
> V. Skills Development (10%)
> ...
> B. Did the manager promote and ensure the training and skills development of his staff?

Colonial clearly recognized that it had a duty to keep the facilities that it manages "safe and hazard free," as well as maintaining the facility and taking proactive steps to reduce losses -- which would include claims made by customers for injuries to persons or property in the garage. (Dkt. #s 750-753, Ex. GG, of *Plaintiffs' Brief in Opposition to Colonial Parking, Inc.'s Brief, Denying its Duty to its Customers to Maintain a Reasonably Safe Parking Environment*.)

Although it is not necessary to prove reckless disregard by a Colonial officer, director or even a supervisor to find liability for negligence, Colonial's managers, directors and officials committed conduct and made decisions that far surpassed negligence, rising to the level of reckless disregard for the safety of others. As a corporate officer and director, Mr. Taylor was responsible for ensuring that the garage was maintained in a reasonably safe condition. The fact that he disciplined Mr. Song and instructed Mr. Pelz and Mr. Tennant to terminate him demonstrates his involvement in safety issues in the garage; yet, Mr. Taylor denied any knowledge of the Manager's Daily Check Sheets or his subordinates' practices or duties related to ensuring that the facilities inspections were performed. Mr. Taylor's deliberate decision to ignore safety issues in the garage, and not even discuss with his subordinates their own duties with respect to ensuring safety in the garage, demonstrates Colonial's negligence at the highest level -- and beyond negligence, constituting reckless disregard for safety issues in the garages.

Mr. Song did not know the dangers behind the air shafts and was not trained to inspect them, so did not train his staff to inspect them, because Colonial's officers and upper-level managers *did not train him* regarding the structure of the garage or how to inspect the premises. Colonial's officers and managers failed to train and supervise its employees and contract employees to inspect for and recognize safety hazards in the garage. In fact, these

high level supervisors failed to even familiarize *themselves* with the structure of the garage or to recognize safety hazards in it. Colonial's Vice President of Operations, Blair Taylor, did not know that, behind the vent covers, was a drop of more than two stories (JA 1437, Facts ¶ 236, citing Ex. CCC, Tennant depo at 149:6-41, 150:18) – and made no effort to familiarize himself with the structure of multi-level garages or any of the safety issues in the garages; neither did its General Manager, Anthony Tennant. (JA 1438, Facts ¶ 242, citing Ex. CCC, Tennant depo at 81:22-83:19, 86:16-95:9) Mr. Pelz knew -- only because he witnessed a multi-level garage structure with air shafts being built. (JA 1438, Facts¶ 244, citing Ex. XXX, Pelz depo at 43:11-49:3, 106:3-138:13) Mr. Pelz trained Assistant Project Manager Mussie Mengiste. (*Id*.) When Mr. Song became Project Manager, Mr. Mengiste was still the Assistant Manager and continued to perform the inspections or to delegate them. (JA 1437-1438, Facts ¶¶ 236, 245, citing Ex. CCCC, Tennant I depo at 149:6-41, 150:18) Colonial fired Mr. Mengiste less than a year after the accident, but claimed that it was not because of the accident. (JA 1438, Facts ¶ 245, citing Ex. DDDD, Confidential Separation Action from Personnel File of Mengiste)

Check Sheets that were completed for weeks and even months before the accident indicate that each of the parts of the garage listed was in acceptable condition (JA 1437, Facts ¶ 239, citing Ex. FFF, Woods II depo at 266: 12-25); yet, there was no way that someone could have overlooked the gaping hole in the wall unless he/she negligently disregarded his/her duty to patrol and inspect the garage. The weekend Shift Manager, Martha Woldemedhin, who has been working for Colonial for 17 years, has been filling out the *Manager's Daily Check Sheets* while she sits in the ticket booth, rather than while walking around the garage inspecting. (JA 1439, Facts ¶ 250, citing Ex. OOO, Woldemodehin depo at 31:4-36:3) Her predecessor, "Mohammed," filled them out the same way. (JA 1439, Facts ¶ 251, citing Ex. OOO,

Woldemodehin depo at 30:2-31:10) Ms. Woldemedhin claimed that she did perform walk around inspections and took notes, but that she did not take the forms with her during while she walked around and that she threw her notes away after she filled out the form. (JA 1439, Facts ¶ 252, citing Ex. OOO, Woldemodehin depo at 31:4-36:10, particularly 31:11-32:1-4) She also admitted that she often fills out the form stating that she inspected three times per day, when, in fact, she only inspected twice. (JA 1439, Facts ¶ 253, citing Ex. OOO, Woldemodehin depo at 41:19-47:16, particularly 45:15-47:16) This conduct constitutes a *falsification* of the "*Manager's Daily Facility Check Sheets*;" yet, this practice has apparently persisted for more 20 years or longer and continues, even three years after G's horrific fall through the air shaft.

The "*Manager's Daily Facility Check Sheet*" for the Day Shift for the period from February 15th through March 14th, 2009, is listed repeatedly as "Belete;" however, when Colonial finally produced Mr. Belete for his repeatedly requested deposition, **Mr. Belete *shockingly* testified that he never inspected the garage or completed *any* of the *Manager's Daily Facility Check Sheets* or conducted any inspection of the garage until *after* the March 11, 2011 accident**. (JA 1440, Facts ¶¶ 256, citing Ex. PPP, Belete depo at 49:21-57:22) Mr. Belete further testified that he was *never* a "Site manager," "Shift Manager" or any manager, of any kind, for Colonial (JA 1440, Facts ¶¶ 258, citing Ex. PPP, Belete depo at 51:1-56:4); yet, he was assigned to perform the task of a "Shift Manager," with no training to do so *or even knowledge that he was functioning as a Shift Manager*. Despite Plaintiffs' counsel's repeated requests that Colonial provide information as to who, in fact, completed these Check Sheets, Colonial has failed to do so. Without the names of the person(s) who conducted the inspection on the form, Colonial's falsification of forms bearing his name, and its refusal to

provide Plaintiffs with the name(s) of the person(s) who filled out these forms, G is entitled to an adverse inference that *no one* conducted the required inspections.

As of March 11, 2009, the Colonial's General Manager, Anthony Tennant, supervised Mr. Song, along with 25 other Site, or Project Mangers, for Colonial. (JA 1437, Facts ¶ 235, citing Ex. YYY, Talor depo at Confidential SEction 113:12, 131:17-134:4) Mr. Tennant met with Mr. Song monthly, reviewing the books regarding profits and monitoring the management of the garage. (JA 1437-1438, Facts ¶ 241, citing Ex. CCCC Tennant I depo at 92:18-95:10) Mr. Tennant testified that one of his job duties was to ensure that the "walk around" inspections of the garage were done and that the *Manager's Daily Facility Check Sheets* were filled out (Id.); yet, he never trained Mr. Song regarding how to conduct the "walk around" inspections of the garage (JA 1437, Facts ¶ 237, citing Ex. ZZZ, Song Affidavit ¶ 16, 21, Ex. CCCC, Tennant I depo at 81:22-83:19, 86:16-95:9; Ex. XXX, Pelz depo at 129:19-136:8, Ex. OOO, Woldedhim depo at 60:11-62:5, Ex. XXX, Pelz depo at 102: 11-17; Ex. PPP, Belete depo at 40:12-25), never witnessed a "walk around" inspection and never discussed the form with Mr. Song. (JA 1438, Facts ¶ 242, citing Ex. CCCC, Tennant depo at 81:22-83:19, 86:16-95:9)

Mr. Tennant testified that, once per month, he inspected the *Manager's Daily Facility Check Sheets*, in a book, kept in the manager's office on the site (JA 1437-1438, Facts ¶ ¶ 241, 247, citing Ex. CCCC, Tennant I depo at 92:18-95:10); yet, for most of the Check Sheets produced, for the time period between October 2, 2008 and March 14, 2009, *no manager's name appear on them, for either the Day Shift or the Night Shift.* (JA 1438, Facts ¶ 246, citing Ex. XXX, Pelz depo at 137:21-138:13, Ex. CCCC, Tennant I depo at 127:9-128:6) Mr.

Tennant testified that he did not know why names were missing on the space on the top of many of the forms indicating which "Shift Manager" conducted the inspection and that *he did not notice missing names when he inspected them*. (JA 1439, Facts ¶ 248, citing Ex. CCCC, Tennant depo at 127:9-128:6) Mr. Tennant also testified that he did not know why, during the form purportedly filled out during the week of the March 11, 2009 accident, the item line for "Intercom" system was filled out, with "Yes," for the entire week, indicating that the intercom system was working, when, in fact, *there is no intercom system in that garage.* (JA 1439, Facts ¶ 249, citing Ex. CCCC, Tennant depo at 114:17-117:3) *If Mr. Tennant did not notice these glaring errors and omissions, what could he possibly have been inspecting for when he looked at them once per month?* Mr. Tennant's own testimony demonstrates his own reckless disregard for safety by his failure to even read these Check Sheets or to train Mr. Song with respect to the safety of the garage and completing the Check Sheets.

According to Mr. Pelz and Isaac Song, Mr. Taylor *actually made the decision to discipline, and even terminate Isaac Song.* (JA 2889, Song Affidavit ¶¶ 25, 27, considered by Court with respect to Colonial's "duty.") Mr. Song did not know the dangers behind the air shafts and was not trained to inspect them, so did not train his staff to inspect them, because Colonial's officers and upper-level managers *did not train him* regarding the structure of the garage or how to inspect the premises. Colonial's officers and managers failed to train and supervise its employees and contract employees to inspect for and recognize safety hazards in the garage. In fact, these high level supervisors failed to even familiarize *themselves* with the structure of the garage or to recognize safety hazards in it.

Colonial management neglected and even completely disregarded safety issues and inspections of the garage. Check Sheets that were completed for weeks and even months

before the accident indicate that each of the parts of the garage listed was in acceptable condition; yet, there was no way that someone could have overlooked the gaping hole in the wall unless he/she negligently disregarded his/her duty to patrol and inspect the garage.

The hospital claims that it conducted an "extensive investigation" of the accident. This "investigation" apparently involved reviewing an untold number of surveillance videos taken by the hospital at numerous points inside the hospital itself, as well as in the garage. The hospital produced videos of *nearly every step* that Ms. Destefano took on the hospital's property on March 11, 2011 -- identified and isolated out of the hundreds of people that must enter the hospital and garage daily. In sharp contrast, neither Defendant produced any videos of any Colonial employee or contractor conducting any inspection of the garage -- *on any day*. The hospital's "extensive investigation" of when and why the vent cover was left off, and who should have noticed it, should certainly have included some footage of a Colonial Parking "Site Manager" conducting *at least one* of the three purported inspections per day that Colonial claims it performed.

If there had been a real, good faith investigation by Colonial, *Colonial* would have requested the hospital videos documenting its inspections for March 11, 2009 and the 30 days prior to the accident for which videos still existed. These videos would have been material to the purported investigation. The Defendants' failure to produce them should be afforded an adverse inference that no such videos existed because no inspections were conducted for the 30 days prior to the accident.

The evidence presented at trial was more than sufficient for the jury to conclude that Colonial "*Shift Managers*" and other employees assigned the duties of "*Shift Managers*," **fraudulently** completed the *Manager's Daily Facility Check Sheets*, failed

to inspect the garage premises and truthfully report to the hospital that the walls of the garage were crumbing in numerous places and that air shaft covers were loose, missing screws, detached from the wall and even that one was even lying next to the wall, leaving an air shaft open, with a hole two feet high by 3 feet wide. Had the Colonial *managers* and/or officers or directors actually performed their duties to train and supervise employees/contractors in their maintenance duties of sweeping and cleaning up oil spills, they would have noticed the open hole in the wall and/or the vent cover standing free against the wall, with the screws still in it.

6. Colonial's Legal Duty to Ms. Destefano and her Children is Derived from their Status *as Direct Customers* of Colonial Parking

Colonial appears to argue that Colonial's duty to Ms. Destefano and her children depends solely upon the contract between Children's National Medical Center (CNMC) and Colonial, as third-party-beneficiaries of that contract; however, Colonial's duty to Plaintiffs is based on their status as Colonial's own, direct customers. Colonial's President and CEO, Andrew Blair, admitted that *Colonial customers* at the CNMC garage site consist of CNMC "patients and their families." (JA 10, 1040 at Tr. 54:1-20) G.I. was a patient at CNMC; his mother and sister, V.I., are members of his family.

As Judge Josey-Herring ruled, Colonial's reliance on *Presley* is misplaced. In addition to the distinctions between the present case and *Presley* cited in the Court's June 24, 2013 *Memorandum Opinion*, but also because, in *Presley*, there was no direct relationship, or contractual relationship, between Mr. Presley and the contractor working with his employer. Any "duty" by the contractor would have to Mr. Presley would have been based on a third-party beneficiary argument derived from his employer's contract

with the contractor.[11] In contrast, Ms. Destefano and her children had a direct contract with Colonial, as customers, which entitled them to a reasonably safe passage from their car to the hospital and back again -- and it was Colonial's duty to provide it. [12]

Colonial encourages its customers, or "parkers," to rely on the name and reputation of Colonial for "safety" in all of its 200 local locations.

> No matter which way you park, you'll always enjoy the **safety,** convenience and friendly smile that says Colonial.

(JA 2825-2826, Tr. 156:12-159:5; https://www.ecolonial.com/parkers/)

Colonial's direct contract with Ms. Destefano, to pay a fee, for a parking space, inherently included safe passageway to and from her car for her children and herself. Colonial has cited no case that allows any commercial business to relieve itself of its duty to its own customers, through a contract with a third party. Colonial's duty to its customers cannot depend upon a contract to which *the customer* was *not* a party and to which he/she was not privy.

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[11] Mr. Presley likely sued the contractor because Workers' Compensation Law precluded him from suing his employer, with whom he had a direct contract.

[12] CNMC delegated the operation of the garage to Colonial by contract -- as it had done for the previous thirty (30) years. The sign at the entrance of the Colonial garage at CNMC expressly identifies the garage as a "Colonial Operated" garage. Colonial issued Ms. Destefano a *Colonial issued parking ticket* (JA 2907) Colonial dispenses its tickets to its customers at CNMC from a Colonial owned and maintained ticket and collects the money due for parking in the garage from a "Colonial" ticket both by a Colonial employee, wearing a Colonial uniform and nametag. The Colonial parking ticket identifies this "Colonial operated" garage as being "located" at "Children's National Medical Center." (*Id*.) It refers to itself as "this contract" and includes a disclaimer of liability, for Colonial, regarding items left in the car (*Id.*) -- indicating that Colonial acknowledges liability for some other types of damages or injuries resulting from the garage-customer contract.

D. **A "Garage Management Expert" was not Necessary to Determine that the Open Air Shaft Posed an Unreasonable Risk to Garage Customers**

As stated in Section I, A, the Destefano-Ibanez family concurs with, and expressly adopts, CNMC's arguments in its *Supplemental Brief* rebutting Colonial's arguments that Plaintiffs and/or CNMC needed testimony from a "garage management expert" -- which Colonial never defined or explained. *See*, in particular, CNMC's *Supplemental Brief* at 16-19, discussing *District of Columbia v. Shannon*, 696 A.2d 1359 (D.C. 1997) and *Bostic v. Henkels & McCoy, Inc*., 748 A.2d 421 (D.C. 2000), *inter alia*. The family adds to, and/or elaborates on, those arguments as follows.

1) **Expert Testimony regarding "Constructive Notice" is not Necessary Since Colonial had "Actual Notice" the Hole in the Wall**

As Judge Josey-Herring determined, this is a case where "constructive notice," or the duty to inspect, did not even need to be assessed, because Colonial parking attendants who were under Colonial's supervision, had *actual notice* of the hole in the wall. (JA 475, 478, Judge Josey-Herring's *Memorandum Opinion*, at 7, 10) Neither Plaintiffs nor CNMC needed to present testimony by "a garage management expert" to prove "constructive notice" -- or the type or frequency of inspections appropriate to detect the open air shaft because its employees, and/or contractors under its control and supervision, *knew about it* before the accident.[13]

[13] *See* Destefano-Ibanez family's Opening Brief, at 31-33, regarding the testimony of Colonial's parking attendant, Henry Colindres, that he and his co-worker contractor, Freddy Sanchez saw the hole in the wall and vent cover leaning against the wall for weeks. Mr. Colindres and Mr. Sanchez reported the hole to a parking attendant who worked directly for Colonial. (Id.) *See also* Affidavit of Freddy Sanchez (JA 2875) (excluded from trial, but considered by Judge Edelman in summary judgment filings.)

2) **Laypersons are Fully Capable of Determining that a Three-Wide, Two-Foot High Hole in the Wall Adjacent to a Parking Space, should be Reported as a Safety Hazard, without Expert Testimony**

As stated in CNMC's *Supplemental Brief*, at 14, citing *Perkins v. Hanson*, 79 A. 3d 342, 344 (D.C. 2013), this Court reviews the trial court's decision not to require expert testimony on an abuse of discretion standard. *See also Croce v. Hall*, 657 A.2d 307 (D.C. 1995) Expert testimony is not necessary where lay persons can determine "reasonable conduct" under the totality of the circumstances. *Rauf v. Tulin*, 994 A.2d 788 (D.C. App. 2010); *Daskalea v. District of Columbia*, 227 F.3d 433, 445 (D.C. Cir. 2000). In *Daskalea*, the D.C. Circuit upheld the jury's award of $350,000 in compensatory damages against the District of Columbia, finding, among other violations, that prison officials were negligent with respect to training and supervision of its corrections officers, with respect to sexual harassment.

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

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

The *Daskalea* Court expressly held that expert testimony regarding the applicable standard of care for training and supervision was not necessary.

> Expert testimony is required only "where the subject presented is 'so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.'"

227 F.3d at 445.

The Court held that the jury was fully capable of assessing the reasonableness -- or lack thereof -- of the training and supervision provided by the District. The Court relied on, *inter alia*, *Morgan v. District of Columbia*, 449 A.2d 1102 (D.C. 1988), in which this Court held that expert testimony was not necessary to establish the standard of care for control and supervision of police officers because the discipline of police officers "is not a matter which layman are incapable of intelligently evaluating without the assistance of expert testimony.) *Id*. *See also* CNMC's *Supplemental Brief*, at 13-20, and cases cited therein.

The plaintiffs in *Becker*, *Daisy* and *Morely* did not need expert testimony to establish that Colonial violated its duty to its customers. The *Becker* Court specifically acknowledged that

> Here the jury, applying contemporary community standards, [29] might plausibly have concluded that Whitehead was negligent in exposing the Beckers to an unreasonable risk of injury by directing them to walk to the rear of the parking lot through the narrow clear area close by the Enholm car, without either warning them that Enholm might be moving the car or taking steps to safeguard against an attempt by Enholm to do so. Indeed, the evidence might have suggested to the jury the question whether, in view of the fact that at least some customers were required or permitted to fetch their cars, the provision of but a single attendant to manage the lot during the busy periods amounted to reasonable care under the circumstances. (*Footnotes omitted*)

The jury in Becker appropriately assessed the standard of care for detecting safety hazards in a parking garage based on "community standards" --which is simply the reasonable person standard or "common sense." There was no suggestion that any purported "*garage management expert*" testimony was necessary to provide a "*national* standard of care" regarding how many parking attendants should have been assigned to

the lot. The Court deemed lay persons fully capable of assessing the "reasonableness" of such a decision under these circumstances.

The original judge in the case, Judge Bartnoff, stated the case succinctly:

"[a] kid fell into a hole that shouldn't have been a hole."

(Dkt. # 52, 8-27-10 Hearing, at 29:17-18)

The simple fact is that *there "shouldn't have been a hole*" in the wall adjacent to a designated parking space. As discussed on pages 4-5, at trial, Colonial's own counsel, Mr. Hassell, admitted that Colonial agents were negligent in failing to report the three foot by 2 foot hole in the wall, with the vent cover leaning against the wall, several feet away. (JA 1337 at 22:12-23) The vent cover, leaning against the wall, created a "trip hazard," at a minimum and should have been reported or otherwise addressed, as part of Colonial's "housekeeping," "patrolling" and "inspection" duties. (See CNMC *Supplemental Brief* at 1-13)

If there is a hole in the ground at a construction site, a reasonable layperson can determine that the area should be immediately blocked off and the condition should be reported so that it can be fixed as soon as possible, if it is not already scheduled to be repaired. The reasonable person does not need to know specifically how deep the hole in the ground in order to recognize that it poses a danger -- even if only a trip hazard in the ground. The same common sense, or reasonable person standard, applies to a hole in the ceiling or a wall. There is no less an obligation to report for repair and section off a 3 foot by 2 foot large hole in a wall -- particularly when that wall is adjacent to a parking space, requiring the occupant(s) of the car to maneuver in the two foot wide space between the car and the wall and where children are expected to be present, particularly

here, where sick children are coming to a Children's Hospital for receive care. Especially in this setting, parents and guardians are likely to be focused on the sick or injured child and may easily overlook a hazard that is not readily apparent.

After being provided instruction on the clear law requiring a parking management company to maintain the premises reasonably free safety hazards, any layperson can understand that Colonial should have inspected the garage and reported the hole in the wall to the hospital for repair. Temporary parking attendants Henry Colindres and Freddy Sanchez, who are not "experts" in garage management, clearly recognized that there should not be a hole in the 3 foot by 2 foot hole in the wall and that the grille that should be covering it should not be leaning against the wall. As temporary contractors working at the site, they reported it to a permanent Colonial employee whom they regarded as a supervisor -- who dismissed the report as insignificant. The fact is that *any reasonable person* should have recognized that there should not have been a hole in the wall and that it posed a safety hazard to customers, particularly when this site's customers consisted primarily of sick children and their parents. The jury's verdict should not be usurped by purported "experts" whom wealthy corporate defendants can hire by the dozens, burdening injured plaintiffs with yet additional unnecessary expenses of "experts" to state the obvious.

Even if the constructive notice were an issue that affected the jury's verdict in this case, the evidence of record was more than sufficient to allow a jury to conclude that that Colonial agents had such notice of the hole in the wall. As explained in CNMC's

Supplemental Brief, at 19-20,[14] Colonial recognized its own duty to conduct inspections, based on its own internal company directives. Colonial's internal policies also constitute its own admissions of what a reasonable garage management company would do to protect the safety of its customers and its further admission that its own employees -- including managers -- acted unreasonably with respect to the safety of Colonial customers and thereby, caused the accident to G.I. Colonial's policies and directives stated that its employees must conduct at least three inspections per day of the garage facilities to ensure that the premises were safe for customers and Colonial's own employees. Colonial's falsification of backdated Check Sheets demonstrates that NO ONE conducted them for months prior to the accident.

No reasonable juror could deny that Colonial was required -- by any reasonable person's standard -- to report the displaced vent cover to CNMC for repair and to block off a dangerous area of the garage. A reasonable response to seeing the hole in the wall would have been to inspect it to determine the urgency of the repair and the degree of danger that it posed. Such inspection would have revealed an air shaft with a two story drop behind the hole. This is simply the exercise of common sense and within the understanding of any juror. In fact, at the February 21, 2013 "duty" hearing, all parties presented binding witnesses who reached the same conclusion. The trial record includes

[14] CNMC cited, inter alia, *citing, Garrison v. D.C. Transit Sys.*, 196 A.2d 924, 925 (D.C. 1964), *Schneider v. D.C. Transit Sys*., 188 F. Supp. 786, 787 (D.D.C. 1960), *WMATA v. O'Neill*, 633 A.2d 834 (D.C. 1993), *WMATA v. Jeanty*, 718 A.2d 172, 177 n.11 (D.C. 1998), *Snowder v. District of Columbia*, 949 A.2d 590, 603 & n.11 (D.C. 2008); *District of Columbia v. Wilson*, 721 A.2d 591, 598 n.13 (D.C. 1998); *Clark v. District of Columbia*, 708 A.2d 632, 637 (D.C. 1997), *WMATA v. Young*, 731 A.2d 389, 398 (D.C. 1999); *Doe v. Medlantic Health Care Group, Inc*., 814 A.2d 939, 951-52 (D.C. 2003); *Lucy Webb Hayes Nat'l Training School v. Perotti*, 136 U.S. App. D.C. 122, 419 F.2d 704, 709-10 (1969) and 50 A.L.R.2D 16 (2010).

overwhelming evidence to support the jury's conclusion that Colonial breached its duty to Ms. Destefano and her children, including, but not limited to, the following.

1) CNMC's Vice President of Operations, Roberta Alessi, testified that she administered the contract with Colonial to manage and operate the garage and that Colonial's duties included inspecting for and reporting to her office needed repairs. (JA 1062-1066, 4-8-13 PM Tr. at 27:15-42:14)

2) CNMC's Director of Engineering and Facilities, Robert Beckwith, testified that Colonial "managed" the garage at CNMC and that Colonial collaborated with CNMC to inspect for and report needed repairs in the garage. (JA 1134**,** 4-10-13 AM Tr. at 79:21-80:17)

3) Parking attendant Henry Colindres testified that he and another parking attendant, Freddy Sanchez, saw the hole in the wall weeks before the accident and reported it to another parking attendant who was a full-time Colonial employee and possible a supervisor, but that this Colonial employee dismissed the report as unimportant. (JA 642 -644, 3-27-13 Tr. at 35:2-5, 37:16-41:18)

4) The hole in the wall left by the missing grille was 3 feet wide by 2 feet high, as was the grille, which was feet away, leaning up against the wall. (JA 2908-2989**,** photos of open air shaft) This gaping hole was evident to anyone passing by when cars were not parked in front of it, and also, to anyone performing a proper inspection of the garage, even if cars were parked in front of it.

5) Parking Attendant/Facilities Specialist, Belete Belete, testified that, two hours after the accident, his supervisors, Colonial Assistant Project Manager Mussi Mengiste, and Colonial Project Manager, Isaac Song, tried to coerce him into signing months worth

of backdated "*Managers' Daily Facilities Check Sheets*," as if he had performed inspections of the garage for those months, when, in fact, he had never conducted any inspections and it was not his job to do so. (JA 818-820**,** 4-1-13 Tr. at 124:18-134:1)

6) The condition of the trash and decomposing rat inside of the air shaft constituted evidence that the air shaft had been open for a long period of time, such that any reasonable inspection of the garage would have revealed the hole in the wall and a reasonable inquiry into why the cover was off the wall would have revealed the dangerous condition behind it. (JA 2933-2945, photos of air shaft)

7) Former Colonial Project Manager Joseph Pelz testified that it was his job to supervise the Project Manager at the CNMC site, and that included ensuring that the CNMC garage was inspected for needed repairs and safety. (JA 1146-1147, 4-10-13 PM Tr. at 11:10-12:20)

8) Colonial Night Shift Manager Khalid Ahmed testified that there was no Day Shift Manager at the time of the accident -- although it was the Shift Manager's job to conduct the safety inspections of the garage. (JA 1187-1188**,** 4-11-13 Tr. at 20:14-22:8)

3) **There is no Established Certification for a "*National* Expert" in "Garage Management" or a "*National* Safety Training Standard" Specific to Garage Management**

There is no basis for Colonial's argument that the Destefano-Ibanez family or CNMC were required to present expert testimony needed was from an expert in "garage management" to prove that it was Colonial's negligence that caused the accident. Colonial has not defined what credentials would be necessary to qualify someone as a "garage management expert." Unlike a doctor, lawyer, mechanic, electrician, computer technician, or other occupation or profession that is regulated in some way, there is no

professional certification or special training to operate a garage or to become the President/CEO of a garage management company. There is no required "continuing education" required to continue operating a parking garage.

As this case stated in *PMI v. Gilder,* 343 A.2d at 54., fn. 10, "[t]he legal relationship [between a parking garage and a customer parking in that garage] depends upon the place, conditions and nature of the transaction." There are many different parking structures throughout the country, which vary based on geography, size, number of customers, self-park and/or valet parking, number of parking levels, purpose of garage, attached buildings or structures, above ground or under ground parking, existence and/or number of air shafts. Even when in the same city, parking garages differ based on their street location, size, number of customers, self-park and/or valet parking, number of parking levels, purpose of garage, attached buildings or structures, above ground or under ground parking, existence and/or number of air shafts, the numbers of people expected to use it daily, whether it's an urban setting, the type of establishment(s) it serves and numerous other factors. As Colonial's own officers and managers testified, garages in more rural or suburban parts of the country do not have underground parking garages, and therefore, have no ventilation systems.

A perfect example of a person whose longevity in the parking garage industry might indicate that he was an "expert" in garage management, and appears to be recognized as such by the National Parking Association and other parking associations, is Colonial's CEO and President, Andrew Blair (JA 2791 at 18:10-13, 21:1-12; 2808 at 88:2-89:15); yet, Mr. Blair's only qualifications for beginning with Colonial, thirty years

ago, as a claims adjuster, was being a high school friend of the son of one of the owners of Colonial. (JA 2792 at 23:9-25:6)

Mr. Blair is not an architect, engineer, mechanic, expert in the D.C. Code or any other Building Code. He has no post-college degree, specialized training or certification in anything. He has no knowledge of parking garage air shafts. Mr. Blair's "experience" is limited to "office work," fundraising, attracting large corporate clients, maximizing profits, cancelling training classes and general local "politicking." Despite his complete lack of knowledge of the structure of the CNMC garage, an apparently, any other garage, Mr. Blair sits on panels at the National Parking Association and speaks about the duties of Project Managers in parking garages (JA 2791 at 18:10-13, 21:1-12; 2808 at 88:2-89:15) -- although he also testified that he did not know the duties of his own Shift Managers, even though Colonial's Job Description for Shift Manager expressly stated that it was the Shift Manager's duty to inspect the garage three times per day. (JA 2835-2839 at 194:1-209:12-210:17).

Even after his thirty year rise to becoming the President and CEO of the company, he has never managed or even worked in any garage -- Colonial or otherwise. In fact, Mr. Blair has *never even bothered* to walk through the Colonial garage located at CNMC (JA 2830 at 177:1-8, JA 2832 at 184:2-8) -- even though he negotiated the original contract with CNMC and reviewed and approved the renewal contracts.[15] A layperson who actually parks his or her car in any underground garage would have a better understanding of what it is like walking through the garage to or from his or her car,

[15] When Mr. Blair goes to the hospital for negotiations or as a member of the Board at CNMC, he always gives his keys to a valet to park the car for him and has never seen any more than the garage than is necessary for him to walk from the valet station to the elevator into the hospital. (Id)

especially with one or more children. A layperson on a jury -- or anyone with common sense -- can certainly understand that an open air shaft poses a danger to persons parking in a garage. No academic degree or certification is necessary to reach this conclusion.

Mr. Blair denied that Colonial has any duty to its customers to provide a reasonably safe parking environment. He was completely oblivious to the case law, such as *Becker*, holding that *his own company -- Colonial -- specifically and by name* -- has such an obligation, as a matter of law. (JA 2820-2821, Blair depo at 135-139) In fact, Mr. Blair testified that Colonial has a duty to keep "cars safe," but "not people" -- who must walk through the garage once they park their cars in it to get out of the garage. (Destefano Brief, at 29; JA 2842-2843**,** 2825-2827, Blair depo at 228-232, 156-163, particularly 158:9-159:5) He had no knowledge of the construction of the CNMC garage and certainly no knowledge about any air shafts in it.

In contrast to Mr. Blair's assertions that Colonial has no duty to inspect its garages for safety hazards, all of Colonial's officers and managers who actually managed garages for Colonial testified that it was standard operation in the management of parking garages to inspect for safety hazards. Former Colonial Vice President Charles Wainwright testified that "any parking company worth its salt would inspect for safety hazards." (JA 562, 2-21-13 Duty Hearing at 40:13-16.[16]

Who, then, is the "expert" in garage management that would be qualified to testify about the appropriate safety precautions that should be taken in the garage? Is it an

[16] *See also* former Colonial General Manager Joseph Pelz' testimony and former Colonial Project Manager Isaac Song's testimony. Colonial's former Risk Manager, Geta Wold, stressed the importance of performing the inspections -- at all Colonial garages -- to ensure that there are no safety hazards *because the lack of inspections could be used to impose liability on Colonial for injuries*. (JA 2898)

executive who has no "hands on" experience in running a parking facility, or a low level manager who runs a garage every day? Neither the Destefano-Ibanez family nor CNMC *could have* presented evidence of a "national standard" or "professional standard" for safety in operating a parking garage because *there is neither a "professional standard*" or "nationally recognized standard" for air shaft safety in parking garages -- except for the same Building Code requirements that *all commercial establishments* must meet.

4) To the Extent that Expert Testimony would Assist the Jury, it was Provided by Experts on D.C. Building Code Violations

To the extent that any expert testimony *was* appropriate or helpful, Plaintiffs provided expert testimony on the D.C. Building Code by Eric Woods, the former Inspector for the D.C. Regulatory Agency (DCRA) who actually inspected the garage on the day of the accident. The condition that caused the accident constituted a violation of D.C. law (DCRA Notice of Violation and Notice to Abate, redacted, as it was read to the jury at JA 1129, 1131, 1138-1139 4-10-13 AM Tr. 60:10-22, 66:9-23, 96:2-98:3). Mr. Woods testified that the condition of the uncovered air shaft violated the D.C. Property Maintenance Code, Section 102.1. (JA 681**,** 3-27-13 Tr. 189:10-190:1) *Defendant CNMC's own facilities expert, Lawrence Dinoff, an architect, agreed with Mr. Woods* that the Building Code violation existed as soon as the vent cover was off the wall and unguarded. (JA 1118, 4-10-13 AM Tr. 4-10-13 at 15:22-17:14, JA 1132-1133 at 72:24-73:25) These experts also agreed regarding measures that should have been taken to remedy it: that the area should have been blocked off and Colonial should have reported the hazard to CNMC to fix it. (JA 1132-1133 at 72:24-73:25)

All businesses -- whatever their nature -- are required to maintain their business premises in a reasonably safe condition for their customers. The D.C.

Building/Maintenance Code sets the minimum standard for safety to protect the public, including customers. It was not necessary to present an "expert in garage management" -- undefined -- to establish liability, any more than it would have been necessary to produce expert testimony in diamonds or jewelry store management to address a Building Code violation in a jewelry store that caused and injury to a customer therein.

The District of Columbia entrusted Mr. Woods with issuing violations and fines to commercial establishments of *all types*. D.C. does not have different inspectors, with "expertise" in each different type of commercial establishment -- from coffee shops to office supply stores -- to issue citations and fines for building structure dangers. Each of these establishments is expected to conform its premises to the D.C. Building Code and to ensure that it is maintained in a reasonably safe condition, based on common sense, a reasonable person's perspective and a reasonable familiarity with the applicable law and the particular structure of the facility, or premises upon which it operates its business.

E. **V.I.'s Award for Negligent Infliction of Emotional Distress was Justified under the "Bystander Rule" and *Hedgepeth***

Plaintiffs adopt and incorporate by reference, Section I, B, 3 of their August 11, 2014 *Response and Reply Brief to Children's National Medical Center's Opening Brief,* at 7-10.

II. <u>THE DESTEFANO-IBANEZ FAMILY'S REPLY TO COLONIAL PARKING, INC.'S OPPOSITION TO THEIR APPEAL</u>

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

In the interests of duplicating arguments made in response to each Defendant, Briefs, Plaintiffs adopt and incorporate, by reference, Section II, A of their August 11, 2014 *Response and Reply Brief to Children's National Medical Center's Brief,* at 10-25.

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

Plaintiffs adopt and incorporate by reference, Section II, B of their August 11, 2014 *Response and Reply Brief to Children's National Medical Center's Brief,* at 25-46.

C. Punitive Damages should be Assessed against Colonial Parking, Inc., for its Reckless Disregard for the Safety of Others

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

Plaintiffs adopt and incorporate by reference, Section II, C, 1 of their August 11, 2014 *Response and Reply Brief to Children's National Medical Center's Brief,* at 46-47.

2. Colonial Maintained a Corporate Culture of "Reckless Disregard" for the Safety of its Customers

Colonial's President/CEO, Mr. Blair, testified that Colonial cancelled "Colonial University" where employee training took place. (JA 1055 at 112:21-114:24) Judge Josey-Herring stopped Plaintiffs' counsel from asking Mr. Blair any more detailed questions about Colonial University, even though Mr. Blair testified, in his deposition, that he made the decision to close Colonial Universiyt to save money. (JA 2853-2854 at 268:14-273:2); however, Colonial University was the only avenue by which Colonial offered consistent training, including educating its employees on Colonial's own policies and procedures. Colonial University included courses in "risk management" (JA 279), which includes assessing hazardous conditions in the garages that could result in injuries. It provided an opportunity to ensure that all employees were aware of their duty to take reasonable steps regarding safety in the garages that Colonial operates. It provided an opportunity to educate its employees regarding the structures of underground garages and air shafts.

Mr. Blair simply closed Colonial University, to save money, without even *knowing* what was being taught there. Colonial had no mechanism for training its employees, but left purported "on the job training" to whatever other employees might tell new employees what to do. Colonial hired temporary workers and provided no training at all. (JA 648 at 55:5-56:10, Colindres testimony) This closing reflects Mr. Blair's own stated belief that Colonial has no duty to its customers to provide a reasonably safe parking environment for them. He is *wrong* -- as a matter of law, fact and public policy; moreover, he has surpassed the standard of negligence, violating his duty to Colonial customers, and reached the level of "reckless disregard" for the safety of Colonial customers by flippantly asserting -- and acting as if -- Colonial has no such duty in the first place.

Colonial has an Office of General Counsel. Its General Counsel(s)[17] participated in this litigation, as well as in the interviews of witnesses after the accident. (Dkt. # 331-348, G.I.'s Motion for Summary Judgment, Ex. JJ, deposition of Colonial General Counsel, Rebecca Cady) As discussed in Section I, Colonial's Risk Manager, a non-attorney, Geta Wold, clearly understood Colonial's duty to its customers to maintain a safe parking environment and sent out an e-mail to all Colonial managers, stressing the importance of the garage inspections to avoid injuries to customers and resulting lawsuits. Mr. Blair would have to deliberately isolate himself from the very people that Colonial hired to protect against personal injuries in the garages and resulting lawsuits, to believe and act as if Colonial does not have the legal duty that it does, in fact, have, to protect the safety of its customers.

[17] Colonial replaced its General Counsel during the course of this litigation.

Mr. Blair began with Colonial as a claims manager and held that position for years. (JA 868 at 177:1-178:5) This position required him to investigate and adjudicate accident claims for injuries that occurred in Colonial garages. (*Id.*) Mr. Blair had therefore assessed safety hazards in Colonial garages and received many claims regarding injuries due to those hazards over his many years with Colonial; moreover, the fact that he performed this duty and adjudicated claims demonstrates that Mr. Blair clearly understood Colonial's obligations to its customers to maintain a reasonably safe parking environment. His refusal to even acknowledge that obligation in this case demonstrates his reckless disregard for the safety of his customers.

In a corporation such as Colonial, which grosses over $100,000,000 per year, the threat of punitive damages should be a powerful deterrent. If this deterrent is removed, the public and even of Colonial's own employees, are left unprotected from the safety hazards caused, or allowed to continue, due to Colonial's corporate culture of reckless disregard for the safety of others. This corporate culture is established by Colonial's management, at the highest level, through its utter failure to train and supervise its managers and employees to recognize common dangers in the parking garages that it manages, such as an open air shaft in a multi-level underground garage -- which is the most typical type of garage in the District of Columbia and neighboring suburbs.

Colonial officers, directors and managers acted with *reckless disregard,* through acts and omissions that resulted in a long-standing, egregious safety hazard in the garage that really was “an accident waiting to happen.” This dangerous condition resulted from Colonial's "corporate culture" of reckless disregard for safety in the garage, through omissions in its policies, practices and procedures, established at the highest level of

Colonial's management, with respect to training and supervision regarding safety issues. The decisions of Colonial Parking *managers and/or officers* **not** to train its workers to recognize dangers in the parking garage or to monitor the *Manager's Daily Check Sheets* or to otherwise ensure that proper inspections are performed in the garage, constitutes reckless disregard for the safety of others.

As discussed in CNMC's Supplemental Brief, at 9, which has been adopted and incorporated into this Brief, in an e-mail to all managers, dated May 6, 2006, Colonial's own Risk Manager, Geta Wold, warned that the mandated inspections must be conducted and that, if they were not, Colonial could be held liable for any injuries that customers suffered in the garage resulting from hazardous conditions that would have been detected through proper inspections (JA 2898); yet, as previously discussed in Section I, Colonial's President/CEO, Andrew Blair, testified that Colonial is not responsible for the safety of its customers in the CNMC garage, but only cars.[18]

Mr. Blair's statements reflect that the "reckless disregard" of Colonial's managers emanates from its corporate officers, to its on site managers, to its permanent parking attendants. In fact, the only people who attempted to address the hole in the wall were Henry Colindres and Freddy Sanchez -- who were not even permanent employees of Colonial, but were temporary contractors working under Colonial's supervision and control -- with no training and clearly, inadequate supervision. When they reported the hole in the wall to their Colonial co-worker, who could clearly see the hole in the wall, in

[18] Mr. Blair provided this testimony in his deposition and one of the issues on appeal is Judge Josey-Herring's exclusion of this evidence at trial. If this issue is remanded, Plaintiffs should be permitted to elicit this testimony at trial.

plain view, the Colonial employee stated that he was well aware of it because it had been there for a long time, and told them not to worry about it.

Colonial should not be permitted to escape punitive damages by casting blame on its lowest ranking temporary parking attendants, who: 1) did not have the authority to report the hole in the wall to CNMC; 2) were not provided with Colonial's Employee Guidelines or any other Colonial employee or safety publication; 3) were not provided with any CNMC safety publication; 4) were not provided any training at all regarding safety in the garage; 5) were not provided with a specific supervisor, or person to whom to report; and 6) who actually were concerned about the hole in the wall, with the dark drop behind it, and who *did* report it to a full time, permanent Colonial employee.

The jury heard sufficient evidence to find that Colonial managers and/or officers acted with reckless disregard for the safety of its customers and that this reckless disregard resulted in the air shaft to remain open for weeks, if not months before the accident. Had Colonial implemented its own stated policies, as directed by its Risk Manager, Geta Wold (JA 2898), its employees would have discovered, reported and sectioned off 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. The jury should have been permitted to assess punitive damages against Colonial.

F. **Colonial Falsely Represents that the Destefano-Ibanez Family's Counsel "Gave Biased, Daily Reports to Reporters Likely to Violate the Rule on Witnesses and Expose the Jury to Sequestration to Avoid Such Publicity**"

Plaintiffs hereby adopt and incorporate by reference, herein, Section II, D of their August 11, 2014 Response and Reply Brief to Children's National Medical Center's Opening Brief.

CONCLUSION

The Destefano-Ibanez family respectfully requests that this honorable Court deny Colonial's Cross Appeal and grant the following specific relief:

1) order the trial court 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 as ordered in that judgment;

2) impose sanctions on Colonial for filing it a frivolous appeal;[19]

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

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 Colonial Parking, Inc., with an instruction that punitive damages may be awarded for conduct by any Colonial "manager" that constitutes "reckless disregard for the safety of others" and that this "manager" need not be a corporate officer or director, but may be the senior manager at the site on the day of the reckless conduct;

[19] Such sanctions should include an amount of money that would reasonably compensate the Destefano-Ibanez family and their counsel, for any interest on litigation costs, loans and other costs related to the delay in collection of the judgment, particularly, but not limited to, the costs necessary to litigate this case.

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; and

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

a) the March 11, 2009 photograph of G.I.'s face as he was taken to the Emergency Room;

b) evidence regarding the condition of vent covers in the garage other than the one that G.I. fell through, including, but not limited to, the District of Columbia Regulatory Agency (DCRA) Notice of Violation, issued to CNMC on the day of the accident, March 11, 2009 and thereafter, as it related to the accident;

c) testimony of Colonial's President/CEO, regarding Colonial's procedures and policies regarding safety measures, Colonial's supervision and training of Colonial managers, Colonial's website, his own understanding of Colonial's duty to its customer to provide a safe parking environment and what measures he has personally taken to ensure that this duty is fulfilled, and Mr. Blair's deposition testimony, for purposes of impeachment and for admissions of a party-opponent;

d) Colonial's disciplinary action against its Project Manager at the CNMC location, Isaac Song, attributing G.I.'s accident to the negligence of Mr. Song and his staff;

e) evidence of Colonial's negligent training and supervision with respect to safety in its garages, including, but not limited to, the garage located on the CNMC premises;

f) the testimony of Freddy Sanchez;

g) no party will be permitted to ask leading questions of its own client, or representatives thereof, whether or not that person is called as an adverse witness by opposing counsel;

h) adverse witnesses may be asked leading questions by the adverse party, but not by his/her own counsel;

i) time and witnesses will be fairly allocated, in light of the fact that there are three plaintiffs and two defendants in this case; and

8) order Colonial to pay the cost of the Destefano-Ibanez family's Appeal, including both out of pocket costs and attorneys' fees, based on submissions to this Court regarding those costs.

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 Colonial Parking, Inc.'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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