

In the Matter Of:

WENDY PAOLA DESTEFANO

vs

CHILDREN'S NATIONAL MEDICAL CENTER and COLONIAL PARKING

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, :
 :
 vs : DCSC No.
 : 2010 CA 001935 B
 :
 CHILDREN'S NATIONAL MEDICAL :
 CENTER and COLONIAL PARKING, INC., :
 :
 Defendants :
 - - - - -

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E X H I B I T S

(None.)

1 P R O C E E D I N G S

2 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.

12 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.

18 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.

10 JUDGE REID: You might want to get directly
11 into the issues since you have limited time.

12 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 --

18 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.

22 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 --

7 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.

14 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.

22 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.

19 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.

9 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.

13 MS. MARTIN: Actually --

14 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?

19 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.

22 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.

13 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.

21 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.

3 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?

10 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.

16 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.

22 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.

17 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 --

11 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?

14 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.

17 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.

21 MS. MARTIN: Like innkeeper and -- patron
22 and innkeeper with some of the things, passenger and

1 railroad operator.

2 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 --

17 JUDGE MCLEESE: Fair enough, but you need to
18 get to the point.

19 MS. MARTIN: Yes, 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?

10 MS. MARTIN: Yes, and I have cited --

11 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.

22 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.

7 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 --

21 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 --

14 MS. MARTIN: Yeah.

15 JUDGE MCLEESE: -- to where he said there
16 was no indication it would ever end?

17 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.

14 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.

22 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?

14 MS. MARTIN: Okay. The case law also talks
15 about reckless disregard for the safety of others.

16 JUDGE REID: Yes, it does.

17 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.

20 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.

12 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?

22 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.

14 JUDGE REID: Oh, I'm sorry. Is it your
15 position that the violation of a building code would
16 constitute reckless disregard?

17 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?

21 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 --

13 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.

17 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?

11 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 --

19 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.

11 MS. MARTIN: And here we had numerous
12 managers who were supposed to be ensuring --

13 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 --

3 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.

3 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.

14 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.

21 I agreed to argue the post-concussive
22 syndrome issue that is in the plaintiff's appeal, and

1 but the ramifications or the sequelae of that blow are
2 considered to be an emotional issue.

3 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.

15 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.

21 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 --

2 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 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.

8 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.

15 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.

19 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 going to be a risk. You'd have to literally in this
2 situation throw yourself down the hole.

3 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:)

15 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 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.

11 MS. MARTIN: May I show one more, Your
12 Honor, because --

13 JUDGE FISHER: Thank you, Ms. Martin.

14 MS. MARTIN: Oh.

15 JUDGE FISHER: You may sit down.

16 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.

19 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 --

13 MR. HASSELL: Okay.

14 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 --

3 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 --

11 JUDGE MCLEESE: Well, the court said --

12 MR. HASSELL: Plus --

13 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.

14 JUDGE MCLEESE: Sir, I'm not quite sure what
15 that means.

16 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 --

22 JUDGE MCLEESE: Can we just -- I mean, we --

1 it's our predecessor I guess 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.

10 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.

22 JUDGE MCLEESE: I just wanted to interrupt

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.

8 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 --

11 MR. HASSELL: Not as the owner because it's
12 a nondelegable duty.

13 JUDGE MCLEESE: Right.

14 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.

18 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 --

3 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?

13 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.

17 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.

21 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.

3 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?

14 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.

8 JUDGE REID: You do not agree?

9 MR. HASSELL: No, I don't disagree.

10 JUDGE REID: Oh, all right.

11 MR. HASSELL: I thought that's what you were
12 asking.

13 JUDGE REID: So you had --

14 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?

19 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 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 --

7 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 --

11 MR. HASSELL: No, I -- well, sorry, I didn't
12 let you finish, I'm sorry.

13 JUDGE FISHER: There's going to be
14 redundancy here. You think that even though you were
15 obligated to patrol the building to --

16 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.

10 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 --

14 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?

17 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?

16 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 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.

21 MR. SMITH: Well, the contract had several
22 provisions in it, including an obligation for them to

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.

8 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.

15 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.

13 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.

16 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 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?

11 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?

20 MR. SMITH: We agreed to split the 10
21 minutes equally.

22 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.

5 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.

13 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 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.

5 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.

12 MR. SMITH: Thank you.

13 (Laughter.)

14 MR. SMITH: Do you want me to just sit down
15 now?

16 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.

22 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.

10 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.

18 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.

22 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.

17 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.

13 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.

18 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 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.

22 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.

14 MR. SMITH: All right.

15 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.

21 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.

6 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) --

14 MS. MARTIN: Post-concussive syndrome.

15 JUDGE MCLEESE: -- and so I'm not sure that
16 the issue you're describing would be the subject of
17 further proceedings.

18 MS. MARTIN: For punitives, Your Honor?

19 JUDGE MCLEESE: For punitive damages, that's
20 true. That's true.

21 MS. MARTIN: And --

22 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

1 had been repaired so it's just plain not true, and I
2 think actually Your Honor's covered the other points I
3 wanted to make on that.

4 JUDGE FISHER: Thank you, Ms. Martin. Thank
5 you, Mr. Smith, Mr. Hassell. The cases will be
6 submitted and the court will stand adjourned.

7 THE BAILIFF: All rise.

8 (The recorded court hearing was concluded.)
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CERTIFICATE OF TRANSCRIBER

I, Bonnie K. Panek, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording as provided; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

Bonnie K. Panek

BONNIE K. PANEK