

1 IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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3 WENDY PAOLA DESTEFANO, et al., :

4 Appellant, :

5 vs :

DCSC No.  
2010 CA 001935 B

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

8 Defendants :

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9 Recorded Court Hearing

10 Washington, D.C.

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P R O C E E D I N G S

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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.

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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.

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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

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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

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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 --

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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

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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

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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

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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

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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.

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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

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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.

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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

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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

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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 --

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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.

15           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?

22           MR. SMITH: Well, first of all, I think

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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

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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.

11           JUDGE FISHER: You keep going back and forth  
12 between emotional harm and post-concussive syndrome.

13           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?

17 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,

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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

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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?

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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

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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

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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.

20           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

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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.

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1 -- or the mother's claim, Ms. Destefano.

2 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

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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.

4           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.

15           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

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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.

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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 --

13 JUDGE FISHER: I don't think they're saying  
14 an adult could not fit through.

15 MS. MARTIN: Well, Judge Edelman --

16 JUDGE FISHER: I think it's more nuanced  
17 than that.

18 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

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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.

14 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

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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

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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

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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

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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 --

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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

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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.

8           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.

15           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.

20           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

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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.

13           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?

22           JUDGE MCLEESE: Can't be contracted away, so

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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?

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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 --

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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  
Page 41

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

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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

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1 know, without knowing exactly what happened. We know  
2 exactly what happened.

3           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.

11           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?

21           MR. HASSELL: Well, again I'm going now to  
22 go back to the duty point. I'm not trying -- I don't

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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

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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 baseace (phonetic) 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.

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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

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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.

8 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.

13 JUDGE REID: And what was the purpose of  
14 that?

15 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?

21 MR. HASSELL: No, nor was there any  
22 testimony about that, no. And my final point and then

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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?

16 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.

20 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

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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

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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

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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.

16 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 --

22 JUDGE MCLEESE: In other words, people do

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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

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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.

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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.

14           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 --

20           MR. SMITH: Exactly, because that was the  
21 working relationship.

22           JUDGE MCLEESE: But you agree that to the

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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 --

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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

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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 --

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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.

21           Then I did want to move quickly to the

22 garage management expert issue. No expert is

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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.

13           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.

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1           There are all sorts of things that are  
2 involved in managing, and we don't care about any of  
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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.

21 MR. SMITH: Your Honor, our cross appeal,  
22 this involves two evidentiary rulings that were made by

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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,

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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

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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.

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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

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1 why it would matter where they were located.

2           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 --

16           JUDGE MCLEESE: what's the prejudice of it?

17           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

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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

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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

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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

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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,

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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  
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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2 I, Bonnie K. Panek, do hereby certify that  
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13 BONNIE K. PANEK

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