## In the Matter Of:

## WENDY PAOLA DESTEFANO

VS

## CHILDREN'S NATIONAL MEDICAL CENTER and COLONIAL PARKING

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## **COURT HEARING**

January 27, 2015

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         IN THE DISTRICT OF COLUMBIA COURT OF APPEALS
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    WENDY PAOLA DESTEFANO, et al.,
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              Appellant,
 4
                                          DCSC No.
              VS
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                                          2010 CA 001935 B
    CHILDREN'S NATIONAL MEDICAL
    CENTER and COLONIAL PARKING, INC., :
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              Defendants
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                    Recorded Court Hearing
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                       Washington, D.C.
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- 1 PROCEEDINGS
- JUDGE FISHER: Counsel, before you begin I'd
- 3 just like to remind everybody that the court has issued
- 4 a -- an order I guess trifurcating the arguments in
- 5 this case. I assume you're all familiar with that.
- 6 We will try to proceed as three separate
- 7 arguments with separate time limits, and even though as
- 8 we progress somebody may shift from being an appellee
- 9 to an appellant I don't want anybody shuffling around,
- 10 so wherever you are at the moment is your seat for the
- 11 duration.
- We will first begin with essentially the
- 13 issues raised by Ms. Destefano and her children, and
- 14 we've allowed 30 minutes for that argument. Mr.
- 15 Brannon (phonetic), if you'll give 15 minutes for each
- 16 side and then we'll reset the clock when we start up
- 17 again. We may proceed.
- MS. MARTIN: Good morning. May it please
- 19 the court, my name is Dawn Martin. I represent the
- 20 plaintiff appellants, Ms. Destefano and her children,
- 21 minor children who are known as G.I. and V.I. I would
- 22 like to reserve five minutes for rebuttal if I may.

- 1 JUDGE FISHER: We'll do our best. Part of
- 2 this will be whether you manage your time wisely.
- 3 MS. MARTIN: Okay. This is a premises
- 4 liability case arising from an accident that occurred
- 5 in March of 2009 when G.I. fell two stories through an
- 6 open air shaft in the Colonial operated garage located
- 7 in Children's Hospital. The open air shaft was part of
- 8 a wall that was adjacent to the designated parking
- 9 space where Ms. Destefano had parked.
- JUDGE REID: You might want to get directly
- 11 into the issues since you have limited time.
- MS. MARTIN: Okay. The DeStefano-Ibanez
- 13 family is appealing six issues. One, the dismissal of
- 14 Ms. Destefano's claim for negligent infliction of
- 15 emotional distress; two, the instruction to the jury
- 16 not to award G.I. any damages for future pain and
- 17 suffering --
- JUDGE FISHER: Why don't we just jump in.
- 19 Let's focus on Ms. Destefano's claim that her count of
- 20 negligent infliction of emotional distress was
- 21 improperly dismissed.
- MS. MARTIN: Thank you.

- 1 JUDGE FISHER: Why.
- 2 MS. MARTIN: Judge Edelman dismissed Ms.
- 3 Destefano's claim based on the false representations in
- 4 defendant's summary judgment filings that Ms. Destefano
- 5 could not fit through the hole in the wall. The hole
- 6 --
- JUDGE FISHER: Well, she couldn't fit
- 8 through it in the same way that her son had.
- 9 MS. MARTIN: Actually she could because the
- 10 hole was three feet long by two feet wide. It was one
- 11 foot off of the ground. G.I. actually stood several
- 12 inches above where it was. He had to bend in the
- 13 middle in order to fall through.
- In other words, he wasn't in a position
- 15 where he could fit through the hole in the wall
- 16 standing and walking through. He fell backwards into
- 17 it butt first, and this was witnessed by a parking
- 18 attendant, Freddy Sanchez, and Judge Edelman did have
- 19 Mr. Sanchez's affidavit for the summary judgment
- 20 findings, although Mr. Sanchez's testimony was not part
- 21 of the trial.
- Of course Ms. Destefano's claim was not part

- 1 of the trial. So the -- what matters is what Judge
- 2 Edelman had at the time of the summary judgment
- 3 motions.
- 4 JUDGE REID: It would be helpful if you
- 5 could state precisely how you think Ms. Destefano --
- 6 MS. MARTIN: Destefano.
- 7 JUDGE REID: -- Destefano's claim falls
- 8 within the parameters of either Baker or Hedgepeth.
- 9 MS. MARTIN: Absolutely. Well, first of all
- 10 she's a classic bystander under Williams even before
- 11 Hedgepeth, which of course that's been expanded, the
- 12 claim of negligent infliction of emotional distress,
- 13 but even prior to Hedgepeth Ms. Destefano was standing
- 14 right next to her son in the zone of danger --
- 15 JUDGE FISHER: Our general rule is
- 16 bystanders don't get damages for emotional distress, so
- 17 you've got to establish that she was in the zone of
- 18 danger.
- MS. MARTIN: Well, yeah, I said, Your Honor,
- 20 she was in the zone of danger standing right next to
- 21 her son. She was maneuvering in a space that was two
- 22 feet wide between the car and the wall. She had her

- 1 two children and the stroller for her third child and
- 2 she was trying to unlock the car door, so she was doing
- 3 a lot of bending and maneuvering standing right next to
- 4 her children.
- 5 She asked the children to back up so that
- 6 she could have room for the car door to open, and when
- 7 she did that the children backed up and G.I. fell
- 8 backwards into the hole.
- JUDGE MCLEESE: I thought your theory about
- 10 when she was in the zone of danger was after she
- 11 realized that the child had fallen through the shaft
- 12 and she rushed over.
- MS. MARTIN: Actually --
- JUDGE MCLEESE: I didn't realize -- but you
- 15 were also contending that she was in the zone of danger
- 16 simply when she was standing near it, and depending on
- 17 the geometry of how she moved it's possible she could
- 18 have stumbled and fallen through?
- MS. MARTIN: Correct, Your Honor. There
- 20 were two opportunities where she was -- two points at
- 21 which she was clearly in a zone of danger.
- JUDGE MCLEESE: Was there any evidence --

- 1 speaking of the first which I hadn't recalled you
- 2 focusing on in the brief, was there any evidence in
- 3 front of the trial judge at the time of the summary
- 4 judgment motion that would have permitted a reasonable
- 5 juror to find that she could have fallen through just
- 6 as she was moving around?
- 7 MS. MARTIN: Yes. Number one, I did make
- 8 that argument, and number two, Ms. Destefano's
- 9 deposition testimony stated that. She was asked do you
- 10 think you could have fallen in the hole, and she said
- 11 yes, while I was moving around I could have stumbled
- 12 and fallen in.
- So the same way that G.I. stumbled and fell
- 14 in, bent in the middle, she could have done exactly the
- 15 same thing, and she's actually -- at the time she was
- 16 only about a head and a bit of a shoulder taller than
- 17 her son anyway. She's basically five feet tall, I
- 18 think a hundred and ten, a hundred and fifteen pounds.
- 19 JUDGE FISHER: Let's talk then about the
- 20 second way.
- MS. MARTIN: Yes, Your Honor. Then -- so
- 22 when she -- when her daughter V.I. yelled my brother's

- 1 gone that was the first that she even knew that the
- 2 hole existed.
- JUDGE FISHER: I understood Judge Edelman's
- 4 point to be what matters is whether she could have
- 5 accidentally fallen through the hole, and for the
- 6 second theory you have she had taken affirmative steps
- 7 to put herself in the hole, and I thought that was part
- 8 of his reasoning.
- 9 MS. MARTIN: Well, he actually didn't. In
- 10 fact, he said that -- he specifically said that he
- 11 assumed that -- he said even assuming -- he said
- 12 assuming that the -- not even assumed, but he said
- 13 assuming that the court -- that this court would accept
- 14 the Danger Invites Rescue Doctrine which has been
- 15 accepted in other jurisdictions, it's not been raised
- 16 here, but in every jurisdiction where it has been
- 17 raised it has been accepted.
- 18 So he made the assumption that this court
- 19 would accept the Danger Invites Rescue Doctrine, which
- 20 would mean when you go to rescue another person you put
- 21 yourself in danger, that you're still a bystander and
- 22 you get the protection of the bystander rule, and

- 1 particularly where this is a mother and this is a
- 2 six-year-old boy clearly she's going to put herself in
- 3 danger to try to save her son.
- 4 But to precisely answer your question, Your
- 5 Honor, when her daughter said my brother's gone Ms.
- 6 Destefano looked because she's thinking how can he be
- 7 gone, he's standing right next to me, and as she turned
- 8 to respond to her daughter that was the first time she
- 9 saw the hole and saw that her son was indeed gone.
- 10 And that is the point, Your Honor, that she
- 11 lunged in herself like any parent would do, and that's
- 12 when she stumbled and it was actually the four year
- 13 old, V.I., who grabbed her mother and helped to balance
- 14 her mother. And that's when Ms. Destefano dropped her
- 15 keys in because of the force, and she realized this is
- 16 not a situation where there's a floor at the same level
- 17 on the other side of this wall where I'm standing.
- 18 She thought she could just reach in and get
- 19 him from the other side, but she realized at that point
- 20 that her son had fallen into a dark hole. Then she
- 21 heard him crying mommy, mommy, and realized he was in a
- 22 place where she couldn't reach him and began screaming

- 1 for help. So there were two opportunities where she
- 2 was clearly in the zone of danger, did in fact almost
- 3 fall, could have almost fallen the first time, did
- 4 actually almost fall the second time, and that's why
- 5 she falls straight within the Williams rule.
- 6 JUDGE FISHER: Do we have a case in this
- 7 jurisdiction like the rescuer scenario where somebody's
- 8 considered to be in the zone of danger when you rush to
- 9 save your child?
- MS. MARTIN: No, the zone of -- the Danger
- 11 Invites Rescue Doctrine has not been raised in D.C.
- 12 before, but as I said actually in Hedgepeth this court
- 13 mentioned a case that was a New Jersey case in which --
- 14 I don't want to misspeak, Your Honor. I did raise in
- 15 the brief the other cases in the other jurisdictions.
- I know it's New Jersey and New York and some
- 17 other jurisdictions that have adopted it, and I know
- 18 that Hedgepeth did seem to, if I recall correctly, cite
- 19 one or more of those cases with approval, but no, the
- 20 Danger Invites Rescue Doctrine has not been
- 21 specifically raised in D.C. before.
- JUDGE FISHER: I guess I'm not persuaded by

- 1 your argument that Hedgepeth helps you. Do you want to
- 2 try to persuade me on Hedgepeth?
- 3 MS. MARTIN: Well, Hedgepeth first of all
- 4 says that the -- a bystander rule is still good law,
- 5 and as I said, Ms. Destefano is a classic bystander
- 6 even without -- in fact, I filed this case before
- 7 Hedgepeth was decided, so I believe she falls
- 8 classically within that category.
- 9 Secondly, Hedgepeth specifically criticized
- 10 the court's own previous decisions that were
- 11 restrictive and, you know, very specific about the
- 12 bystander rule, and this court said we now reject those
- 13 cases and adopt a doctrine of foreseeability, and this
- 14 is --
- 15 JUDGE FISHER: I think you read a different
- 16 opinion than I read.
- MS. MARTIN: Well, I've quoted in the brief,
- 18 Your Honor --
- 19 JUDGE FISHER: Hedgepeth requires that there
- 20 be a special relationship where somebody take on
- 21 responsibility for the emotional well-being of another
- 22 person.

- 1 MS. MARTIN: Yes, and --
- 2 JUDGE FISHER: How do you argue that has
- 3 happened here?
- 4 MS. MARTIN: Okay. In our reply brief I
- 5 addressed that very specifically because Judge Edelman
- 6 classified Ms. Destefano as a stranger to Colonial
- 7 parking, and she's not a stranger. She's a business
- 8 invitee and an actual paying customer, so there's a
- 9 special relationship based on that, and this court
- 10 actually in the PMI case --
- JUDGE FISHER: So do you think any store
- 12 owner who has a customer to buy something assumes the
- 13 special relationship we described in Hedgepeth?
- MS. MARTIN: No, but they're not a stranger,
- 15 and the degree of the special relationship depends on
- 16 all the circumstances which this court has also said.
- JUDGE MCLEESE: Yeah, but I thought we said
- 18 something along the lines of the nature of the special
- 19 relationship has to be one in which serious emotional
- 20 distress is especially likely to arrive.
- MS. MARTIN: Like innkeeper and -- patron
- 22 and innkeeper with some of the things, passenger and

- 1 railroad operator.
- JUDGE MCLEESE: No, that's -- I think there
- 3 you're talking about an earlier passage in the opinion.
- 4 When we got to the point where we started describing
- 5 the kinds of special relationships that were permitted
- 6 outside the zone of danger in position of the negligent
- 7 infliction of emotional distress and liability I think
- 8 our examples were more like, you know, doctor/patient,
- 9 psychotherapist/patient, things more of that order, not
- 10 just general business relationships.
- 11 MS. MARTIN: Right. I do want to make two
- 12 distinctions. You're correct of course, Your Honor, on
- 13 that point. My point and where I talk about the --
- 14 this court's passage on the passengers and innkeepers
- 15 is to distinguish from Judge Edelman's statement that
- 16 Ms. Destefano was a stranger to -- and that goes --
- JUDGE MCLEESE: Fair enough, but you need to
- 18 get to the point.
- MS. MARTIN: Yes, yes, and of course
- 20 Hedgepeth was a case where it was a doctor/patient
- 21 relationship, but here we have a situation, and I
- 22 discussed this at length in the reply brief, where Ms.

- 1 Destefano stands in the shoes of her son who is -- who
- 2 has a doctor/patient relationship with the hospital and
- 3 the hospital has delegated the housekeeping and
- 4 operation of this garage.
- 5 JUDGE REID: So you're reading Hedgepeth as
- 6 saying that in this particular case, a situation like
- 7 this particular case a plaintiff who also has a
- 8 plaintiff son can stand in the shoes of the son for the
- 9 purpose of her own claim?
- MS. MARTIN: Yes, and I have cited --
- JUDGE REID: Did we not in Hedgepeth say
- 12 that there are certain kinds of relationships where
- 13 neither the purpose is to care for the plaintiff's
- 14 emotional well-being, or let me just state it as the
- 15 purpose is not to care for the plaintiff's emotional
- 16 well-being.
- 17 It doesn't say it's not to care for the son
- 18 of the plaintiff's emotional well-being, but for the
- 19 plaintiff, and what I'm trying to do is extract from
- 20 Hedgepeth some language that says it's okay if the
- 21 plaintiff steps into the shoes of another plaintiff.
- MS. MARTIN: I did address that in the reply

- 1 brief, and I wanted to -- okay. I think it may be in
- 2 the 24th, but Hedgepeth cited a case from another
- 3 jurisdiction that --
- 4 JUDGE FISHER: We will take another look at
- 5 your reply brief, Ms. Martin.
- 6 MS. MARTIN: Thank you.
- JUDGE FISHER: Let's focus on a problem
- 8 we're having here. You've already used more than the
- 9 10 minutes you wanted to devote to your primary
- 10 argument. I will allow you a little bit more time, but
- 11 you need to prioritize things.
- 12 What is your next important issue that you
- 13 want to talk to us about?
- 14 MS. MARTIN: It's the exclusion of future
- 15 damages for G.I.'s pain and suffering for
- 16 post-concussive syndrome and the entire basis of Judge
- 17 Josey-Herring's exclusion was because our expert, the
- 18 pediatric neurologist, Dr. Woodruff, testified using
- 19 the word ongoing and instead of the word permanent, and
- 20 there is --
- JUDGE FISHER: Well, here's the question I
- 22 need your help with. When you're trying to calculate

- 1 future damages you need to figure a couple of things.
- 2 One is how much suffering is there every year that goes
- 3 by, and how long is this condition going to last, and
- 4 then you will apply one against the other to get an
- 5 approximation of the damages. I haven't found any
- 6 testimony about how long this condition was going to
- 7 last.
- 8 MS. MARTIN: Well, actually Dr. Woodruff
- 9 testified that there was no indication that it would
- 10 ever end, so it really was considered for the rest of
- 11 his life, and --
- 12 JUDGE MCLEESE: I'm sorry. Where -- could
- 13 you give a specific transcript cite --
- MS. MARTIN: Yeah.
- JUDGE MCLEESE: -- to where he said there
- 16 was no indication it would ever end?
- MS. MARTIN: Yes. It is in the briefs, and
- 18 the point is that that wasn't the point that Judge
- 19 Josey-Herring made at all. What the defendants argued
- 20 was that because Dr. Woodruff did not say the word
- 21 permanent that the jury could not infer permanence, and
- 22 that is the exact polar opposite of the --

- 1 JUDGE FISHER: But the problem is if you're
- 2 talking about damages you need numbers to calculate, so
- 3 if it's going to last the rest of his life what's his
- 4 life expectancy. Do we know that?
- 5 MS. MARTIN: Well, I mean, nobody knows how
- 6 long a person is going to live. We had a lot of
- 7 medical testimony in this trial, and there was no
- 8 indication that his preexisting condition or even his
- 9 condition after the accident would cause him to die,
- 10 you know, earlier than, you know, than your average
- 11 child.
- 12 JUDGE FISHER: Okay. Let's move on to
- 13 punitive damages.
- MS. MARTIN: Okay. If I might just, Your
- 15 Honor, finish my point on that --
- 16 JUDGE FISHER: Quickly.
- 17 MS. MARTIN: -- because it's extremely
- 18 important. The entire basis of the exclusion of future
- 19 damages for G.I. was that Dr. Woodruff did not use the
- 20 word permanent, but -- and I've given in my brief the
- 21 dictionary definitions of permanent and ongoing.
- He used the word ongoing and he explained it

- 1 at great length in all aspects of his life, and there's
- 2 no case, the defendants have presented no case that
- 3 requires the word permanent to be used and the decision
- 4 that was made at the lower level is the exact polar
- 5 opposite of the model D.C. jury instruction which says
- 6 that the jury can infer permanence even if there's no
- 7 medical testimony of permanence, and --
- 8 JUDGE REID: Now, on the punitive damages
- 9 with -- we have a strict view of punitive damages and
- 10 the elements that must be shown. In some of our cases
- 11 we talk about malice and we talk about evil motive.
- 12 What is the evidence of malice and evil motive here
- 13 that would justify an award of punitive damages?
- MS. MARTIN: Okay. The case law also talks
- 15 about reckless disregard for the safety of others.
- 16 JUDGE REID: Yes, it does.
- MS. MARTIN: And we are -- we've never
- 18 alleged that the defendants intended for G.I. to fall
- 19 down the open air shaft. Of course not.
- What we have based our case on is cases like
- 21 Muldrow in which this court -- Muldrow versus Re-Direct
- 22 in which this court held that -- that Re-Direct, the

- 1 organization that had custody of the boy Kenny, acted
- 2 with reckless disregard for his safety when they did
- 3 not enforce procedures or set up procedures to keep him
- 4 from getting out, and he went to his own neighborhood
- 5 where he was beaten.
- 6 JUDGE FISHER: If I recall correctly in that
- 7 case they had had bad things happen to other of their
- 8 -- I don't know -- I won't say prisoners, I can't think
- 9 of a better word, but they had been on notice that they
- 10 let people roam around, bad things happen to them.
- 11 There wasn't any prior notice here.
- MS. MARTIN: Well, I don't think -- I don't
- 13 think that the court focused on that quite, Your Honor.
- 14 I may be mistaken there, but I also want to point out
- 15 the Exxon Valdez case, which of course is a Supreme
- 16 Court case, but it's certainly very instructive with
- 17 respect to what constitutes reckless disregard for the
- 18 safety of others which justifies punitive damages and
- 19 the --
- 20 JUDGE FISHER: In that case the captain was
- 21 drunk on duty, wasn't he?
- MS. MARTIN: Correct, correct, but he didn't

- 1 intend for an oil spill.
- 2 JUDGE FISHER: But what is the comparable
- 3 here that would amount to reckless disregard?
- 4 MS. MARTIN: Well, first of all, they didn't
- 5 conduct the inspections. They knew that they were
- 6 obligated to conduct the inspections, and the other
- 7 case, and actually off the top of my head I forget the
- 8 name of it, but there's a case that I've cited which
- 9 involves air shafts in a prison, and this court held
- 10 that the prison was liable for the air shaft falling on
- 11 a prisoner's head because they had a duty to inspect.
- 12 JUDGE REID: Is it your position --
- 13 MS. MARTIN: That is constructive notice.
- JUDGE REID: Oh, I'm sorry. Is it your
- 15 position that the violation of a building code would
- 16 constitute reckless disregard?
- MS. MARTIN: Well, that's one element of it.
- 18 I mean, they've certainly violated the standard of care
- 19 by violating the law, but in addition to that they
- 20 lied. They falsified records. We have the testimony
- 21 of Belete Belete, the parking attendant who said they
- 22 tried to make -- my managers tried to make me sign

- 1 forms saying that I have been conducting these
- 2 inspections for the past several months and I didn't do
- 3 it.
- 4 JUDGE MCLEESE: Can I ask you about the
- 5 significance of that? That's conduct that is after the
- 6 injury to your client as kind of a coverup, and it
- 7 wasn't clear to me whether -- if the defendant's
- 8 conduct -- this would be Colonial, not -- this is
- 9 conduct only by Colonial if I understand, if Colonial's
- 10 conduct otherwise with respect to the circumstances of
- 11 the injury to the child, this conduct otherwise
- 12 wouldn't call for punitive damages.
- 13 It was unclear to me whether punitive
- 14 damages could rest as an essential component on that
- 15 kind of postinjury conduct that didn't aggravate the
- 16 injury, it was just sort of -- it's certainly bad
- 17 behavior and reflecting a very bad state of mind.
- 18 MS. MARTIN: Well --
- 19 JUDGE MCLEESE: So do you have law on that
- 20 topic or do you have a view about it?
- MS. MARTIN: Yes, two things, Your Honor.
- 22 Number one, if the inspections had actually been done

- 1 they wouldn't need to falsify the records later. The
- 2 point is that it was reckless disregard for the safety
- 3 of others not to do the inspections for months.
- 4 Not only that, at least three of the parking
- 5 attendants actually saw -- I mean that was the
- 6 testimony of Henry Calendres (phonetic), one of the
- 7 parking attendants, they saw the vent cover off the
- 8 wall and laying alongside the wall for a period of at
- 9 least weeks and there was some indications it had been
- 10 off for months, plus the trash and the decayed rat
- 11 carcass showed that it had been a very long period of
- 12 time since --
- JUDGE MCLEESE: Now, are these -- one of the
- 14 other components of imposing punitive damages on a
- 15 corporation is -- and different jurisdictions take
- 16 different approaches.
- We take a somewhat restrictive approach, and
- 18 so we require not just that one of the corporations
- 19 employees acted badly in the course of his or her
- 20 duties, but we require some kind of ratification, we
- 21 sometimes call it by the corporation itself which gets
- 22 you into officers, directors which are definitely not

- 1 here, or managers.
- 2 MS. MARTIN: Right, and managers -- and I
- 3 have cited the case law that says managers are included
- 4 in this, and that was actually Judge Bartnoff's
- 5 decision in the first place in this case, and she left
- 6 the punitive damages claim in specifically saying no.
- 7 JUDGE MCLEESE: And do you think our cases
- 8 would shed much light on exactly what level in a
- 9 corporation one has to have to qualify as a managerial
- 10 agent as it's sometimes called?
- I didn't find a lot of law in our
- 12 jurisdiction, and what I found out in jurisdictions
- 13 seems to conflict some jurisdictions to think that
- 14 somebody like the parking garage manager here who kind
- 15 of is responsible for a site would be a manager for
- 16 this purpose and others seem to require some more high
- 17 level management responsibilities, so I found that a
- 18 little --
- MS. MARTIN: Well, you're actually correct,
- 20 Your Honor, that D.C. has not specifically defined it,
- 21 but other jurisdictions have, and the cases that I've
- 22 found and cited I didn't find to be inconsistent. They

- 1 seem to be consistent that the highest ranking person
- 2 on a particular site is a manager for purposes, and
- 3 then of course you have the Supreme Court with the
- 4 Kolstad case which defines manager.
- 5 JUDGE MCLEESE: Somewhat imprecisely, but --
- 6 MS. MARTIN: I'm sorry?
- 7 JUDGE MCLEESE: Somewhat imprecisely. They
- 8 say we don't have much of a definition, it's somebody's
- 9 who's important but not -- doesn't have to be at the
- 10 very highest levels.
- MS. MARTIN: And here we had numerous
- 12 managers who were supposed to be ensuring --
- JUDGE FISHER: Well, let's get more
- 14 particular. With regard to Colonial's knowledge that
- 15 the grate had been removed and was sitting over to the
- 16 side, what manager knew that fact but chose to ignore
- 17 it?
- 18 MS. MARTIN: Well, we're not aware of a
- 19 manager who knew that, Your Honor. What I'm saying is
- 20 in terms of the inspections being conducted if
- 21 inspections had been conducted, and that's the
- 22 manager's job, and not just Isaac Song who was the site

- 1 manager but the managers above him who were supposed to
- 2 come by and check the forms -- the check sheets --
- JUDGE MCLEESE: Again, with respect to them
- 4 your view is all omissions. You're not saying any
- 5 manager actually knew that inspections weren't being
- 6 conducted. What you're saying is that the managers
- 7 didn't adequately supervise and they ought to have
- 8 known that the inspections weren't being --
- 9 MS. MARTIN: Well, I'm saying that they knew
- 10 or should have known. I'm saying that it was only
- 11 because of their reckless disregard for the safety of
- 12 others that they didn't know because they were supposed
- 13 to be -- they admitted in their depositions it was
- 14 their job to review the check sheets, and those check
- 15 sheets did not exist.
- 16 And it also goes for the hospital. Roberta
- 17 Alessi testified that she -- and she is the director of
- 18 operations and she's now the vice president of
- 19 operations, and she testified that it was her job to
- 20 make sure that these were done, and she deferred to
- 21 Colonial Parking, but that she received the check
- 22 sheets regularly and then she said sometimes she looked

- 1 at them, sometimes she didn't, and then she threw them
- 2 away.
- Now, if she had been looking at them she
- 4 would have known that the inspections were not being
- 5 done. It was her job to --
- 6 JUDGE FISHER: Ms. Martin, you have well
- 7 exceeded your 15 minutes. Is there another important
- 8 issue you want to address very briefly?
- 9 MS. MARTIN: I'll stand on the briefs, Your
- 10 Honor, for the rest. Thank you.
- 11 JUDGE FISHER: Thank you. And if you
- 12 gentlemen will let me know who's going to argue in this
- 13 segment.
- MR. SMITH: May it please the court, Adam
- 15 Smith for Children's National Medical Center, Your
- 16 Honor, and what -- counsel and I have agreed is to
- 17 split up some of these issues. We're going to try and
- 18 divide our 15 minutes equally, so if someone could tell
- 19 me when we get to the 7-and-a-half-minute mark that
- 20 would be great.
- I agreed to argue the post-concussive
- 22 syndrome issue that is in the plaintiff's appeal, and

- 1 the real question as we see it is whether the
- 2 plaintiff's evidence was sufficient to support a
- 3 permanency instruction for emotional distress or
- 4 inconvenience based on a post-concussive syndrome. The
- 5 law is fairly clear in this jurisdiction that such
- 6 damages have to be supported by substantial evidence,
- 7 and they have to be reasonably certain and they cannot
- 8 be speculative.
- 9 In this case the plaintiff, a preadolescent
- 10 boy, had a pretty significant medical history with
- 11 neurologic injury suffered prenatally or antenatally
- 12 within a few days of his birth that resulted in a very
- 13 serious brain hemorrhage and brain damage to a
- 14 significant portion of his brain.
- JUDGE FISHER: We know the background, but
- 16 when you have testimony from the plaintiff's expert
- 17 that the post-concussive syndrome was ongoing four
- 18 years after the event, and at least according to Ms.
- 19 Martin he said he wasn't sure it would ever end, why
- 20 isn't that enough to get the question of how long it's
- 21 going to last to the jury?
- MR. SMITH: Well, first of all, I think

- 1 there is a real distinction, and I think the trial
- 2 court was correct in recognizing this, between
- 3 something that's ongoing and something that will last
- 4 forever or the rest of a person's life.
- 5 The fact that this child had a complicated
- 6 medical history with preexisting conditions that
- 7 affected his behavior and his emotion, and the fact
- 8 that there was defense evidence in the case that a
- 9 single concussive injury usually will not result in a
- 10 permanent problem and will resolve over time made it
- 11 incumbent on the plaintiff under the case law in this
- 12 jurisdiction to put on something more than what was put
- 13 on, to actually come out and lay a foundation that it
- 14 was going to be permanent and last the rest of his
- 15 life.
- 16 Particularly given the fact that this was
- 17 considered to be an aggravation of a preexisting
- 18 condition I think it -- involving an emotional injury,
- 19 and the cases in this jurisdiction also pointed out the
- 20 significance of the fact that when you're dealing with
- 21 an emotional damage or an emotional harm it's that much
- 22 more of a duty to make sure the evidence is sufficient

- 1 to support the instruction.
- 2 So I don't think a lay jury could infer from
- 3 something that's -- from testimony of something that's
- 4 ongoing that it would be permanent, and I think in the
- 5 absence of evidence of a -- from a qualified expert
- 6 that it was going to last the rest of his life that the
- 7 court was within its discretion to limit the
- 8 instruction for future emotional harm by saying it will
- 9 not -- it cannot award damages for permanent
- 10 post-concussive syndrome.
- JUDGE FISHER: You keep going back and forth
- 12 between emotional harm and post-concussive syndrome.
- MR. SMITH: Yes.
- 14 JUDGE FISHER: Those aren't necessarily --
- 15 emotional harm is not necessarily the only
- 16 manifestation for post-concussive syndrome, is it?
- MR. SMITH: Well, I think the way the
- 18 evidence came in at trial is that it was resulting in
- 19 an emotional problem and some behavior problems for
- 20 this child at school, and that's why it was considered
- 21 to be an emotional aspect of the damages. I mean,
- 22 obviously the blow to the head is a blow to the head,

- 1 but the ramifications or the sequelae of that blow are
- 2 considered to be an emotional issue.
- JUDGE REID: But part of the appellant's
- 4 argument, at least in the brief, had to do with the
- 5 jury instruction, that the trial court first gave the
- 6 13-2 permanent injury instruction and then withdrew
- 7 that instruction in favor of one presented by Colonial
- 8 Parking as I recall.
- 9 MR. SMITH: I think if you look at the
- 10 record in the case that's actually not accurate. The
- 11 trial court never gave the permanent injury absent
- 12 medical testimony instruction. If you read the
- 13 transcript when the judge instructed the jury for the
- 14 first time you'll see that language is not in the
- 15 instruction. The plaintiff asked for that instruction.
- 16 JUDGE REID: So there's an error somewhere
- 17 along the way that that instruction actually was not
- 18 given?
- 19 MR. SMITH: That was never given. We
- 20 objected to it because there was medical testimony, so
- 21 it didn't seem to us that the instruction really
- 22 applied, and then the judge modified the standard 13-1

- 1 instruction on future emotional harm and future
- 2 inconvenience to limit it so that the jury would not be
- 3 entitled to award damages for permanent post-concussive
- 4 syndrome.
- 5 JUDGE REID: The modification it appears
- 6 said to the jury you cannot award post-concussive
- 7 damages. Is that not correct?
- 8 MR. SMITH: No, the way the language was
- 9 instructed it said you shall not award damages for
- 10 future emotional injury from permanent post-concussive
- 11 syndrome, I believe, so if you look at the instruction
- 12 it was -- 13-1 is the standard instruction for damages
- 13 in personal injury cases. There's two subparagraphs in
- 14 there. There's four and seven.
- One deals with a future emotional injury,
- 16 one deals with future inconvenience, and the judge
- 17 allowed them to consider future emotional damage and
- 18 future inconvenience but just redacted the part about
- 19 permanent post-concussive syndrome is the way I saw the
- 20 instruction.
- JUDGE FISHER: And how is the jury to decide
- 22 where future ended and permanent began?

- 1 MR. SMITH: Well, there was a competing
- 2 theory for future emotional damages -- not a competing
- 3 theory really, a court concurring theory that the
- 4 plaintiff's evidence put on about post-traumatic stress
- 5 disorder.
- 6 That was another theory that they had put on
- 7 that would support future emotional damages and the
- 8 judge allowed that instruction, allowed that theory to
- 9 proceed, and that's why the instruction as I recall is
- 10 worded to state that they could award future injury for
- 11 emotional damages but not for a post-concussive
- 12 syndrome, so the judge was trying to accommodate the
- 13 plaintiff's evidence in that regard.
- 14 JUDGE FISHER: And the verdict form reveals
- 15 the jury did not award any damages for PTSD or future
- 16 --
- 17 MR. SMITH: That's correct. There wasn't
- 18 any special interrogatory about post-concussive
- 19 syndrome. There was a special interrogatory about
- 20 post-traumatic stress disorder. It's two different,
- 21 although it's somewhat overlapping injuries. I'd like
- 22 to turn, if you don't mind, briefly to the punitive

- 1 damages issues so --
- JUDGE FISHER: Please.
- 3 MR. SMITH: -- I don't run out of time here.
- 4 JUDGE REID: Let me start off with a
- 5 question that I have, and that's the interpretation of
- 6 why the trial judge ruled out punitive damages, and it
- 7 appears that the trial judge referred to the stigma,
- 8 the, quote, stigma of punitive damages. Is that
- 9 accurate?
- 10 MR. SMITH: I think she used that language,
- 11 but I don't think it was a determinative factor. I
- 12 think we made numerous motions to have punitive damages
- 13 out of the case along the way, and she was -- frankly
- 14 she denied all of them until the very end, and she said
- 15 I listened to all this evidence and at least as to --
- 16 and I want to focus on Children's because I'm
- 17 representing the hospital, but at least as to
- 18 Children's she said, you know, you have to show some
- 19 evidence.
- 20 And it's not just some evidence, but frankly
- 21 it needs to be clear and convincing evidence that this
- 22 defendant acted with an intent to at least willfully

- 1 disregard the rights of somebody else and also that the
- 2 conduct itself was malicious or reckless, and she
- 3 ruled, and I think quite correctly so on the evidence,
- 4 that there wasn't enough evidence that the hospital
- 5 acted recklessly in this case or acted in a conscious
- 6 disregard of the child's rights because the entire
- 7 premise of this case as to the hospital is one of
- 8 constructive notice, which means that the theory was
- 9 that the condition existed for a sufficient amount of
- 10 time that the hospital should have known about it but
- 11 failed to correct it.
- 12 And there's no evidence that the hospital
- 13 had actual notice that the grill was off, so the court
- 14 said you don't -- you can't get this -- I think my
- 15 understanding is that the court essentially said you
- 16 can't find scienter, a reckless conduct or a conscious
- 17 disregard for somebody else's rights unless you at
- 18 least know about a risk and then proceed to act without
- 19 accommodating that risk or to do something about it.
- That's why I think the Muldrow case and some
- 21 of the other decisions that were cited by the plaintiff
- 22 are not really apposite in this case as to the

- 1 hospital.
- 2 JUDGE FISHER: Will you confirm or maybe
- 3 clarify this point for me? If I understand the way
- 4 this is structured the plaintiffs were asked to put on
- 5 all of the evidence that they had in front of the jury
- 6 that would support an award of punitive damages.
- 7 MR. SMITH: Correct.
- JUDGE FISHER: And amounts would wait later,
- 9 and so the standard we have to apply now is no rational
- 10 juror or no reasonable jury could have found punitive
- 11 damages based on this record.
- 12 MR. SMITH: I think that's the correct
- 13 standard, Your Honor, yes.
- 14 JUDGE FISHER: Okay.
- MR. SMITH: I'm out of time, and I know
- 16 counsel wants to address the infliction of emotional
- 17 distress issue in a bystander.
- 18 JUDGE FISHER: Thank you.
- MR. HASSELL: May it please the court, my
- 20 name is Chris Hassell. I represent Colonial Parking.
- 21 I'm going to address first the two negligent infliction
- 22 of emotional distress claims first with regard to Mrs.

- 1 -- or the mother's claim, Ms. Destefano.
- What is important for this court to
- 3 understand is that Judge Edelman had a absolute full
- 4 understanding of what the facts were in this case. He
- 5 had pictures which are extremely important in this case
- 6 and can be found at the joint -- the joint appendix. I
- 7 have this particular picture which was used extensively
- 8 during the trial. It's joint appendix 2915.
- 9 This is actually Ms. Destefano's automobile,
- 10 and the court can see and Judge Edelman could see
- 11 exactly what this hole was and what it consisted of.
- 12 On top of that he had her deposition testimony and he
- 13 had the complaint, and all of this showed us the
- 14 following facts, which was this hole is about three
- 15 feet wide, like two feet high and it's about one foot
- 16 off the ground, and Ms. Destefano testified that it
- 17 came up to -- the top of the hole came up to her waist.
- 18 She then proceeded to in her deposition
- 19 explain exactly how this accident occurred, and that is
- 20 that she had parked her car there, went into the
- 21 hospital, came back with the children. She never ever
- 22 noticed this hole. She went to open the vehicle car

- 1 with her keys, and as she wanted to open it because the
- 2 space is somewhat tight she asked her children to step
- 3 back.
- When they did that G.I. unfortunately,
- 5 because he was short, fell into the hole. Ms.
- 6 Destefano didn't even know this had occurred until her
- 7 daughter said my brother is gone. At that point she
- 8 turned around and she saw this hole. Was she scared of
- 9 it, did she back away from it? No. Why? Because as
- 10 virtually everyone here can see, this hole does not
- 11 represent a risk to an adult.
- 12 JUDGE MCLEESE: That could easily represent
- 13 a risk to an adult that was leaning into it to try to
- 14 rescue a child.
- MR. HASSELL: Well, that is a different
- 16 issue, and you brought this up when you were talking to
- 17 Ms. Martin, that there's two time periods, I suppose,
- 18 and I would address the first time period. The second
- 19 time period is when she then consciously and
- 20 deliberately moves herself toward the hole, but this is
- 21 an objective standard of what is the risk here, and I'd
- 22 submit that leaning into the hole by itself is not

- 1 going to be a risk. You'd have to literally in this
- 2 situation throw yourself down the hole.
- JUDGE FISHER: Well --
- 4 MR. HASSELL: Go ahead.
- 5 JUDGE FISHER: Speaking as a father, I think
- 6 I would have thrown myself down the hole. And why
- 7 isn't that a reasonably foreseeable consequence because
- 8 of the negligence of the leaving the grate off?
- 9 MR. HASSELL: I don't know of any support in
- 10 this jurisdiction for the concept that trying to rescue
- 11 your child and placing yourself deliberately in the
- 12 zone of danger --
- 13 (The recording cut off briefly and began
- 14 again as follows:)
- MS. MARTIN: The first thing that I want to
- 16 point out is the photographs that demonstrate
- 17 absolutely that adults fit through this hole in the
- 18 wall. Joint appendix 2908 is a photograph that was
- 19 taken on the day of the accident by Ms. Destefano which
- 20 was an exhibit before Judge Edelman, and you can see
- 21 that there are two women kneeling on the ground leaning
- 22 into the hole, two very full grown women with coats on.

- 1 And you can see that if someone were to walk
- 2 by and push them they would both fall in together, so
- 3 there's plenty of room for adults. There's another
- 4 picture. This was before Judge Edelman, page JA 2910
- 5 where one woman is standing and the other woman is
- 6 leaning in the hole, and you can see clearly that she
- 7 can fit through if she's leaning in.
- 8 Also although these photographs were not
- 9 before Judge Edelman at the time of summary judgment,
- 10 it goes to the statements that are being made here on
- 11 appeal that defendants are still take the position that
- 12 an adult could not fit through. When we --
- JUDGE FISHER: I don't think they're saying
- 14 an adult could not fit through.
- MS. MARTIN: Well, Judge Edelman --
- 16 JUDGE FISHER: I think it's more nuanced
- 17 than that.
- MS. MARTIN: Well, Judge Edelman's opinion
- 19 states that Ms. Destefano could not fit through the
- 20 hole if she tried to squeeze herself through, so he
- 21 clearly was absolutely wrong, and based -- and in terms
- 22 of the motion for reconsideration, yes, I did file a

- 1 motion for reconsideration pointing out look, here are
- 2 the pictures and, you know, this is the dimensions.
- 3 This is not true and there wasn't a sham
- 4 affidavit, and the reason Judge Edelman made the
- 5 mistake of saying it was a sham affidavit is because
- 6 the defendants said it was. The defendants said that
- 7 it was an affidavit, tried after the deposition to try
- 8 to make her deposition match, and not only was the
- 9 affidavit submitted at least a month before the
- 10 deposition, they used it as an exhibit in the
- 11 deposition, but it was the same language that was out
- 12 of the initial complaint, and the defendant said --
- 13 admitted to the dimensions of the hole.
- But if I can direct your attention to joint
- 15 appendix pages 2966 through 2980 -- just here's -- Mr.
- 16 Gallardo, who is my paralegal, obviously a grown man,
- 17 page 2966 looking inside the hole. At this point they
- 18 had changed it so that there is a grate inside, so
- 19 that's why Mr. Gallardo didn't fall two stories, but he
- 20 clearly could have fallen here.
- 21 Here's another one I'd like to show you,
- 22 myself, here I am, 2968. I'm leaning in just the way

- 1 Ms. Destefano described leaning in to see if she could
- 2 reach G.I. who she thought was on the other side of
- 3 this, and I want to mention also that if she had fallen
- 4 it would have been accidentally because remember she --
- 5 even though as you say a parent would place themselves
- 6 in harm's way she didn't know she was placing herself
- 7 in harm's way. She thought she was going to reach in
- 8 to the other side and get her son on the other level of
- 9 that, and she --
- 10 JUDGE FISHER: Thank you, Ms. Martin.
- MS. MARTIN: May I show one more, Your
- 12 Honor, because --
- JUDGE FISHER: Thank you, Ms. Martin.
- MS. MARTIN: Oh.
- 15 JUDGE FISHER: You may sit down.
- MS. MARTIN: May I just say that there's
- 17 also a picture of Mr. Smith who is --
- 18 JUDGE FISHER: You may sit down, Counsel.
- MS. MARTIN: Thank you.
- 20 JUDGE FISHER: That concludes the first
- 21 portion of the argument. We will now begin the second
- 22 portion of the argument. Mr. Brannon, there will be 10

- 1 minutes per side in this segment, and Mr. Hassell.
- 2 MR. HASSELL: Thank you, Your Honor. This
- 3 is our appeal of the denial as of a judgment as a
- 4 matter of law for Colonial in this case, and there's
- 5 two parts to the argument. I'd like to address first
- 6 the issue of the duty. The issue here is whether
- 7 Colonial had a duty to protect the plaintiffs from a
- 8 dangerous condition in the structure of the building,
- 9 and I would submit to the court that the answer to that
- 10 is clearly no. This --
- 11 JUDGE FISHER: That's kind of a scary
- 12 proposition, frankly --
- MR. HASSELL: Okay.
- JUDGE FISHER: -- to have somebody in charge
- 15 of a facility like this with lots of people and lots of
- 16 machines going through and the person who is in
- 17 day-to-day, hour-to-hour charge of running that
- 18 facility has no duty to me as an agent?
- 19 MR. HASSELL: No, I think the court has to
- 20 look very closely at the undertaking in this case.
- 21 That's what this court has always said, is the basis of
- 22 a duty like this. It's said that in Hedgepeth. It's

- 1 said that in Haynesworth. It's said that in Presley.
- 2 You must --
- JUDGE FISHER: But there's also the
- 4 background of Becker which seems to say that even
- 5 before there's any contract there's a duty to take
- 6 reasonable care.
- 7 MR. HASSELL: Well, the -- one, we don't
- 8 know what the arrangements were for the undertaking in
- 9 Becker. We don't know whether Colonial owned that lot,
- 10 what contract, but that's not really --
- JUDGE MCLEESE: Well, the court said --
- MR. HASSELL: Plus --
- JUDGE MCLEESE: No, what the court said was,
- 14 just paraphrasing, but if you operate a business at a
- 15 location and your business involves inviting the public
- 16 onto your business to engage in whatever transactions
- 17 your business entails, that under the common law you're
- 18 undertaking -- that is -- you decide what a contract
- 19 might do, but that itself amounts to an undertaking of
- 20 a duty to make sure that the premises where you're
- 21 conducting your business are reasonably safe to the
- 22 public you're inviting on. That's the common law, and

- 1 that's one way of looking at it, it seems to me.
- 2 That's what the common law says you're undertaking.
- 3 MR. HASSELL: Well, two things, Judge
- 4 McLeese. One, that case involved the actual parking of
- 5 the vehicles, and I don't dispute that we have a duty
- 6 when we're doing -- when we're dealing with the
- 7 vehicles to do that in a reasonable way.
- 8 You'll recall that in that case it was about
- 9 placing -- parking the car in a particular place,
- 10 telling people when they could go get their car when
- 11 they know that this other guy may come and try to get
- 12 his car back. It all had to do with the actual
- 13 undertaking.
- JUDGE MCLEESE: Sir, I'm not quite sure what
- 15 that means.
- MR. HASSELL: Well, meaning the undertaking
- 17 is about parking cars. It's not about keeping the
- 18 premises safe in that case. It was about the cars and
- 19 what that attendant did with regard to the customers.
- 20 Here it's all about the premises, and here is the part
- 21 --
- JUDGE MCLEESE: Can we just -- I mean, we --

- 1 it's our predecessor I quess but, I mean, I didn't --
- 2 I'm not sure -- I'd be interested if you could quote me
- 3 language in that case that suggests that the concept of
- 4 the duty that the court thought the common law imposed
- 5 on a company that is occupying a place and inviting the
- 6 public on for business purposes was limited to the way
- 7 in which the business was conducted rather than the
- 8 safety of the premises. I thought it was -- I mean,
- 9 it's called premises liability.
- MR. HASSELL: Well, I can't place that, Your
- 11 Honor, because it wasn't -- that wasn't the facts of
- 12 the case. It wasn't about somebody being hurt by
- 13 something on the property. It was somebody who got
- 14 hurt by a customer who moved their car and hit
- 15 somebody, so that's my point. I don't think the case
- 16 addresses this issue one way or the other.
- 17 What addresses this issue is Presley and
- 18 Haynesworth, and to go to Judge Fisher's point, I think
- 19 what's critical is that you look at this contract to
- 20 understand what the scope of our undertaking was. We
- 21 were not the property manager.
- JUDGE MCLEESE: I just wanted to interrupt

- 1 you for a second and get back before you move on to
- 2 Becker because you're right that the facts of Becker
- 3 are different to a degree from the facts of your case,
- 4 but what the court said about the scope of the
- 5 liability it understood to exist was that a parking lot
- 6 operator like other possessors of business premises
- 7 owes customers a duty of reasonable care.
- It can be predicated on the breach of the
- 9 duty in regard either to his own activities or those of
- 10 a third person. The obligation is to exercise prudent
- 11 care not only in his own pursuits, but also to identify
- 12 and safeguard against whatever hazardous acts of
- 13 others, or you might say hazardous conditions are
- 14 likely to occur thereon.
- So the language of that case seems to me
- 16 much -- it's going to reflect a much broader concept of
- 17 the duty that arises of common law for the operator of
- 18 a business, including a garage, than I think you're
- 19 suggesting is the case.
- MR. HASSELL: Well, I guess I'm suggesting
- 21 -- I believe the quote says possessor of land, and we
- 22 don't know what that exactly means in that case. They

- 1 could be the owner of the land, and that's a whole
- 2 different duty than what we have. We didn't own this
- 3 land and we're not the people who have the common law
- 4 duty as the owner of the land to keep the land
- 5 reasonably safe, to keep the whole garage reasonably
- 6 safe. It's not in our contract.
- 7 That's the important point because this
- 8 court has always said that when you look at the
- 9 undertaking the -- I'm trying to find the exact quote
- 10 from here -- that the defendant should have foreseen
- 11 that its contractual undertaking was necessary for the
- 12 protection of a third party.
- JUDGE MCLEESE: But that's a different -- I
- 14 mean, there are two different theories on which your
- 15 client could have been held to have a duty. One is
- 16 that it arises out of the common law in virtue of your
- 17 conducting a business there and inviting the public on
- 18 to engage in business transactions with you, and that
- 19 has nothing to do with contract and I assume you would
- 20 agree can't be contracted away.
- 21 MR. HASSELL: I'm sorry?
- JUDGE MCLEESE: Can't be contracted away, so

- 1 assume that I am the owner of a property and I run a
- 2 parking garage there and --
- 3 MR. HASSELL: I'm sorry. If you're the
- 4 owner?
- 5 JUDGE MCLEESE: I am the owner and I run it,
- 6 so both.
- 7 MR. HASSELL: Uh-huh.
- B JUDGE MCLEESE: So you would agree there's a
- 9 duty that arises there. Would you agree that I
- 10 couldn't contract it away, imagine that I then --
- MR. HASSELL: Not as the owner because it's
- 12 a nondelegable duty.
- JUDGE MCLEESE: Right.
- MR. HASSELL: But I disagree that just
- 15 because I own the property -- I mean, just because I
- 16 operate the parking lot that we can't define our
- 17 duties, and that's exactly what occurred in this case.
- JUDGE MCLEESE: Well, so the question --
- 19 right. So the question is do you think that there are
- 20 some duties created by common law that are to business
- 21 invitees that are delegable by contract and some that
- 22 aren't?

- 1 MR. HASSELL: If I control the whole
- 2 property, the whole business, yes, but --
- JUDGE MCLEESE: But my question is a
- 4 different way of looking at it is assume for a minute
- 5 that the court were to conclude that as a matter of
- 6 common law and in light of the previous decisions of
- 7 this court and its predecessor that your client did
- 8 have a duty of reasonable care. I know you don't agree
- 9 with that, but assume we concluded that.
- 10 Do you agree that if that is true whatever
- 11 your contractual arrangements were with Children's
- 12 couldn't change that?
- MR. HASSELL: No, I don't because I think
- 14 the court has repeatedly said that when deciding on a
- 15 duty of care that you look to the undertaking, and so
- 16 the undertaking is -- you say it's the business.
- JUDGE MCLEESE: But I thought you --
- 18 MR. HASSELL: You can't -- I don't think --
- 19 I'm not agreeing with you that there's two duties here.
- 20 If we were the owner that would be different.
- JUDGE MCLEESE: No, I do agree that there's
- 22 none. What I'm trying to figure out is if --

- 1 MR. HASSELL: Well, I don't believe there's
- 2 two theories, excuse me.
- JUDGE MCLEESE: Oh, I see. I see, because
- 4 what I was trying to figure out was whether -- if the
- 5 court were to conclude contrary to your position that
- 6 some kind of a duty arose upon you under the common law
- 7 in virtue of you operating a business at a place and
- 8 inviting the public on do you think that duty -- I know
- 9 you don't think one exists, but if there were one is it
- 10 your position that it could be delegated or defeated by
- 11 your contractual arrangements for the third party, or
- 12 do you agree that if we were to conclude there was such
- 13 a duty you couldn't delegate it or contract it away?
- MR. HASSELL: I believe we could delegate
- 15 that because the only nondelegable duty that I know of
- 16 in this jurisdiction is by being virtue of the owner
- 17 because with that comes certain responsibilities, but
- 18 if, for instance, you know, I run a business and I have
- 19 a cleaning company come in and I get some -- I can
- 20 delegate -- you're going to pick up all the trash or
- 21 something and you will always be responsible for every
- 22 single piece of trash that comes through here, I want

- 1 you here 24 hours, I could delegate that. I mean, it's
- 2 an extreme example but let me try to give you a better
- 3 example of what --
- 4 JUDGE REID: Let me interrupt you one
- 5 second, please. Would you disagree that the record
- 6 shows that Colonial had actual knowledge of the hole?
- 7 MR. HASSELL: No.
- JUDGE REID: You do not agree?
- 9 MR. HASSELL: No, I don't disagree.
- 10 JUDGE REID: Oh, all right.
- MR. HASSELL: I thought that's what you were
- 12 asking.
- JUDGE REID: So you had --
- MR. HASSELL: There was a gentleman, Mr.
- 15 Calendres, who saw the hole.
- 16 JUDGE REID: Colonial had actual knowledge
- 17 -- actual notice of the hole, but did nothing to cover
- 18 it up?
- MR. HASSELL: Well, he had notice of a hole,
- 20 and this is important I think when the court considers
- 21 this case in every aspect. We cannot turn the clock
- 22 back and not look at this case as to what exact -- you

- 1 know, without knowing exactly what happened. We know
- 2 exactly what happened.
- It was a very unfortunate incident, but
- 4 every single witness in this case has said there is --
- 5 that they didn't know that the hole -- behind the hole
- 6 was a two-floor shaft. That was said by Mr. Calendres
- 7 who said I thought it was an air duct. That was said
- 8 by Mr. Wood who said I thought it was a cubby hole, and
- 9 it was also said by the plaintiff herself who said when
- 10 she reached in she thought there was a floor there.
- So, you know, we all know now that there was
- 12 a shaft, but knowing then it wasn't obvious, and this
- 13 is part of the reason for my argument about the need
- 14 for an expert. There's -- you know, there needed to be
- 15 somebody who could say that Colonial should have known
- 16 that behind this hole was a two-floor shaft.
- 17 JUDGE FISHER: Why is that important? The
- 18 grate is there for a purpose. It's been displaced.
- 19 That can't be good. Isn't your obligation to react to
- 20 that knowledge?
- MR. HASSELL: Well, again I'm going now to
- 22 go back to the duty point. I'm not trying -- I don't

- 1 think I'm dodging your question by doing that. There
- 2 is absolutely nothing in our contractual agreement that
- 3 says we will take care of this building structure.
- 4 JUDGE FISHER: Sir?
- 5 MR. HASSELL: There's absolutely nothing in
- 6 the agreement that says we will report --
- JUDGE FISHER: Your point, as I understand
- 8 it then, is that the hospital should have had its own
- 9 people inspecting every part of the structure every day
- 10 --
- MR. HASSELL: No, I -- well, sorry, I didn't
- 12 let you finish, I'm sorry.
- JUDGE FISHER: There's going to be
- 14 redundancy here. You think that even though you were
- 15 obligated to patrol the building to --
- MR. HASSELL: We weren't.
- 17 JUDGE FISHER: You were. I mean, your very
- 18 contract says that you have a golf cart, you're
- 19 supposed to patrol the building, you're supposed to
- 20 report certain things. You've got forms for reporting
- 21 oil spills and spalling concrete and things like that.
- 22 Even though you were back and forth doing all those

- 1 things virtually all day long that the hospital had to
- 2 have its own people out regularly, we'll talk later
- 3 about how often, inspecting the structure.
- 4 MR. HASSELL: My response is two-fold, Judge
- 5 Fisher. First of all, I beseech the court
- 6 to look at this agreement and see where it says that
- 7 we're patrolling the area to make sure that it's safe.
- 8 What we were doing was doing what I would call Boy
- 9 Scout patrols, patrols to clean up trash.
- If you look at this agreement in a full
- 11 context, not parsing out one word or two, it's clear,
- 12 run the garage and keep it clean, not you will be
- 13 responsible for keeping this place safe, and in fact --
- JUDGE FISHER: So there's a pile of trash
- 15 over here, that's my job. There's a gaping hole over
- 16 here, not my worry?
- MR. HASSELL: It's true because that's what
- 18 the contract says because the hospital being the
- 19 property owner retained that duty. They did not tell
- 20 us we want you -- we are -- the contract does not
- 21 delegate to us the responsibility to keep the property
- 22 safe.

- 1 JUDGE MCLEESE: Just to see how far you take
- 2 that thought, imagine that instead of the problem that
- 3 arose here there was like a sink hole that developed so
- 4 that if you drove into the parking lot you would --
- 5 your car would fall into the sink hole 50 feet and
- 6 people would die, and imagine 2 or 3 cars had already
- 7 fallen in and Colonial knew about it.
- 8 Am I right that your view is Colonial would
- 9 have had no duty to the public under common law or
- 10 under its contract to do anything about that?
- 11 MR. HASSELL: Well, I think it would be like
- 12 in Haynesworth. It would be nice if we did, but the
- 13 contract didn't require it and I could --
- 14 JUDGE MCLEESE: And the common law doesn't
- 15 require that in your view?
- MR. HASSELL: Well, the duty -- again, you
- 17 and I maybe have a disagreement about the two different
- 18 theories. I say the only theory can be the contract.
- 19 I would like to put one other example to you that maybe
- 20 will put my point. Suppose there was a sprinkler pipe
- 21 that was leaking and one of our guys saw one of the
- 22 sprinkler pipe and didn't report it and then two days

- 1 later it bursts.
- 2 Clearly under this contract -- and damaged
- 3 all sorts of cars -- would we be liable for that? No,
- 4 because under this contract we had absolutely no
- 5 responsibility for sprinkler pipes, none. Now, would
- 6 it be nice if somebody did that? Yes, but that's the
- 7 Haynesworth, it would be nice but it's not your duty.
- JUDGE REID: Is my recollection correct that
- 9 there was a provision in the agreement that said that
- 10 Colonial had to take out a liability insurance policy
- 11 with a -- for at least two million in bodily injury.
- 12 MR. HASSELL: Correct.
- JUDGE REID: And what was the purpose of
- 14 that?
- MR. HASSELL: General good prudence. I
- 16 think it's a negotiation that if the hospital wants to
- 17 make sure it's covered for --
- 18 JUDGE REID: It doesn't reflect any wider
- 19 responsibility for the areas than you're admitting
- 20 here?
- MR. HASSELL: No, nor was there any
- 22 testimony about that, no. And my final point and then

- 1 I'll sit down is the fact that we did some things that
- 2 were above and beyond the contract like doing certain
- 3 inspections that weren't required that we put in
- 4 ourselves should not be used against us, and that's
- 5 what the plaintiffs and the codefendants are trying to
- 6 do.
- 7 They're saying you did these inspections, we
- 8 did them voluntarily, they weren't required, but now
- 9 that you did them you're going to be held responsible.
- 10 I ask the court to reject that argument and grant us
- 11 judgment as a matter of law.
- 12 JUDGE FISHER: Thank you, Mr. Hassell. Now,
- 13 in the second part of this segment I understand that,
- 14 Mr. Smith, you and Ms. Martin are both going to argue.
- 15 Have you determined who's going first?
- MR. SMITH: We did, and we were going to
- 17 defer to the court.
- 18 JUDGE FISHER: How about if you go first.
- 19 There's a total of 10 minutes for both of you.
- MR. SMITH: Your Honor, we believe the court
- 21 made the correct decision to find that there was a duty
- 22 on behalf of Colonial Parking to make sure that the

- 1 garage was reasonably safe and that extended to the
- 2 customers that were using the garage. The court looked
- 3 initially at the contract.
- 4 JUDGE FISHER: Let me --
- 5 MR. SMITH: Yeah.
- 6 JUDGE FISHER: -- just clarify something
- 7 that I've tried to assimilate from all these papers.
- 8 As I understand it, you're not fighting liability in
- 9 this case with respect to the young man. You just want
- 10 Colonial to help pay the judgment.
- 11 MR. SMITH: In terms of our appeal?
- 12 JUDGE FISHER: Yes.
- 13 MR. SMITH: Our appeal as to G.I. is a
- 14 protective cross appeal. In the case that the court
- 15 grants any of the errors that might affect the judgment
- 16 remand as to G.I. we want those issues addressed, but
- 17 yes, in a sense you're correct in the way you've
- 18 described it.
- 19 JUDGE FISHER: Okay. So tell me why they
- 20 ought to help pay the judgment.
- MR. SMITH: Well, the contract had several
- 22 provisions in it, including an obligation for them to

- 1 perform general maintenance and housekeeping
- 2 responsibilities. It used that term.
- 3 It also had provisions in it that required
- 4 them to patrol the garage, and it had a provision in it
- 5 that allowed the use of the golf cart to do that, so
- 6 there is reference and there is language in the
- 7 contract that required Colonial not only to park cars
- 8 but to keep the garage generally maintained, and the
- 9 question became in the court's mind what does that
- 10 mean.
- 11 We're not -- the hospital never argued in
- 12 this case that Colonial had an obligation to repair the
- 13 vent or to, you know, take a trowel and a bucket and go
- 14 fix the concrete. That wasn't the point of the
- 15 contract, but the contract retained that right to the
- 16 hospital, but when the court held a hearing on this
- 17 issue in terms of the scope of Colonial's duty they
- 18 heard evidence from a number of witnesses in this case
- 19 that talked about the course of dealing between these
- 20 parties.
- 21 And that evidence indicated that over a very
- 22 long period of time the hospital and Colonial had a

- 1 working relationship whereby Colonial performed daily
- 2 inspections of the garage and brought issues to the
- 3 hospital's attention for correction either directly to
- 4 our engineering staff or through Ms. Alessi, and those
- 5 problems or concerns in the garage did include safety
- 6 concerns.
- 7 And they were not only issues about puddles
- 8 on the floor or oil spills, but they involved issues
- 9 that you could argue were parts of the structure of the
- 10 garage, so there was testimony in the case that showed,
- 11 for example, that if there was a broken sprinkler pipe
- 12 they would bring that to the hospital's attention and
- 13 the hospital repair. If there were issues with drain
- 14 covers that were displaced or clogged, they were
- 15 bringing those to the hospital's attention.
- JUDGE MCLEESE: Do you agree --
- 17 MR. SMITH: Yes.
- 18 JUDGE MCLEESE: -- that that was being done
- 19 doesn't necessarily establish that there was a
- 20 contractual obligation to do it?
- 21 MR. SMITH: I would --
- JUDGE MCLEESE: In other words, people do

- 1 things that are not contractually required to do.
- 2 MR. SMITH: I would disagree because they
- 3 were being paid to perform general maintenance and
- 4 housekeeping. That was part of the written contract,
- 5 so if you look at --
- 6 JUDGE MCLEESE: My point is only --
- 7 MR. SMITH: Yes.
- JUDGE MCLEESE: -- it doesn't necessarily --
- 9 that they did it doesn't necessarily mean that the
- 10 contract required them to. It's -- I take your point
- 11 that it is arguably relevant to how to interpret a
- 12 contract term, but I was simply observing that that
- 13 they did it doesn't by itself establish that they were
- 14 required by the contract to do that.
- MR. SMITH: No, but I think it helps to
- 16 understand the relationship of the parties, and the
- 17 contract was not integrated. There's no integration
- 18 clause in the contract.
- 19 JUDGE FISHER: Let me ask you to address
- 20 this. If you could not refer to or rely upon course of
- 21 dealing and had to rely solely on the written contract
- 22 what's your best argument that the contract itself

- 1 obligated Colonial to do these things?
- 2 MR. SMITH: I think the requirement that
- 3 they perform general housekeeping maintenance and the
- 4 requirement that they patrol the garage were the key
- 5 elements of that.
- 6 JUDGE MCLEESE: But what do you think they
- 7 were required to do? I mean, there is language that
- 8 your opponent relies on -- your opponent for this
- 9 purpose relies on seeming to exclude from Colonial's
- 10 obligations air handling systems and HVAC systems.
- 11 MR. SMITH: Building related equipment and
- 12 structure is -- yeah.
- JUDGE MCLEESE: Well, that's part of --
- 14 those are some of the specific, more specific terms
- 15 defining what those more general terms mean.
- MR. SMITH: I think if you read the contract
- 17 you will note that where Colonial wanted to absolve
- 18 itself completely of any responsibility it used that
- 19 language. So, for example, there's a paragraph in
- 20 there that says we have no responsibility whatsoever
- 21 for the Helix spiral driveway and some sidewalks, so
- 22 when Colonial wanted to say that it said that.

- 1 It never said we have no responsibility
- 2 whatsoever for the structure of this building at all
- 3 and that was never the understanding of these parties
- 4 before this accident happened, so Colonial's own
- 5 documents indicated that they understood that
- 6 housekeeping meant keeping the garage safe.
- 7 The guy that negotiated this contract stood
- 8 up in deposition and said any company worth its salt
- 9 would check for safety issues. Mr. Pelz who was the
- 10 senior operations manager of this outfit said this was
- 11 a safety hazard, I recognize it as such, it should have
- 12 been reported and they disciplined the guy that was
- 13 running the garage for not reporting it.
- So everybody up until counsel on this case
- 15 for Colonial understood that this was an issue and they
- 16 were responsible for it, and --
- 17 JUDGE MCLEESE: When you say responsible for
- 18 it you mean responsible at least to notify Children's
- 19 of it, you don't mean responsible --
- MR. SMITH: Exactly, because that was the
- 21 working relationship.
- JUDGE MCLEESE: But you agree that to the

- 1 extent there was responsibility to correct the
- 2 condition that it was not Colonial's and that was
- 3 entirely Children's, or do you think that Colonial had
- 4 a responsibility even extending to fixing the
- 5 condition?
- 6 MR. SMITH: No, I don't think we argue that
- 7 they should have taken a screwdriver and put it back
- 8 on. They should have put a cone in front of it and
- 9 called the engineering department. That's what they
- 10 should have done, so -- are we at five minutes?
- MS. MARTIN: Yes.
- 12 MR. SMITH: Okay. So I think that's --
- 13 unless you have any other questions about that I'm
- 14 pretty much finished with the duty issue. In terms of
- 15 the expert issue I think --
- 16 JUDGE FISHER: Well, wait a minute.
- 17 MR. SMITH: Yes.
- 18 JUDGE FISHER: Is Ms. Martin acceding her
- 19 time to you?
- MR. SMITH: We agreed to split the 10
- 21 minutes equally.
- MS. MARTIN: I'll give him another --

- 1 JUDGE FISHER: And you've already used more
- 2 than your half.
- 3 MR. SMITH: I have. Okay. All right. Then
- 4 I'll sit down. Thank you, Your Honor.
- JUDGE FISHER: Thank you.
- 6 MR. SMITH: All right.
- 7 MS. MARTIN: I just wanted to add briefly to
- 8 Mr. Smith's description of the contract that it also
- 9 includes a provision to look for trip hazards and
- 10 they're supposed to clean up oil spills, so certainly
- 11 this vent cover being off would be a trip hazard at
- 12 minimum.
- I want to point out that although we
- 14 completely agree and adopt the portion of the
- 15 hospital's brief, their reply to Colonial's argument,
- 16 cross appeal, we completely adopt that as our own, but
- 17 I would point out that it's not necessary at all, and I
- 18 think Your Honor was getting to that point earlier when
- 19 you talked about the two bases of finding liability or
- 20 finding a duty with respect to Colonial.
- 21 And the first one is the straight, you know,
- 22 customer and business relationship that there was a

- 1 duty under Becker and also, you know, we've talked a
- 2 lot about Becker and it makes sense because it's
- 3 actually Colonial Parking, but there's another case,
- 4 PMI versus Gilder, that this court decided in 1975
- 5 where this court also acknowledged a special
- 6 relationship between a parking garage and --
- 7 JUDGE REID: Colonial spends substantial
- 8 time in its reply brief disputing the relevance of PMI.
- 9 MS. MARTIN: Well, I -- it's right on point
- 10 because the court held that the legal relationship
- 11 depends on the place, conditions and nature of the
- 12 transaction and the type of establishment it serves and
- 13 numerous other factors. All those factors are here.
- 14 Also PMI was located in the Hilton Hotel,
- 15 and that makes it very much like the present case
- 16 because you've got a very prominent parking company
- 17 operating in the context of a building owned by another
- 18 entity, so I frankly don't understand their
- 19 distinctions at all. It seems to me right on point.
- 20 And this court also said it is the operator,
- 21 not the car owner who is in a position to have superior
- 22 knowledge of the conditions in the garage, so here --

- 1 and this is not a situation -- Mr. Hassell makes it
- 2 appear that they are just hired hands, you know, under
- 3 the umbrella of the hospital, and that's not the case
- 4 at all.
- 5 My client was given a Colonial Parking
- 6 ticket out of a -- from a Colonial booth with a, you
- 7 know, Colonial dispenser. Everybody is wearing
- 8 Colonial uniforms except for the people who are
- 9 contracted out from Unipark who are working under the
- 10 supervision of Colonial, so they operated it. Anyone
- 11 driving into it is going to say this is a Colonial lot.
- 12 Also the comment that's on the website for
- 13 Colonial says no matter where you park you'll always
- 14 enjoy the safety, convenience and friendly smile that
- 15 says Colonial, so Colonial's own website is saying you
- 16 can expect everything the same, we operate the same way
- 17 everywhere and you can trust our name, and they're
- 18 encouraging their customers or parkers, you know, to
- 19 rely on that Colonial reputation for safety
- 20 specifically.
- Then I did want to move quickly to the
- 22 garage management expert issue. No expert is

- 1 necessary, and the law is very clear that no expert is
- 2 necessary where average lay people can discern what
- 3 reasonable care requires, what a reasonable response is
- 4 under the circumstances.
- 5 And I think that Judge Bartnoff laid it out
- 6 very well when she said, you know, the kid fell in a
- 7 hole where there shouldn't have been a hole. Everyone
- 8 can understand that. Everyone can understand that
- 9 there shouldn't have been an open vent, whether it
- 10 dropped two stories or one foot or whatever, with a
- 11 vent laying across a wall that it poses a danger and a
- 12 hazard.
- In terms of the expert -- Colonial has never
- 14 even identified what kind of an expert they're talking
- 15 about. They keep saying an expert in garage parking
- 16 management. Well, there's no degree required to open a
- 17 garage. Anybody can open a garage. There's no
- 18 specific training, no specific certification that
- 19 someone has to learn, and there's a difference between
- 20 the safety aspect of it and general management to, you
- 21 know, increase the number of cars who can park in a
- 22 certain place.

- 1 There are all sorts of things that are
- 2 involved in managing, and we don't care about any of
- 3 that. We care about the safety and we had the -- Eric
- 4 Woods who was the D.C. building code inspector who came
- 5 and inspected on the same day and he became our expert
- 6 as well as the fact witness who came on behalf of D.C.
- 7 government, and so we feel that to the extent that any
- 8 expert was necessary at all Mr. Woods very nicely put
- 9 everything in context.
- 10 And also the hospital produced an expert.
- 11 They had a Mr. Dinoff who was an architect, and both
- 12 Mr. Woods and Mr. Dinoff testified that the vent cover
- 13 being off violated the D.C. building code the minute it
- 14 was off, not five minutes later, two weeks later, the
- 15 minute it was off.
- 16 JUDGE FISHER: Thank you, Ms. Martin. I
- 17 think we've reached the end of the second segment and
- 18 now the third segment will be a total of 10 minutes, 5
- 19 minutes per side. This apparently is the hospital's
- 20 cross appeal -- cross appeal. Excuse me.
- MR. SMITH: Your Honor, our cross appeal,
- 22 this involves two evidentiary rulings that were made by

- 1 the court during the course of the trial.
- 2 JUDGE FISHER: Let me sort of confront you
- 3 at the outset.
- 4 MR. SMITH: All right.
- JUDGE FISHER: As I understand it, these are
- 6 issues that you want us to address in the event there
- 7 is a retrial, and you want us to instruct the trial
- 8 court how to rule on evidentiary matters if these
- 9 things come up again in a new trial.
- 10 MR. SMITH: That's correct.
- 11 JUDGE FISHER: Good luck.
- MR. SMITH: Thank you.
- 13 (Laughter.)
- MR. SMITH: Do you want me to just sit down
- 15 now?
- JUDGE FISHER: No.
- 17 JUDGE MCLEESE: Let me just follow up in
- 18 that vein. Like one of your points about the surprise
- 19 testimony if there's a retrial it's not going to be a
- 20 surprise, so it seems like that's water under the
- 21 bridge for any purpose we or you would have right now.
- MR. SMITH: Well, we needed to -- you know,

- 1 the case law is very clear that if you want to preserve
- 2 error on retrial you have to raise it in a cross -- a
- 3 potential cross appeal as law of the case, so I don't
- 4 -- Your Honor, I don't know how to tell you what to
- 5 tell the trial judge on remand, but we did -- we do
- 6 think that there --
- 7 JUDGE MCLEESE: Well, I understand your
- 8 point better --
- 9 MR. SMITH: Right.
- JUDGE MCLEESE: With your second argument I
- 11 understand it a little better. That's an issue that
- 12 could occur, and maybe you could persuade us to resolve
- 13 the matter rather than leaving it to the trial court,
- 14 but the first, if the issue is at the time of the first
- 15 trial in the middle of the trial there was a surprise
- 16 and the trial court didn't handle it well.
- 17 MR. SMITH: Correct.
- JUDGE MCLEESE: That seems -- I have a hard
- 19 time seeing how there would be any reason for us to
- 20 need to address that. If it comes up again there
- 21 certainly won't be a question of surprise.
- MR. SMITH: All right. Well, as long as it

- 1 doesn't become law of the case then I guess you're
- 2 correct about that. The other issue I guess was the --
- 3 it was also an evidentiary issue with regard to the
- 4 fact that the trial court permitted the plaintiffs to
- 5 put in evidence about problems with other grills that
- 6 Mr. Woods had found which --
- 7 JUDGE REID: So what was the abuse of
- 8 discretion?
- 9 MR. SMITH: Well, the abuse of discretion
- 10 was that she -- the trial judge did it on the argument
- 11 that we had somehow opened the door to this evidence
- 12 which she had already excluded prior to the trial, one
- 13 of the pretrial conferences and, in fact, it was the
- 14 plaintiff who had used the same photographs that they
- 15 then claimed that Mr. Dinoff had used that opened the
- 16 door.
- So we didn't refer -- Mr. Dinoff did not
- 18 refer to any evidence that Mr. Woods had not already
- 19 pointed to when he did his direct examination, so the
- 20 whole justification for saying that we can now start to
- 21 talk about other grills in the garage was absent from
- 22 the gitgo.

- 1 JUDGE FISHER: What I have trouble seeing is
- 2 why this evidence was excluded in the first place.
- 3 MR. SMITH: Uh-huh.
- 4 JUDGE FISHER: To my mind if there are three
- 5 or four grates off as opposed to one that's highly
- 6 relevant to negligence.
- 7 MR. SMITH: Well, there wasn't any evidence
- 8 of other grates being off. There was evidence of some
- 9 screws missing from some grills. This is a very large
- 10 garage, there are multiple levels and there are
- 11 multiple vents, and Mr. Woods said he found some screws
- 12 missing.
- One of the other grates was loose, but he
- 14 didn't know where they were in the garage. He didn't
- 15 have any documentation to help us understand whether
- 16 they had any relationship to this shaft or even this
- 17 area, so we didn't know that.
- JUDGE MCLEESE: Why would it matter where
- 19 they are in the garage or how proximate they are to
- 20 this particular grill? I get -- some of your other
- 21 points I can see go to certainly weight and maybe
- 22 admissibility, but I'm not sure I follow the logic of

- 1 why it would matter where they were located.
- If your opponent's argument is we're trying
- 3 to assess the degree of negligence and if there are in
- 4 a single facility -- maybe if it were a different
- 5 facility you'd have a better point, but if it's the
- 6 same facility why isn't -- so related deficiencies in
- 7 the other shafts relevant to whether this happened as a
- 8 result of negligence or instead happened in some way
- 9 that didn't reflect negligence either by Colonial or by
- 10 the hospital with respect to the premises. Excuse me.
- 11 MR. SMITH: Well, I think the trial court
- 12 made a discretionary call on that, and basically she
- 13 decided that that evidence was only marginally relevant
- 14 and was more prejudicial than probative given the fact
- 15 that --
- JUDGE MCLEESE: What's the prejudice of it?
- MR. SMITH: Well, he had no way to tell us
- 18 where they were or what they were. It was -- I mean,
- 19 we couldn't defend against what he was saying because
- 20 he didn't have any proof of where they were or what
- 21 they were or how they even had any bearing on this
- 22 particular opening being open at the time of this

- 1 particular event.
- 2 JUDGE MCLEESE: So it was kind of too vague
- 3 is --
- 4 MR. SMITH: It was extremely vague. I mean,
- 5 the issue that -- I think the trial judge said look,
- 6 this is about this vent and this opening, why this
- 7 grill cover was off, and that's what this trial is
- 8 going to be about.
- 9 JUDGE MCLEESE: I mean, that ruling was in
- 10 your favor.
- 11 MR. SMITH: Yeah.
- 12 JUDGE MCLEESE: What you're contesting
- 13 conditionally in your cross appeal is the opening of
- 14 the door ruling, and that too happened as a result of a
- 15 particular sequence of events at the first trial that
- 16 there's no specific reason to think would recur at a
- 17 retrial, so it's again a little bit hard to see the
- 18 need for us to weigh in after the fact about how that
- 19 should or shouldn't have been handled if you're not --
- 20 if you're contesting it only conditionally as it
- 21 relates to a future trial.
- MR. SMITH: Well, I agree, and I think that

- 1 if you are inclined to reverse on the issues that the
- 2 plaintiffs have raised in their appeal then I would ask
- 3 you to look at that and use your judgment in terms of
- 4 whether you think it's worth something that the court
- 5 should take -- have some advice from you or not, so
- 6 that's what I would say about that.
- 7 JUDGE FISHER: Your main point is you don't
- 8 want anybody to accuse you in the future of having
- 9 forfeited --
- 10 MR. SMITH: Exactly.
- 11 JUDGE FISHER: -- this issue.
- 12 MR. SMITH: Yes.
- 13 JUDGE FISHER: Okay. All right. Thank you.
- MR. SMITH: All right.
- JUDGE FISHER: Ms. Martin.
- 16 MS. MARTIN: I want to follow up on the
- 17 point that you made, Your Honor, Judge Fisher, a point
- 18 that I've been making throughout the appeal, which is
- 19 that the hospital has not raised any kind of appeal
- 20 that constitutes reversible error.
- They're not challenging the award, and I
- 22 ask, and we do have another motion pending, to lift the

- 1 stay in collection of the judgment because there's no
- 2 basis for withholding payment of the judgment for the
- 3 hospital to pay G.I.'s award. We've waited almost two
- 4 years since the appeal, and these children are now six
- 5 years older. My firm is going under.
- I mean, it's not fair and there's no basis
- 7 for it, and this was frankly a subterfuge to continue
- 8 withholding the money of the judgment that was already
- 9 paid because we're not asking for a retrial for the
- 10 money that was awarded to G.I. for his past pain and
- 11 suffering. Anything that would happen on remand would
- 12 be in addition to that award, and we ask that -- beg
- 13 the court to make the hospital pay. It's a joint and
- 14 several liability issue and they should pay it now.
- 15 The -- with respect to the evidence about
- 16 the other vent covers, this actually was an issue in
- 17 our brief, one of the evidentiary issues that we raised
- 18 and we said on remand please let us bring in the
- 19 evidence of the condition of the other vent covers, and
- 20 there actually would have been testimony about another
- 21 vent cover being off.
- 22 Ronnie Sellers -- it is in the record -- was

- 1 an employee of the hospital and he would have
- 2 testified, but we didn't bring his testimony in because
- 3 the judge had said we couldn't bring in any evidence of
- 4 it so that was out, but there is a discussion in the
- 5 trial transcript because I only discovered Ronnie
- 6 Sellers while the trial was going on or discovered he
- 7 had this knowledge.
- 8 JUDGE MCLEESE: Can I ask you about -- so
- 9 you're suggesting -- well, if there were a retrial on
- 10 the issues that you're raising it seems like liability
- 11 wouldn't be contested at that retrial. The issues
- 12 would be I guess zone of danger issues and damages
- 13 relating to future suffering relating to (inaudible) --
- MS. MARTIN: Post-concussive syndrome.
- JUDGE MCLEESE: -- and so I'm not sure that
- 16 the issue you're describing would be the subject of
- 17 further proceedings.
- MS. MARTIN: For punitives, Your Honor?
- JUDGE MCLEESE: For punitive damages, that's
- 20 true. That's true.
- MS. MARTIN: And --
- JUDGE MCLEESE: But again the trial court,

- 1 I'm not sure that that's something that we should
- 2 necessarily need to decide because the trial court
- 3 hasn't confronted the question of whether that evidence
- 4 --
- 5 MS. MARTIN: Okay.
- 6 JUDGE MCLEESE: -- should or shouldn't be
- 7 relevant to punitive damages that were going to be
- 8 tried.
- 9 MS. MARTIN: And actually like the hospital
- 10 we wanted to put it all in so that, you know, we'd have
- 11 that issue, but what Mr. Smith said about the hospital
- 12 not being able to contest what grates were off or had
- 13 screws, that is not true. Mr. Woods was accompanied by
- 14 what he called in his deposition or trial testimony as
- 15 the entourage, and there's an entire list of hospital
- 16 directors and engineers and people who walked around
- 17 with him.
- 18 And they also -- there is also documentation
- 19 thereafter between the hospital and the government -- I
- 20 want to be clear on what agency it is, I don't want to
- 21 misspeak, but it is an exhibit -- which lists all the
- 22 vent covers that needed screws or stuff -- things that

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1
    had been repaired so it's just plain not true, and I
 2
    think actually Your Honor's covered the other points I
    wanted to make on that.
 3
 4
               JUDGE FISHER: Thank you, Ms. Martin.
                                                       Thank
 5
    you, Mr. Smith, Mr. Hassell. The cases will be
    submitted and the court will stand adjourned.
 6
 7
               THE BAILIFF: All rise.
 8
               (The recorded court hearing was concluded.)
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1	CERTIFICATE OF TRANSCRIBER
2	I, Bonnie K. Panek, do hereby certify that
3	the foregoing transcript is a true and correct record
4	of the recorded proceedings; that said proceedings were
5	transcribed to the best of my ability from the audio
6	recording as provided; and that I am neither counsel
7	for, related to, nor employed by any of the parties to
8	this case and have no interest, financial or otherwise,
9	in its outcome.
10	
11	
12	Donnie L. Panek)
13	BONNIE K. PANEK
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