No. 24-CV-892

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

V.

ESTATE OF DEANGELO GREEN,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Other

INTRODUCTION

DeAngelo Green was tragically killed when his vehicle was struck in an intersection by a D.C. Fire and Emergency Medical Services (FEMS) fire engine on an emergency run. Green's wife and his estate's personal representative, T'Anita Coles-Green, sued the District for wrongful death, alleging that the fire-engine operator was grossly negligent. *See* D.C. Code § 2-412 (requiring gross negligence in cases involving emergency vehicles on emergency runs). At the end of a winding procedural path that included two jury trials, the Superior Court entered a judgment of more than $13.5 million against the District. But that journey was marred by reversible errors at multiple stops along the way. For any of those reasons, the District is entitled to judgment as a matter of law—or at a minimum a new trial.

First, Coles-Green failed in her case in chief. Her claim of gross negligence required her to present an expert who could establish a national standard of care, framed in specific and measurable terms, for the safe operation of fire engines on emergency runs. Her experts did none of these things. They offered only vague, inconclusive standards based on local customs, not national standards. On this evidence, the case never should have gone to the jury. Instead, the trial court should have entered judgment for the District.

Second, if not judgment in its favor, then the District was entitled to a new trial. The District maintained that Green was contributorily negligent for failing to

exercise ordinary care and yield to the fire engine. On the eve of closing arguments, *after* the District had presented its entire case, Coles-Green moved to strike the District's contributory negligence defense on the theory that only *gross* negligence (i.e., recklessness) by Green would preclude the District's liability. The trial court initially refused to strike the defense—and rightly so, given the unfairness of this last-minute attempt to upend the legal framework under which the parties had tried the case. The jury then returned a verdict for the District after finding that Green was contributorily negligent.

After the trial, however, the court reconsidered and decided that Coles-Green was right about the applicable principles of contributory fault. But rather than simply grant Coles-Green a new trial, the court entered judgment as a matter of law on liability *against* the District. It did so even though Coles-Green had never moved for judgment as a matter of law under Super. Ct. Civ. R. 50, an absolute prerequisite to such relief. The court instead asserted that such relief could be granted under Super. Ct. Civ. R. 59(a), but in doing so relied on a subsection of that rule that applies only to *non*jury trials. That was legal error. Moreover, even if this relief were not barred as a matter of law, it was an abuse of discretion not to allow a retrial on liability given the course of the litigation and the unfair surprise to the District.

Third, a new trial is independently required because of multiple, prejudicial evidentiary errors by the trial court. Green had a history of using phencyclidine

(PCP), and a toxicology report from his autopsy revealed that he was under the influence of PCP at the time of the accident. This evidence was highly probative of his contributory fault and, in combination with evidence of his inattentive driving moments before the accident, could have persuaded a jury that he was reckless. Yet the trial court excluded the evidence of PCP intoxication, wrongly deeming it irrelevant and inadmissible hearsay, and wrongly concluding that the District needed supporting expert testimony. The trial court also prejudicially erred by permitting an accident reconstructionist to testify about the safe driving practices for fire engines, a topic on which he had no expertise—testimony that was critical to Coles-Green's case for gross negligence.

Fourth, following the damages trial, the jury awarded Coles-Green and Green's children over $13.5 million—an insupportable sum. The award is speculative because Coles-Green gave the jury none of the information it needed to discount its award to present value. The award was also excessive in that it was based on passion, prejudice, and improper considerations such as abstract "justice" to Green's family and non-economic damages covering pain and suffering, which cannot be recovered under the District's Wrongful Death Act.

STATEMENT OF THE ISSUES

1. Whether the trial court erred by denying the District's motion for judgment as a matter of law where Coles-Green failed to establish the applicable standard of

care for her gross negligence claim.

2. Alternatively, whether the trial court erred by entering judgment as matter of law for Coles-Green on liability where Coles-Green waived that relief, and also whether the trial court abused its discretion by ordering a new trial on damages only.

3. Whether the trial court independently erred by excluding evidence of Green's PCP use and intoxication and by admitting the testimony of an expert on a subject—the safe operation of a fire engine—about which he had no expertise.

4. Whether trial court abused its discretion in denying the District's motion for remittitur or a new trial on damages where the award was speculative, excessive, and based on improper considerations.

STATEMENT OF THE CASE

Coles-Green sued the District in April 2019. Joint Appendix (JA) 2. Her amended complaint asserted gross negligence, a survival action, and wrongful death claims. Following discovery, the District moved for summary judgment, which the trial court denied in January 2022. JA 9, 302-24. The case went to trial before a jury in June 2023, and the jury returned a verdict for the District. JA 19-21, 1143.

Coles-Green moved for a new trial under Super. Ct. Civ. R. 59(a). JA 1145-62. The Superior Court granted her motion. JA 1169-88. In doing so, it entered judgment as a matter of law for Coles-Green on liability and ordered a new trial on damages only. JA 1169, 1187. After the February 2024 damages trial, the jury

awarded Coles-Green and Green's six children $13,574,680.95. JA 25-26, 1207.

The court entered judgment for Coles-Green on April 3, 2024. JA 26, 1209-11. The District filed a timely post-trial motion May 1, 2024. JA 26. The Superior Court denied that motion on August 30, 2024. JA 1244-60. The District noted a timely appeal on September 30, 2024. JA 27.

STATEMENT OF FACTS

1. The March 2018 Accident.

A. Firefighter Joseph Tate's background and training.

Joesph Tate was a FEMS fire technician who drove a fire engine. Supplemental Record (SR) 1 at 207-08. He graduated from the academy in 2008. SR4 at 84, 93. There, he took an emergency vehicle driving course established by the National Fire Protection Association (NFPA) and was licensed to drive a fire engine. SR4 at 94-96; JA 1266-67, 1269.

Tate was taught that it was FEMS policy to come to a complete stop for a red light and not to exceed the posted speed limit by more than 10 miles per hour (mph) when driving a fire engine. SR1 at 211-12; SR4 at 104-07; JA 1267, 1317-18. He also understood that, under the District's traffic regulations, he could go through an intersection on a red light after slowing down and exercising caution while on an emergency run. SR4 at 86; 18 DCMR § 2002.2 (permitting a fire truck driver on an emergency run to "[p]roceed past a red or stop signal or sign, but only after slowing down as may be necessary for safe operation" and "[e]xceed the prima facie speed

limit so long as it does not endanger life or property").

After graduating from the academy, Tate served a six-month probationary period where he drove a fire engine on nonemergency calls so his superiors could evaluate his driving. SR4 at 84, 95. Only after successfully completing probation did he drive on emergency runs. SR4 at 95-96.

B. Tate's engine company is dispatched to an apartment fire.

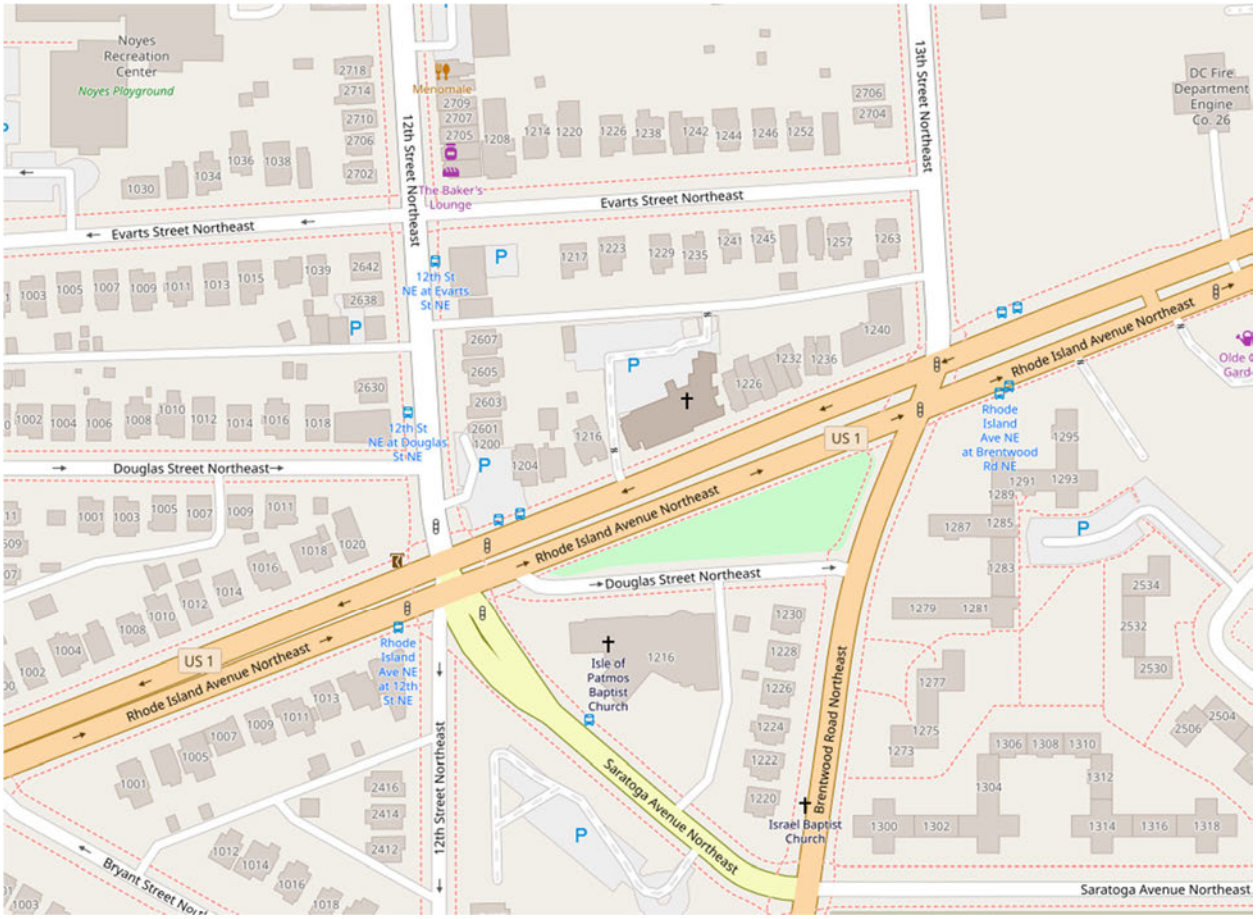
Ten years later, in March 2018, Tate was stationed at Engine Company 26, which sat between 13th Street and 14th Street, N.E., at 1340 Rhode Island Avenue, N.E. SR1 at 190; SR4 at 80; JA 1289. On the morning of March 9, shortly before noon, Company 26 was dispatched to an apartment building fire. SR4 at 80-81, 111. Tate drove Truck 26, a fire engine that weighed about 37,000 pounds and was loaded with 500 gallons of water that added another 3,000 pounds to its weight. SR4 at 34, 82, 108. The truck was equipped with at least 15 warning lights and had three different audible warning devices. SR1 at 190-91; SR4 at 82; SR5 at 28-29.

As he pulled out of the station, Tate immediately turned on all the engine's lights and sirens. SR4 at 84, 89. He turned right onto Rhode Island, traveling westbound. SR2 at 140; SR4 at 84-85; JA 1289. From his vantage point at 13th Street, the intersection with 12th Street appeared clear. SR4 at 85.

C. The 12th Street and Rhode Island Avenue intersection.

The intersection at 12th Street and Rhode Island is a "four way controlled

intersection." JA 1353; *see* JA 1280. The 1200 block of Rhode Island consists of three eastbound and three westbound lanes. SR1 at 153; SR2 at 137; JA 1280, 1353. South of Rhode Island is Saratoga Avenue. SR1 at 153; SR2 at 137; JA 1280, 1353. It is a two-way street that ends at Rhode Island and connects with 12th Street, which continues two ways on the north side. SR1 at 153; SR2 at 137; JA 1280, 1353. 12th Street south of Rhode Island is one way southbound. SR2 at 137; JA 1280, 1353.



Screen shot: https://www.openstreetmap.org/#map=18/38.923670/-76.990423.[1]

[1] This map was not admitted into evidence and is offered only to aid the reader. Similar depictions can be found at JA 1279-80, 1289, 1353.

The traffic signals for both directions on Rhode Island were red or green at the same time. SR1 at 188; SR2 at 137-38, 144-45. When the light was green for Rhode Island, it was red for Saratoga and 12th Streets. SR1 at 154, 188; SR2 at 137-39. When the signals changed, the lights for northbound Saratoga turned green first. SR2 at 137-39, 145-46. This included a left turn signal allowing traffic to turn westbound on Rhode Island. SR1 at 142-43, 154; SR2 at 137-39, 145-47. When the Saratoga left turn signal went off, the lights for 12th Street southbound turned green. SR1 at 143; SR2 at 137-39, 145-46.

D. As Tate travels from 13th to 12th Street along Rhode Island, Green and other drivers are stopped at the intersection.

FEMS fire technician Clifford Miller was driving an out-of-service ladder truck eastbound on Rhode Island avenue when he stopped for a red light at 12th Street. SR1 at 141, 156, 183-84, 187, 190. He heard the dispatch for Company 26 and could see and hear Truck 26 leaving the fire station a block and a half away with is lights and sirens activated. SR1 at 185, 189-90, 192, 194, 203; JA 1289. Miller remained stopped for about a minute as Tate approached. SR1 at 184, 192, 204.

Green had begun working for So Others Might Eat (SOME) as a maintenance technician about six weeks before the accident. *See* SR2 at 22; JA 1336. That day was payday, and Green left work at lunchtime to cash his check. SR2 at 37, 73-74. On his way back to work, Green was headed northbound on Saratoga. SR1 at 175. His windows were rolled down. SR1 at 196. When he reached the intersection with

Rhode Island the light was red and there was a car stopped ahead of him and one in the left turn lane. SR1 at 150, 169-70, 172; SR2 at 143. Upon stopping, Green left a gap of about two car lengths between his car and the one in front of him. SR1 at 175. This put him 75-100 feet from the stop bar—the white line marking where to stop at the intersection. SR1 at 195; SR5 at 21-22.

Stuart McKnight worked as a truck driver for the U.S. Postal Service. SR1 at 165. That morning, he was also traveling northbound on Saratoga. SR1 at 168. When he reached the intersection with Rhode Island, he stopped behind Green. SR1 at 169, 175. Across Rhode Island, Andre Tobe was traveling southbound on 12th Street. SR1 at 143, 154. He was also stopped for the red light at Rhode Island. SR1 at 140, 143, 154, 160-61.

E. As Tate nears 12th Street, Green enters the intersection on a green light while all others yield to Tate.

While Tobe was stopped at the red light (north of Rhode Island), he heard Tate's sirens, and they were loud. SR1 at 143-44, 155-56. He looked around for the fire truck and eased forward. SR1 at 144-45, 156. When he reached the crosswalk, he could hear the sirens coming from his left. SR1 at 156.

While they were sitting at the red light, McKnight saw Green rummaging in the back of his car. SR1 at 170, 178-79. Green then turned to face forward. SR1 at 170, 179. After that, the lights for northbound Saratoga turned green. SR1 at 169-70. The car in front of Green moved through the intersection. SR1 at 170, 172-73,

176; SR2 at 143. The car in the left lane turned onto Rhode Island. SR1 at 172-73, 195; SR2 at 143; SR4 at 88, 98. After the turn arrow on Saratoga went off, Tobe's light turned green, but he stayed put because he heard the sirens and was being careful. SR1 at 157-58, 161. At that point, all other cars had stopped. SR1 at 159.

Although the cars ahead of him had advanced through the intersection, Green did not move forward until after McKnight had honked at him three times. SR1 at 170, 173, 179-80. It was then that McKnight heard the sirens from Truck 26. SR1 at 171, 173, 177-80. McKnight did not move but checked his mirrors. SR1 at 171, 178, 180. Although McKnight could hear the sirens, Green continued toward the intersection. SR1 at 171, 178.

F. Tate reaches the 12th Street intersection and collides with Green.

The posted speed limit on Rhode Island was 30 mph. SR2 at 156; SR4 at 34. As he traveled between 13th Street and 12th Street, Tate reached a speed of about 54 mph. SR2 at 153; SR4 at 34, 110; JA 1364. The intersection continued to appear clear to Tate. SR 1 at 209-10; SR4 at 88, 102. Tate applied his brakes before reaching 12th Street but did not stop for the red light. SR 1 at 158-59, 185-86, 198, 209-10; SR2 at 140; SR4 at 105-06, 111; SR5 at 5-6; JA 1294, 1363.

According to Tobe and Miller, Green was just coming across the Saratoga stop bar when Tate began braking. SR1 at 159-60, 198. No other cars were moving. SR1 at 159, 162, 177-78, 195. Green was traveling about 15-20 miles per hour and

had only one hand on his steering wheel. SR1 at 185, 187, 204-05. He maintained a constant speed and did not brake, swerve, or honk. SR1 at 161-62, 195-97, 204; SR4 at 89; SR5 at 27-28, 31-32. He simply proceeded into the intersection, staring forward and never turning his head to look at Tate. SR1 at 196-97, 202; SR4 at 32.

Tate took evasive action to avoid the accident, further applying his brakes and swerving right. SR4 at 34, 88-89; SR5 at 26, 37. When it collided with Green's car, Truck 26 was traveling 40.57 mph. JA 1364. It pushed Green's car to the northwest corner of the intersection, onto the sidewalk and into a masonry wall. SR1 at 150, 152, 172; SR2 at 141; SR4 at 116-17. Green was killed instantly. *See* SR1 at 199.

The Metropolitan Police Department's (MPD) crash investigation identified Green's failure to yield to Tate as the primary cause of the accident. SR5 at 24-25; JA 1369. According to the District's expert accident reconstructionist, Green would have been able to see the fire engine no later than when he reached the Saratoga stop bar. SR5 at 20, 24, 45-46. Green traveled 90 feet beyond the stop bar before impact, and in the expert's opinion he had enough time to react to avoid the collision given his speed and relevant distance. SR5 at 20-24, 32-33, 37.

2. The Emergency Run Statute.

The District of Columbia Employee Non-Liability Act generally waives the District's immunity in negligence actions based on a District employee's misuse of a government vehicle—but with the key proviso that "in the case of a claim arising

out of the operation of an emergency vehicle on an emergency run the District shall be liable only for gross negligence." D.C. Code § 2-412. The accident in this case undisputedly involved an emergency vehicle on an emergency run. The parties therefore agreed from the outset that Coles-Green needed to prove gross negligence.

What was not clear was the degree of contributory fault by Green that would defeat the District's liability. The District's clear and consistent position was that ordinary negligence by Green would defeat liability. As described in more detail below, Coles-Green did not take a consistent position on this question. At key points, she either did not dispute or affirmatively agreed (as in her proposed verdict form, JA 1126-27) that the District needed to prove only that Green was ordinarily negligent. *After* the close of evidence, however, she changed tack and argued that the District needed to prove that Green was grossly negligent (i.e., reckless), and the trial court ultimately agreed with that view. This dispute about the proper standard of contributory fault is important context for understanding the pretrial litigation.

3. The Court Excludes Evidence Of Green's PCP Use And Intoxication In A Series Of Pretrial Rulings.

Green had a history of PCP use. He was convicted in 2011 of possessing PCP. JA 1346. About two weeks before this accident, Green was in another accident and tested positive for PCP. JA 417-18. When Green smoked PCP, it affected his behavior. Coles-Green said that he slurred his words and became quiet. JA 397. Green's brother said that he would act "weird like slow motion," as if his response

time was delayed. JA 404-05. He also described Green's speech as "slow." JA 405.

Toxicology testing from Green's autopsy revealed that he had PCP in his system at a blood level of .22 mg/L (220 ng/mL) and tetrahydrocannabinol (THC) metabolite at a level of .01 mg/L. JA 379. The District sought to present this evidence to show that Green was contributorily at fault by driving under the influence of a drug. The District identified Robert Copeland, Ph.D, Chair of the Toxicology Department at Howard University Medical School, as an expert who would testify about the pharmacological effects of PCP and its relationship to the accident. JA 34, 91. Dr. Copeland described the effects of PCP, including the inability to focus on the task at hand and distortions of time and space. JA 69, 71.

In his opinion, 220 ng/mL was a high concentration of PCP, and Green should have been exhibiting signs of impairment with that amount of PCP in his system. JA 78-79. Pointing to literature that included PCP levels for people who were stopped for DUI after showing signs of impairment, he noted that the top value among those tested was 118 ng/mL—and that Green had almost *twice* that much PCP in his system. JA 79, 84, 192.

A. Motion to exclude PCP evidence at summary judgment.

In opposing the District's motion for summary judgment, Coles-Green argued that ordinary contributory negligence by a plaintiff could not defeat a claim of gross negligence by the defendant. Pl.'s Opp'n to District's Mot. for Summ. J. Mem. 8-9.

Instead, a grossly negligent defendant had to show that the plaintiff was also grossly negligent, i.e., reckless. *Id*. at 9.

Around the same time, Coles-Green also moved to bar the District from making any reference to PCP. JA 202-220. Unlike in her summary judgment opposition, she asserted that the PCP evidence was irrelevant because the District needed to prove only that Green was ordinarily negligent. JA 202. She argued that "the reason [Green] failed to get out of the way [of the fire truck wa]s irrelevant" because "Green could have been daydreaming or looking at his phone just as easily as being intoxicated" and still be contributorily negligent because he did not exercise "reasonable care." JA 202, 208, 210. All the District had to show was that "Green was contributorily negligent by failing to get out of the way of the fire truck." JA 214; *see* JA 296.

Judge José López denied her motion. JA 294-301. He found the District's reference to PCP "[wa]s highly probative of its contributory negligence defense"—"indeed, foundational" because it supported a statutory violation. JA 300.

B. Motion to preclude the District's PCP expert from testifying.

Coles-Green also moved at about the same time to preclude Dr. Copeland from testifying. JA 39-53. The District opposed her motion. JA 9. Judge Anthony Epstein granted Coles-Green's motion to exclude Dr. Copeland at the same time that he denied the District's motion for summary judgment. JA 302-24.

In denying summary judgment, Judge Epstein observed that "[c]ontributory negligence is not a defense if the defendant acted recklessly, unless the plaintiff also acted recklessly." JA 316. Regardless, he found that "the District d[id] not offer evidence establishing as a matter of law that [Green] was negligent," let alone reckless. JA 316; *see* JA 316-18. Thus, he denied the District's motion. JA 320.

As for Dr. Copeland, the court found that the District had "not carried its burden to establish the admissibility of [his] opinion that [Green's] use of PCP impaired his driving and was a cause of the accident." JA 304. The court found that a Drug Recognition Expert (DRE)—usually a police officer trained to administer a series of tests to assess impairment under a 12-step process—had to testify about non-driving-related impairment to prove DUI. JA 306; *see* JA 191. The court also found that evidence of PCP intoxication was irrelevant to contributory negligence because it did not matter why Green had been negligent. JA 308-09. The court therefore excluded Dr. Copeland's testimony in its entirety. JA 320.

C. Renewed motion to exclude PCP evidence.

Shortly after Judge Epstein's ruling, Coles-Green renewed her motion to bar any reference to PCP at trial. JA 325-42. First, she argued that "expert witness testimony is required when it comes to PCP" impairment. JA 330. Second, she claimed insufficient evidence showed that Green was driving while impaired. JA 331. She asserted that Green "drove normally, appeared to hear normally, proceeded

through a green light normally." JA 334; *see* SR15 at 9-10. Third, she again asserted that the reason Green failed to yield to Tate was "irrelevant" to the District's contributory negligence defense. JA 332-37. All the District had to prove was that Green "failed to exercise reasonable care for his own safety," and it could by simply showing that he "fail[ed] to get out of the way of the fire truck." JA 333-34, 337.

The District opposed the motion on each ground. After a hearing, Judge Yvonne Williams granted Coles-Green's motion. JA 667-72; SR15 at 3-6. The court found that the District needed expert testimony to prove DUI. JA 669; SR15 at 16; SR2 at 56, 62. It also determined there was "no" evidence of impaired driving. SR15 at 10-11. And it reiterated that the evidence was irrelevant to contributory negligence because it did not matter why Green had been negligent. JA 671-72.

D. Further pretrial rulings.

Following another round of pretrial motions, *see* JA 17; SR16, the court reaffirmed that the District could not introduce evidence of Green's PCP use and intoxication at the time of the accident to defeat liability. JA 986-89. Citing its earlier order, JA 667-72, the court also asserted that it had previously "held that the toxicology report was not relevant because while it found PCP in Mr. Green's system, the toxicology report states that the PCP was ingested at some time in the past and was not affecting Mr. Green on the day of the Accident," JA 986; *but see* JA 379 (toxicology report). Finally, the court ruled that the toxicology report was

inadmissible hearsay. JA 987-88.

4. Coles-Green's Experts Testify About The Standard Of Care.

Coles-Green offered Alexander Perricone as her expert on the applicable standard of care. SR2 at 93-94; JA 29-30. He was a former Deputy Chief with the Baltimore City Fire Department who was responsible for departmental training. SR2 at 94, 102. The Baltimore City Fire Department followed the job performance standards set by NFPA. SR2 at 95-96. Perricone identified NFPA 1002, Chapter 4, Section 4.3.1, as setting the national standard of care for the safe operation of fire trucks on an emergency run. SR2 at 96; *see* JA 1311 (copy of Chapter 4). According to Perricone, Section 4.3.1 says that while on an emergency run, firefighters must follow all local laws, regulations, and departmental policies. SR2 at 96-97, 105.

Perricone was not familiar with District laws and regulations or FEMS policies and had no opinion about how Tate may have deviated from them. SR2 at 96, 104-07. Instead, Coles-Green offered Michael Miller as an expert on those matters, as well as accident reconstruction. SR2 at 113-14; JA 29, 36. Miller was a former MPD detective with the Major Crash Investigation Unit who was a certified accident reconstructionist. SR2 at 114, 129-30. He also taught "safe driving practices" to MPD officers about operating police vehicles on emergency runs, and to high school students learning to drive. SR2 at 130.

Miller testified that it was the "policy of the D.C. government" that fire trucks

on an emergency could go no more than 10 mph over the posted speed limit. SR2 at 156. Given that the Rhode Island speed limit was 30 mph, Tate could not drive more than 40 mph under this policy. SR2 at 156. Miller concluded that if Tate had been traveling 40 mph, the accident would not have occurred. SR2 at 157-59. Miller also spoke generally about 18 DCMR § 2002.2 and MPD's "drive to survive" campaign. SR2 at 99-100, 130-32, 163.

Miller did not consider himself an expert in operating fire apparatuses, nor was he identified as one. *Cf.* SR3 at 3; JA 29, 36. Over the District's objections, he was nonetheless qualified as an expert on "safe driving practices" and permitted to testify about Tate's "unsafe driving practices" while operating the fire engine. SR2 at 132-35, 138, 162-68. He identified two. First, according to Miller, Tate accelerated as he drove despite having a red light from the point he left the station until the collision—for "[m]ore than a minute." SR2 at 164-65. Second, according to this portion of Miller's testimony, Tate passed the red light while traveling 54 mph. SR2 at 162, 166. *But see* SR2 at 153, 157 (Miller's earlier testimony that Tate was traveling about 52 mph when he started breaking well before the intersection). As for Green, Miller's opinion was that he had no reasonable opportunity to avoid the crash because he lacked enough time to perceive the fire truck and decide to stop. SR2 at 159-62.

After Coles-Green rested, the District moved for judgment as a matter of law

under Super. Ct. Civ. R. 50 on the ground that Perricone and Miller failed to establish the standard of care. SR4 at 37-38; SR5 at 64-79. The trial court denied the motion, finding that the "national standard necessarily has to refer back to state and local regulations, because there is no rule for every single jurisdiction and for every type of area." SR5 at 73; *see* JA 675-85 (similar pretrial ruling).

5. Coles-Green Belatedly Objects To The District's Contributory Negligence Defense, And The Jury Returns A Verdict For The District.

In the parties' joint pretrial statement, the District had asserted contributory negligence as a defense, including that Green was negligent for failing to yield to Tate. JA 769-77. While Coles-Green objected to this defense as unsupported by the evidence, she did not argue that, as a matter of law, contributory negligence could not defeat a claim that Tate was grossly negligent, nor did she argue that the District had to show that Green was reckless. *Cf.* JA 772-73, 1182. Rather, Coles-Green was "in general agreement with the jury instructions proposed by the [District]," including the contributory negligence instruction. JA 793, 807. In proposing her own non-standard instructions, Coles-Green did not seek to modify that instruction to require a showing that Green was reckless. *See* JA 807-08.

At the close of the evidence, Coles-Green did not move for judgment as a matter of law on the District's contributory negligence defense. SR5 at 59. At the charging conference, the District requested an instruction on ordinary contributory negligence, and the trial court found evidence to support it, although Coles-Green

disagreed. SR5 at 86. While discussing the instructions on gross negligence, the District asserted its position "that we have to be grossly negligent, but [Green] does not" for purposes of contributory negligence. SR5 at 102; *see* SR5 at 89, 93-99, 101-02. The court agreed, and Coles-Green said nothing in response. SR5 at 102.

The court later adjourned for the weekend, with closing arguments slated for Monday morning. SR5 at 59, 109. Around 4:00 p.m. on Sunday, Coles-Green sent a proposed verdict form to the court that included contributory negligence as a defense. JA 1126-27. At 8:20 p.m., however, Coles-Green did an about-face, offering "Comments To Court's Proposed Jury Instructions" that "request[ed] that the Court strike the contributory negligence instruction" altogether. JA 1135. Pointing to Judge Epstein's summary judgment decision, Coles-Green asserted that contributory negligence "is not a defense if the defendant acted recklessly, unless the plaintiff also acted recklessly." JA 1135. Because there was no evidence that Green was reckless, the contributory negligence instruction should not be given. JA 1135.

The next morning, the court proposed amending the contributory negligence instruction to require a finding that Green had acted recklessly. SR6 at 6. The District objected, arguing that Coles-Green's objection had come too late. SR6 at 6-11, 18-20. The District explained that proof of recklessness "was not offered at trial because it wasn't clear that that was going to be the proof necessary to prove

contributory negligence." SR6 at 19. It asserted that imposing a heightened burden at that point was "changing the landscape of the trial" and "unfair." SR6 at 19.

Judge Williams ultimately declined to strike or modify the instruction. SR6 at 28, 57. Following closing arguments and deliberations, the jury returned a verdict for the District, finding that while Tate had been grossly negligent, Green was contributorily negligent. JA 1143.

6. Coles-Green Moves For A New Trial, And The Court Enters Judgment As A Matter Of Law On Liability And Orders A New Trial On Damages.

Coles-Green filed a post-trial motion invoking only Super. Ct. Civ. R. 59(a). JA 1145, 1148. In it, she argued that it was error for the court to instruct the jury on contributory negligence because the District had to prove that Green acted recklessly and there was no evidence of that. JA 1150-56. Coles-Green asked the court to order a new trial, but on damages only. JA 1156-59.

Over the District's opposition, Judge Williams granted the motion. JA 22, 1169-88. Although the court agreed that Coles-Green had not preserved the issue before trial, and despite failing to find good cause under Super. Ct. Civ. R. 16(g), the court ignored Coles-Green's forfeiture. JA 1181-82. In doing so, the court entered judgment as a matter of law for Coles-Green on the District's liability and ordered a new trial on damages only. JA 1182-87.

7. The Damages Trial And Jury Award.

A. The evidence about three categories of damages.

In February 2024, the court held a trial on damages before a new jury. Three categories of damages suffered by Coles-Green and Green's six children were at issue: the loss of Green's expected earnings from employment, the loss of his household services, and the loss of his parental guidance. SR9 at 9 ("We're claiming lost earnings, lost household services, and loss of parental guidance.").

For the first two categories of damages, both parties relied on expert witnesses. Coles-Green offered Thomas Borzilleri, Ph.D., as an expert in economics and loss of household services. SR11 at 25. To calculate Green's lost earnings, Dr. Borzilleri determined Green's earning capacity based solely on his SOME salary of $35,963. SR11 at 32, 70-71, 74. After adjusting for anticipated salary increases with reference to yearly inflation projections, Dr. Borzilleri concluded that Green's gross lifetime earnings if he worked until age 70 would have been $2.3 million. SR11 at 32-33, 36-37, 40, 42. He then deducted inflation-adjusted amounts for Green's anticipated personal consumption and income taxes. SR11 at 34-35, 39. Next, he discounted the resulting amount to its present value. SR11 at 39-40. He did so by creating a "bond ladder" that reflected the rate of return on AAA-rated general obligation municipal bonds for each year of lost earnings. SR11 at 42-44. Dr. Borzilleri determined that the present value of Green's earnings to his family if

he worked until age 70 was $638,052. SR11 at 30. He did not tell the jury the figures, rates, or formulas he used in making inflation adjustments or discounting the net earnings sum to its present value.

As for the lost value of Green's household services, Dr. Borzilleri used the Dollar Value of a Day tables created by the Department of Labor. SR11 at 47, 51-53; JA 1384-95. From the tables, Dr. Borzilleri determined that Green provided the household with 50.85 hours of services a week including primary and secondary childcare, although he did know how Green spent his time. SR11 at 54-55, 88-90. Using labor costs from the tables, he calculated the loss of services to the children until they reached age 18, and to Coles-Green for the remainder of Green's life expectancy. SR11 at 63. After adjusting for inflation, he discounted that figure to the present value of $1,016,125. SR11 at 62-64. Assuming Green worked until age 70, the combined losses (earnings and household services) totaled $1,654,177.

The District called Charles Betsey, Ph.D., as its expert economist. SR12 at 15-16. Like Dr. Borzilleri, Dr. Betsey calculated values for both Green's lost earnings and his lost household services. SR12 at 16. His approach was broadly similar—and similarly complex—but yielded somewhat lower present values: $579,708 in lost earnings and $708,547 in lost household services, for a total of $1,288,255. Like Dr. Borzilleri, Dr. Betsey did not testify about the interest and inflationary rates or the formulas he used in his calculations.

Neither expert opined on the third category of damages: lost parental guidance. Instead, Coles-Green, one of Green's children, and Green's brother testified about the advice he gave as a father. For instance, he told his children there were consequences for their actions. SR9 at 116. He encouraged his older children to make the most of their teenage years but not succumb to peer pressure. SR11 at 114. He instructed his daughters to stay away from boys. SR9 at 124-25; SR11 at 115. He advised the children to do well in school, encouraging his oldest son to graduate from high school. SR9 at 117-19; SR10 at 55; SR11 at 114-15. He gave his oldest daughter cooking lessons, taught his oldest son handyman skills, and helped the children with homework. SR9 at 102, 105, 107, 113, 115-17; SR10 at 53; SR11 at 114-15.

B. The jury instructions, the note, and the verdict.

As relevant, the court told the jury that in calculating the economic loss to Coles-Green and the children it "must consider the effect of inflation on living expenses and wage earnings." SR12 at 75. The jury was also required to discount the amount of net financial loss to its present cash value. SR12 at 75. To do so, the court instructed the jury that "[f]or each beneficiary, you must figure the amount which, if invested at a particular rate of interest today over the number of years Mr. Green would have been expected to live, would have returned an amount equal to the net financial loss to that beneficiary." SR12 at 76.

During deliberations, the jury requested that court provide it with "a mathematical equation for present value." JA 1206; *see* SR14 at 7-8. The court declined to do so, instructing the jury to rely on the evidence. JA 1206; *see* SR14 at 7-8. Following deliberations, the jury awarded Coles-Green and the children a total of $13,574,680.95. JA 1207.

8. The District's Post-Trial Motions And The Trial Court's Rulings.

After the trial court granted Coles-Green's motion for a new trial, the District moved for judgment as a matter of law or for a new trial. JA 23, 1198. The District renewed its Rule 50(a) argument that Coles-Green had not established the national standard of care. JA 1199. It also argued that a new trial was warranted because Miller was not qualified to give expert testimony on Tate's unsafe driving practices. JA 1199. The court denied those motions. JA 1198-1200.

Following the damages trial, the District moved for judgment as a matter of law, and remittitur or a new trial. JA 26. Among other things, the District argued that it was entitled to judgment as a matter of law because there was no evidence that would have permitted the jury to discount its award to its present value. JA 1247-48. Alternatively, the District sought remittitur or a new trial on this ground, as well as the lack of evidentiary support for the verdict. JA 1248.

The trial court denied these motions. JA 1253-60. The court found that the jurors "had sufficient evidence" to "calculate any damages award to present value"

"with reasonable certainty." JA 1253-54. It concluded that the damages award was not excessive but "within the range of the present value of lost earnings and lost household contribution presented by both Dr. Borzilleri and Dr. Betsey." JA 1259.

SUMMARY OF ARGUMENT

1. To prevail on her gross negligence claim, Coles-Green had to establish the applicable standard of care. To carry that burden, she offered the expert testimony of Perricone, who relied exclusively on NFPA 1002, Chapter 4, about fire apparatus driver qualifications. Under Perricone's interpretation of these provisions, a fire engine on an emergency run had to comply with all applicable state and local laws and departmental rules and regulations, including agency policies. For four reasons, this testimony was insufficient to establish a national standard of care.

First, NFPA 1002 does not say what Perricone claims. It is about driver qualifications and testing that must occur *before trainees* are authorized to operate a fire engine. It is not about operating fire engines on emergency runs. Second, even if it said what Perricone claims, it would not establish a *national* standard. Instead, by relying only on local laws, regulations, and policies, it establishes the type of locality rule this Court has rejected in professional negligence cases. Third, requiring compliance with applicable local laws, regulations, and policies imposes no more than a vague, general duty, rather than the requisite mandate of specific conduct in particular circumstances. Fourth, Perricone was unable to say which of

the conflicting standards in the District's regulations and FEMS's policies controlled. This left the jury with no choice but to impermissibly speculate about the actual standard of care.

Miller's testimony could not, and did not, cure the defects in Perricone's. Miller's reliance on FEMS's policy contradicted decisions of this Court holding that agency policy cannot independently establish a standard of care. To the extent he relied on District regulations, they imposed only a general duty of ordinary care in the circumstances, not the specific guidelines that are required in professional negligence cases. And the safe driving campaign Miller talked about was not a law, regulation, or FEMS policy, let alone a concrete standard by which Tate's actions could be judged. And like Perricone, Miller failed to say which of the conflicting standards controlled, again leaving the jury with no choice but to speculate about the applicable standard of care. The District was entitled to judgment as a matter of law.

2. If the District is not entitled to judgment as a matter of law, it is at least entitled to a new trial. In ruling on Coles-Green's motion for a new trial under Rule 59(a), the court granted relief that is available only under Rule 50—judgment as a matter of law on liability. But Coles-Green waived her right to that relief by failing to make timely Rule 50 motions, and indeed she expressly disavowed seeking any relief under Rule 50. These failings constitute a waiver that left the court with no power to enter judgment as a matter of law.

Instead, Coles-Green sought a new trial under Rule 59(a). In holding that it could grant judgment as matter of law under this rule, the trial court committed two errors. First, it relied on Rule 59(a)(2). But this subsection applies only to *nonjury* trials. Second, the court was simply wrong that Rule 50 and Rule 59 are fungible, and both afford the same relief. Nothing about Rule 59 permitted the court to enter judgment as a matter of law for Coles-Green. Instead, it only authorized a new trial.

It was a further abuse of discretion to order a new trial on damages only. The court failed to consider whether the issue of Green's contributory fault was fairly tried. It was not. Coles-Green's inconsistent positions on the District's burdens and her failure to raise the issue before the eve of closing arguments resulted in unfair surprise to the District. The interests of justice mandated a new trial on liability.

3. Independently, a new trial on liability is required because of two erroneous and prejudicial evidentiary rulings. *First*, the court erred by excluding evidence of Green's PCP intoxication at the time of the accident. This evidence was relevant to whether Green was reckless, and the court's misunderstanding of the District's burden when deeming the evidence irrelevant was legal error. Expert testimony was not required to prove that Green was driving under the influence of PCP. All that was required was a positive test result and evidence of impaired driving. The District had both. The toxicology results were relevant and admissible. The trial court blatantly erred in finding that the report said Green was not affected by PCP on the

day of the accident, and the report was also admissible under a statute governing medical examiner reports. There was also ample evidence of Green's impaired driving, including his behavior at the stop light and in the intersection.

Second, the court erred in letting Miller testify about Tate's unsafe driving when he was not qualified to do so. The record does not support the conclusion that this expertise was subsumed in accident reconstruction. To the contrary, his opinion about Tate's unsafe driving contradicted his own accident reconstruction. Moreover, it was not tied to the applicable standard of care and thus amounted to an impermissible personal opinion. And the improper testimony was prejudicial because it is the only conceivable evidence upon which the jury could base its finding of gross negligence.

4. The District also has the right to a new trial on damages for two reasons. *First*, the jury was instructed to account for inflation and discount its award to its present value. But Coles-Green gave the jury none of the tools it needed to do so. Without the relevant formulas and inflation and interest rates, the jury could not have arrived at a present value based on anything other than impermissible speculation.

Second, the jury's verdict is excessive and based on improper considerations. No evidence supported an upward departure from Dr. Borzilleri's lost earning and lost services calculations totaling $1.65 million. Thus, the jury necessarily awarded about *$12 million* for loss of parental guidance, an insupportable figure. No evidence

suggests that this enormous sum represents a fair approximation of the cost of procuring similar services in the open market. Beyond that, Coles-Green's closing argument urged the jury to base its decision on improper considerations, including giving "full justice" for the loss of Green's life and awarding "non-economic" damages related to pain, suffering, and other losses unrelated to the value of his parental guidance.

ARGUMENT

I. The District Was Entitled To Judgment As A Matter Of Law Because Coles-Green Failed To Establish The Applicable Standard Of Care.

To win her gross negligence claim, Coles-Green had to prove three things: (1) the applicable standard of care; (2) that Tate deviated from that standard; and (3) that Tate's deviation proximately caused Green's injury. *KS Condo, LLC v. Fairfax Vill. Condo. VII*, 302 A.3d 503, 507 (D.C. 2023). She failed to establish the first element—the applicable standard of care—and that failure is dispositive.

Specifically, Coles-Green had to present expert testimony identifying a national standard of care for the safe operation of a fire engine on an emergency run, but her experts failed to do so. This was "fatal," because "[i]f the standard itself is not proven, then a deviation from that standard is incapable of proof." *District of Columbia v. Carmichael*, 577 A.2d 312, 314 (D.C. 1990). As a result, this case should have never gone to the jury. *Meek v. Shepard*, 484 A.2d 579, 582 (D.C. 1984). Instead, the trial court should have granted the District's motions for

judgment as a matter of law at the close of Coles-Green's case or after the trial. *See Clark v. District of Columbia*, 708 A.2d 632, 635 (D.C. 1997). Applying de novo review, *Strickland v. Pinder*, 899 A.2d 770, 773 (D.C. 2006), the Court should reverse and order entry of judgment for the District. *See District of Columbia v. Moreno*, 647 A.2d 396, 401 (D.C. 1994).

A. Expert testimony was needed to establish a national standard of care expressed in concrete and measurable terms.

1. Coles-Green had to present expert testimony.

Expert testimony is *not* needed to establish the applicable standard of care in two circumstances, but neither is present here. *First*, "[w]here negligent conduct is alleged in a context which is within the realm of common knowledge and everyday experience, the plaintiff is not required to adduce expert testimony." *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 200 (D.C. 1991); *see*, *e.g.*, *KS Condo*, 302 A.3d at 508. In contrast, when "the subject in question is so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson," expert testimony is needed. *District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987). The safe operation of a 40,000-pound fire engine on an emergency run was beyond the ken of the jury, as Coles-Green has never disputed.

Second, sometimes the standard of care can be found in a District statute or regulation under the doctrine of negligence *per se*. *See Night & Day Mgmt., LLC v. Butler*, 101 A.3d 1033, 1039 (D.C. 2014). But negligence *per se* requires, among

other things, a law that "imposes specific duties." *Id*. (quoting *Ginsberg v. Granados,* 963 A.2d 1134, 1140 (D.C. 2009)). In other words, "the statute or regulation 'must not merely repeat the common law duty of reasonable care, but must set forth specific guidelines to govern behavior.'" *Id*. at 1040 (quoting *Chadbourne v. Kappaz*, 779 A.2d 293, 296 (D.C. 2001)); *see Carleton v. Winter*, 901 A.2d 174, 179-80 (D.C. 2006). No such statute or regulation applies here.

To start, 18 DCMR § 2002.2 lacks specific guidelines for driver behavior. It provides that "the driver of an authorized emergency vehicle may . . . [p]roceed past a red or stop signal or stop sign, but only after slowing down *as may be necessary for safe operation*," and may "[e]xceed the prima facie speed limit *so long as it does not endanger life or property*." 18 DCMR § 2002.2(b), (c) (emphasis added). These standards are no different from the usual standard of ordinary care under the circumstances that apply in all negligence cases. *See Morrison v. MacNamara*, 407 A.2d 555, 560 (D.C. 1979). Thus, this regulation cannot establish the applicable standard of care under a negligence *per se* theory.

Nor is the standard of care established by the FEMS policy that requires fire trucks to stop for red lights and not to exceed the posted speed limit by more than 10 mph. JA 1317-18. While this policy has specific guidelines, it lacks the force of law. *See Clark*, 708 A.2d at 636. Because it is not a statute or regulation, "it cannot embody the standard of care under a negligence *per se* theory." *Id.*; *see Jones v.*

Nat'l R.R. Passenger Corp., 942 A.2d 1103, 1108 (D.C. 2008); *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 435 (D.C. 2000); *Phillips v. District of Columbia*, 714 A.2d 768, 774 (D.C. 1998). "To hold otherwise would create the perverse incentive for the District to write its internal operating procedures in such a manner as to impose minimal duties upon itself in order to limit civil liability rather than imposing safety requirements . . . that may far exceed those followed by comparable institutions." *Clark*, 708 A.2d at 636. Thus, it was undisputed that Coles-Green had to present expert testimony on the applicable standard of care. *See* JA 29-30.

2. The experts had to establish a concrete and measurable national standard against which the jurors could assess Tate's conduct.

"Where expert testimony is necessary, 'the expert must clearly articulate and reference a standard of care by which the defendant's actions can be measured.'" *Evans-Reid v. District of Columbia*, 930 A.2d 930, 935-36 (D.C. 2007) (quoting *Clark*, 708 A.2d at 635). "When normative standards are used by an expert as a basis for assessing negligence, at the very least the expert must be specific as to what standards were violated and how they were violated. This can be done only by comparing specific standards with specific facts or conduct." *Carmichael*, 577 A.2d at 315; *see Phillips*, 714 A.2d at 773. In other words, the expert must identify a "measur[able]" and "concrete standard upon which a finding of negligence could be based." *Carmichael*, 577 A.2d at 314-15. Vague and conclusory assertions are "insufficient to establish an objective standard of care." *Varner v. District of*

Columbia, 891 A.2d 260, 270 (D.C. 2006).

The experts also had to identify a *national* standard of care, as distinct from a "local custom." *Cardenas v. Muangman*, 998 A.2d 303, 306 (D.C. 2010); *Travers v. District of Columbia*, 672 A.2d 566, 568 (D.C. 1996). There are "two types of expert testimony sufficient to establish" a national standard of care. *Phillips*, 714 A.2d at 775.

First, it could "be found in 'the practices in fact generally followed by other comparable governmental facilities.'" *Evans-Reid*, 930 A.2d at 936 (quoting *Clark*, 708 A.2d at 635); *see Arnold & Porter*, 756 A.2d at 433. When relying on practices of other agencies, "the expert must clearly relate the standard of care to the practices in fact generally followed by other comparable governmental facilities." *Clark*, 708 A.2d at 635. It is not enough for the expert to identify just one other agency and its standards. *See Toy v. District of Columbia*, 549 A.2d 1, 8 (D.C. 1988); *Messina v. District of Columbia*, 663 A.2d 535, 539 (D.C. 1995).

Second, the expert may identify "some standard nationally recognized by such [comparable governmental] units." *Clark*, 708 A.2d at 635. That is, the expert identifies some express standard of conduct—often promulgated by a professional or standard-setting organization—that comparable agencies have widely adopted. *See, e.g.*, *Thurman v. District of Columbia*, 282 A.3d 564, 573 (D.C. 2022) (expert relied on the "International Association of Chiefs of Police Training Key" for

national standard of care for canine handling).

B. Perricone did not establish an applicable standard of care.

Of the two types of testimony just discussed, Perricone did not even purport to offer the first—i.e., a survey of "the practices in fact generally followed by other comparable governmental facilities." *Evans-Reid*, 930 A.2d at 936 (internal quotation marks omitted). To be sure, he testified that the Baltimore Fire Department also has a policy that trucks must come to a complete stop at red lights and must not exceed the speed limit by more than 10 mph. SR2 at 97-98, 111. As for speed, Maryland law (much like 18 DCMR § 2002.2) provides that fire truck operators must use "due regard." SR2 at 98, 111. But Perricone knew of no other jurisdiction that followed these same rules, SR2 at 103-04, 110, and the practices of a single other jurisdiction are not enough to establish a national standard of care, *Toy*, 549 A.2d at 8. Moreover, Perricone did not testify that the Baltimore Fire Department was a governmental facility comparable to FEMS. *See Carmichael*, 577 A.2d at 315. More fundamentally, Perricone never suggested that his opinion was based on an assessment of the practices of other jurisdictions. Instead, his opinion rested entirely on the second type of testimony discussed above: an express standard that he considered applicable—here, NFPA 1002, Chapter 4.

But Perricone's testimony about NFPA 1002, Chapter 4 did not establish an applicable national standard of care either. NFPA is a national "consensus body that

develops standards for any fire service-related item." SR2 at 95-96. At Coles-Green's request, Perricone sifted through "various [NFPA] documents" to identify the standard of care he believed applied here. SR2 at 96. He landed on NFPA 1002, Chapter 4, which governs Fire Apparatus Driver/Operator Professional Qualifications. SR2 at 96; JA 1311-13.

Perricone explained that in setting out the "professional qualifications" for fire engine operators, Chapter 4 outlines what departmental trainers "ask the student to be able to do" when taking the emergency vehicle operation course based on NFPA 1002, like the one Tate took at the academy. SR2 at 95, 100; *see* JA 1266-67, 1269. Section 4.1 provides that "*prior to* operating fire department vehicles, the fire apparatus driver/operator shall meet the job performance requirements defined in Sections 4.2 and 4.3." JA 1311 (emphasis added). Section 4.2, entitled "Preventative Maintenance," lists vehicle systems and components that an operator must inspect before driving, and requires students to be able to identify system problems and use hand tools to fix them. JA 1311.

Key here, according to Perricone, is Section 4.3, entitled "Driving/Operation." It requires the student to pass several driving tests and demonstrate the ability to operate on-board systems. JA 1311. Under Section 4.3.1, the student must be able to "[o]perate a fire apparatus, given a vehicle and a predetermined route on a public way that incorporates the maneuvers and features that the driver/operator is expected

to encounter during normal operations, so that the vehicle is operated in compliance with all applicable state and local laws and departmental rules and regulations." JA 1311. Based on this subsection, as "interpreted by [him]," Perricone testified that the "applicable national standard of care to be followed in a situation in the District of Columbia for a fire truck on an emergency run when it approaches an intersection controlled by a red light" is that the "vehicle is operating in compliance with all applicable state and local laws and departmental rules and regulations," including agency policies and procedures. SR4 at 96, 101, 105; *see* SR2 at 97, 108. For many reasons, however, this testimony was insufficient to establish a national standard of care applicable to this case.

First, NFPA 1002, Chapter 4 does not say what Perricone claims it does. On its face, NFPA 1002 is plainly limited to driver qualifications. JA 1311-13. While it may establish a standard for determining whether a person is qualified to drive a fire engine and operate on-board systems, and it might be something fire departments rely on "to guide their training regimens," SR2 at 96; *see* SR2 at 94-95, 100, 102, it says nothing about emergency runs, speed limits, or stop lights. It addresses only what a trainee must be able to demonstrate *before* being allowed to drive a fire engine. JA 1311-13.

Section 4.3.1, in particular, requires drivers to pass a driving test on a predetermined public route with features they would encounter under "normal

operations" and to do so in compliance with applicable laws and department policies. JA 1311. But Tate was not taking a driving test on a predetermined route under normal operating conditions on the day of the accident—he was on an emergency run. And Tate's qualifications to drive a fire truck were not at issue. It was undisputed that Tate took the NFPA 1002 driving course, was licensed to drive a fire truck, and spent six months driving on predetermined public routes to the satisfaction of his supervisors before ever being sent on an emergency run. No one has suggested that Tate's qualifications were a factor in the accident.

Section 4.3.1 simply does not say what Perricone asserted: that the national standard of care for the safe operation of a fire apparatus on an emergency run is that operators comply with local laws and departmental policies. Indeed, there is no evidence that anyone other than Perricone has ever endorsed his counter-textual reading of NFPA 1002. Thus, it is inadequate to establish the standard of care. *See Evans-Reid*, 930 A.2d at 936; *Phillips*, 714 A.2d at 774.

Second, even if NFPA 1002 said what Perricone claims, the standard would not be *national*. Section 4.3.1 refers to "compliance with all applicable state and local laws and departmental rules and regulations." JA 1311. Perricone confirmed that this standard merely "refer[red] back" to local law and policy and allowed for "differences across the . . . spectrum." SR2 at 105, 109. That is the opposite of a "national" standard. Instead, it is just the type of "locality rule" "peculiar to medical

malpractice" that the Court rejected in *Morrison*. *Morrison*, 407 A.2d at 564; *see Bell v. Jones*, 523 A.2d 982, 987-88 (D.C. 1986). Indeed, this Court's "decision in *Morrison* made clear that any non-medical standard of care in a professional negligence action must be national rather than local." *Bell*, 523 A.2d at 988. As discussed, the only way for a local custom to set a national standard is if it is in fact widely employed by comparable government agencies—a showing not made here.

Third, NFPA 1002 fails as a standard of care because the requirement that Tate "compl[y] with all applicable state and local laws and departmental rules and regulations" imposes no more than a vague, general duty. JA 1311. "An expert may not rely upon a general duty of care to establish an objective standard requiring specific conduct." *Varner*, 891 A.2d at 273; *see Blair v. District of Columbia*, 190 A.3d 212, 230 (D.C. 2018); *Carmichael*, 577 A.2d at 314-15. Instead, the standard must identify a particular course of conduct that should have been taken under similar circumstances in specific, concrete, and measurable terms. *Strickland*, 899 A.2d at 773-74; *Carmichael*, 577 A.2d at 314-315; *see*, *e.g.*, *District of Columbia v. Price*, 759 A.2d 181, 183-84 (D.C. 2000); *Sullivan v. AboveNet Commc'ns, Inc.*, 112 A.3d 347, 358 (D.C. 2015). The vague and conclusory reference to "applicable state and local laws and departmental rules and regulations" is no different from the references to the "American Correctional Association standards" this Court found insufficient in *Mereno*, 647 A.2d at 400, *Clark*, 708 A.2d at 635 & n.3, and

Carmichael, 577 A.2d at 315, because no specific standard was identified. *See Briggs v. WMATA*, 481 F.3d 839, 846-48 (D.C. Cir. 2007).

Fourth, when given the opportunity to provide that missing specificity, Perricone was unable to do so. According to Perricone, Tate was required to follow all applicable District laws, regulations, and departmental policies. SR2 at 105, 109-10. But Perricone was not familiar with those sources and thus had no opinion about what they required or how Tate might have deviated from them. SR2 at 96, 104-07. That was a fatal omission, for "at the very least the expert must be specific as to what standards were violated and how they were violated." *Carmichael*, 577 A.2d at 315.

Beyond that, Perricone was unable to provide the jury with an opinion about which guidance would control if the laws, regulations, and departmental policies imposed different requirements. He acknowledged that it was not "uncommon" for agency policies to be stricter than what the law requires. SR2 at 105. And he agreed that the FEMS policy imposed different standards than 18 DCMR § 2002.2. SR2 at 104-08. But, by his own admission, he was not "educated enough to speak to" which of the differing provisions would establish the applicable standard of care. SR2 at 105; *see* SR2 at 104-08, 112. This was a critical shortcoming in his testimony.

"The purpose of expert opinion testimony is to avoid jury findings based on mere speculation or conjecture." *Washington v. Wash. Hosp. Ctr.*, 579 A.2d 177, 181 (D.C. 1990). When an "expert's testimony is inconclusive as to the proper

course of [action], the plaintiff's case necessarily fails because of a lack of proof as to . . . the standard of care." *Burke v. Scaggs*, 867 A.2d 213, 220 (D.C. 2005). Here, Coles-Green gave the jury both the FEMS policy and 18 DCMR § 2002 to consider during its deliberations, JA 1314-20, without any guidance from Perricone about which controlled, leaving the jury to engage in just the sort of rudderless speculation this Court has found impermissible. *See Moreno*, 647 A.2d at 401.

C. Miller's testimony—even if combined with Perricone's—was also insufficient to establish a standard of care.

As Coles-Green's expert on District traffic laws and policies, Miller was offered to fill the gap left by Perricone by identifying which District laws, regulations, and FEMS policies applied to Tate while on an emergency run. SR2 at 113-14, 135; JA 29. This effort was legally pointless for the reasons already discussed: NFPA 1002, Chapter 4 does not even purport to set a standard for emergency-run driving, and its mere cross-reference to "applicable state and local laws and departmental rules and regulations" precludes it from establishing a *national* standard of care for anything. *See supra* pp. 31-32, 34-35, 39-40. Nothing Miller said could overcome these flaws in Coles-Green's case.

But Miller's testimony was also inadequate on its own terms. He suggested three possible sources of a standard of care, each of which fell short as a matter of law. *First*, Miller testified that it was the "policy of the D.C. government" that the maximum speed a fire truck on an emergency run could travel was 10 mph over the

posted speed limit—plainly a reference to the FEMS guidelines. SR2 at 156; JA 1317-18. As this Court has repeatedly held, however, internal agency policies cannot themselves establish the standard of care because they are not regulations and to hold otherwise would discourage agencies from adopting stricter safety standards. *Supra* pp. 32-33. While "[s]uch internal procedures may be 'admissible as *bearing on the* standard of care,' . . . 'expert testimony [i]s still required to establish that the [internal policies] . . . embod[y] the national standard of care and not a higher, more demanding one.'" *Jones*, 942 A.2d at 1108 (quoting *Clark*, 708 A.2d at 636); *see District of Columbia v. Walker*, 689 A.2d 40, 47 n.13 (D.C. 1997). Neither Miller nor Perricone provided that testimony.

Second, Miller also spoke about the District's traffic regulations, saying that they require an emergency operator to drive with "due care" when exceeding the speed limit and passing stop lights. SR2 at 163. But the regulation Miller cited, 18 DCMR § 2002.2, imposes a duty of ordinary care under the circumstances and lacks the specific guidelines for behavior that are required when assessing professional negligence. And nothing in Miller's testimony about it was more definitive. Thus, as discussed, it cannot establish the standard of care. *Supra* pp. 31-32.

Third, Miller also spoke about "drive to survive," an MPD campaign inspired by officers having died in crashes while responding to service calls. SR2 at 130-32. According to Miller, the idea is that the driver of an emergency vehicle can speed

and pass stop lights so long as he "understand[s his] actions carry heavier weight":

> [D]rive to survive is for emergency vehicle operations where you're operating an emergency vehicle. You're responding to an emergency. However, you have to drive to survive, meaning you have to have that added responsibility and cohesiveness enough to know that you're allowed to do certain things. Driving an emergency vehicle, you are allowed to surpass what an average person can do when they're driving their passenger car, stop signs, traffic lights, speed, wrong side of the road, all these other things. However, with that added responsibility, you still have to arrive to render aid, so you have to bear that extra responsibility to understand your actions carry heavier weight because you are allowed to surpass what an average person can do on the road, driving regulations, but you have to arrive [sic] to survive—meaning arrive okay.

SR2 at 130-31; *see* SR2 at 99-100.

This "drive to survive" concept plainly does not amount to a standard of care applicable here. It is not a regulation or even a FEMS policy. At most it might be an MPD policy, but from the evidence it appears to be just a safe-driving campaign. Miller's description contains no specific or concrete standard by which to judge Tate's conduct. If anything, it establishes that Tate could speed and run the red light so long as he "underst[ood his] actions carry heavier weight." SR2 at 131. This plainly contradicts the FEMS policy and 18 DCMR § 2002.2, but Miller, like Perricone, offered no opinion about which conflicting regulation, policy, or campaign controlled here. As a result, his inconclusive opinion also left the jury with no choice but to speculate about the applicable standard of care.

Because Coles-Green established no standard of care, let alone the concrete

national standard required here, the trial court erred by denying the District's motions for judgment as a matter of law. This Court should reverse and remand for entry of judgment for the District.

II. Alternatively, The Trial Court Erred By Entering Judgment As A Matter Of Law For Coles-Green On Liability And Abused Its Discretion By Ordering A New Trial On Damages Only.

If the District is not entitled to judgment as a matter of law based on Coles-Green's failure to prove the standard of care, it is at least entitled to a new trial. The trial court erred and abused its discretion when it entered judgment as a matter of law for Coles-Green on liability and ordered a new trial on damages only. By failing to move for relief under Rule 50(a) and Rule 50(b), Coles-Green waived her right to challenge the sufficiency of the evidence to support the District's contributory negligence defense. In finding otherwise, the trial court erroneously held that this relief could be awarded under Rule 59(a). Not so. The only relief the court could grant under Rule 59(a) was a new trial. But even then, it was a mistake to limit the second trial in this case to damages only. Reviewing for abuse of discretion, *see Mody v. Ctr. for Women's Health, P.C.*, 998 A.2d 327, 333 (D.C. 2010), the Court should reverse and remand this case for a new trial on liability *and* damages.

A. Coles-Green waived her right to judgment as a matter of law on the District's contributory negligence defense under Rule 50.

Like its federal counterpart, Super. Ct. Civ. R. 50 "sets forth the procedural requirements for challenging the sufficiency of the evidence in a civil jury trial and

establishes two stages for such challenges—prior to submission of the case to the jury, and after the verdict and entry of judgment." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 399 (2006). A party may move for judgment as a matter of law "at any time before the case is submitted to the jury." Super. Ct. Civ. R. 50(a)(2). "The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment." *Id*. "If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may" enter judgment for the movant. Super. Ct. Civ. R. 50(a)(1).

"Rule 50(b), by contrast, sets forth the procedural requirements for renewing a sufficiency of the evidence challenge after the jury verdict and entry of judgment." *Unitherm Food*, 546 U.S. at 400. The Rule 50(a) movant "may file a renewed motion for judgment as a matter of law" under Rule 50(b) no later than 28 days after entry of judgment, and "may include an alternative or joint request for a new trial under Rule 59." Super. Ct. Civ. R. 50(b). In ruling on the renewed Rule 50 motion, the court may allow the jury's verdict to stand; order a new trial; or enter judgment as a matter of law. *Id*.

This Court construes Rule 50 strictly. *Bloom v. Beam*, 99 A.3d 263, 266 (D.C. 2014). "A motion under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a) before the case was submitted to the jury."

Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008); *see Juvenalis v. District of Columbia*, 955 A.2d 187, 190 n.1 (D.C. 2008). And "[t]he failure of a party to make a timely post-verdict Rule 50(b) motion renewing its claims that the evidence at trial was legally insufficient constitutes a waiver of those claims." *Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 339 & n.12 (D.C. 2022); *see Wash. Inv. Partners of Delaware, LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 580 (D.C. 2011).

Coles-Green made no motion for judgment as a matter of law on the District's affirmative defense of contributory negligence under Rule 50(a) before the court submitted the case to the jury, nor under Rule 50(b) after trial. To the contrary, she expressly disavowed that she was seeking Rule 50 relief. JA 1163 ("Plaintiff Did Not Move Under Rule 50."), 1173. Thus, Coles-Green waived her right to challenge the sufficiency of the evidence to support the District's defense as well as her right to judgment as a matter of law on liability. *Iron Vine Sec.*, 274 A.3d at 339 & n.13. The trial court was therefore "without power" under Rule 50 to enter judgment for Coles-Green. *Id.*; *Wash. Inv. Partners*, 28 A.3d at 580 & n.18.

B. Rule 59(a) did not authorize the trial court to enter judgment as a matter of law when granting Coles-Green a new trial.

Rather than pursuing Rule 50 relief, Coles-Green sought a new trial under Rule 59(a) based on instructional error. JA 1145-62. Rule 59(a) provides that, after a jury trial, the trial court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law." Super. Ct. Civ. R. 59(a)(1)(A). A

new trial is the usual remedy for a prejudicial instructional error. *See*, *e.g.*, *Juvenalis*, 955 A.2d at 198; *May v. Washington, Virginia & Maryland Coach Co.*, 197 A.2d 267, 268 (D.C. 1964). Rule 59(a) provided no authority, however, to enter judgment as a matter of law on the District's liability. The Superior Court erred in at least two respects in holding otherwise.

First, and most fundamentally, the Superior Court erred by relying on Rule 59(a)(2) to grant relief. The Superior Court found that it was proper under Rule 59(a)(2) to "direct the entry of a new judgment" and that under this rule a party could "seek . . . the alteration . . . of a judgment based on an error of law." JA 1171-72. But this provision applies only to *nonjury* trials. Super. Ct. Civ. R. 59(a)(2) ("After a *nonjury* trial, the court may, on motion for a new trial . . . direct the entry of a new judgment." (emphasis added)). Thus, Rule 59(a)(2) did not authorize the trial court to enter judgment as a matter of law for Coles-Green.

Instead, Rule 59(a)(1) applies to jury trials. Unlike Rule 59(a)(2), this rule never mentions entering new judgments. Its plain language permits only a new trial. Super. Ct. Civ. R. 59(a)(1)(A); *see Bd. of Trs. of Univ. of D.C. v. Joint Review Comm. on Educ. in Radiologic Tech.*, 114 A.3d 1279, 1283 (D.C. 2015). Beyond this, neither the trial court nor Coles-Green cited any authority for entering judgment as a matter of law under Rule 59(a), and the District is aware of none.

Indeed, even Rule 59(e)—which Coles-Green *did not* invoke—would not

have permitted the trial court to enter judgment as a matter of law as part of "alter[ing] or amend[ing]" its judgment. Super. Ct. Civ. R. 59(e); *see ING Glob. v. United Parcel Serv. Oasis Supply Corp.*, 757 F.3d 92, 96 (2d Cir. 2014). To the contrary, "[p]ermitting a party out of compliance with [Rule] 50 . . . to prevail under Rule 59(e) would render [Rule 50], which [is] basic to the conduct of federal trials, essentially superfluous." *Id*. at 97.

Second, the trial court was wrong that the "difference between" Rules 50(b) and 59(a) "is that a party moving under Rule 50(b) may seek to overturn a judgment based on erroneous findings of fact and conclusions of law whereas a Rule 59 motion may only be granted based on erroneous conclusions of law." JA 1173. To the contrary, "[r]elief from facts found may be granted in cases tried by a jury under Rule 50(b) (where the evidence was insufficient to support the jury verdict) or under Rule 59(a) (where, for example, the jury verdict is against the weight of the evidence)." *Coleman v. Lee Washington Hauling Co.*, 388 A.2d 44, 46 (D.C. 1978); *see* JA 1173 (citing *Coleman*, 388 A.2d at 46); *see also George Washington Univ. v. Violand*, 940 A.2d 965, 979 (D.C. 2008).

What is more, these two rules "have wholly distinct functions and entirely different standards govern their allowance." 9B Charles Alan Wright, et al., *Federal Practice and Procedure* § 2531 (3d ed. 2025). Indeed, "[t]he contrasts between the two motions are dramatic." *Id.* And "[a]ll of this has been understood for some time

and is thoroughly settled in the cases." *Id.*; *see Liu v. Allen*, 894 A.2d 453, 459 n.10 (D.C. 2006); *Fisher v. Best*, 661 A.2d 1095, 1098 (D.C. 1995).

Thus, the court was wrong to find that Rule 50(b) and Rule 59(a) provide "identical relief." JA 1173. The fallacy of the trial court's reasoning is underscored by Rule 50(b)'s option to file an alternative motion for a new trial under Rule 59(a). *See* Super. Ct. Civ. R. 50(b). If Rule 50(b) and 59(a) provided "identical relief," there would be no need to include an alternative request for a new trial with a Rule 50(b) motion, rendering that provision superfluous. But this is not the case. Rather, "[i]t should be noted very carefully that the discretion to order a new trial spoken of in [Rule 50(b)(2)] exists only if the moving party would be entitled to judgment as a matter of law." 9B Wright, *supra*, § 2538. "If that motion must be denied, the court has no power to order a new trial in favor of the moving party . . . unless a [Rule 59(a)] motion for a new trial has been joined in the alternative with the renewed motion for judgment." *Id.*

In short, Coles-Green waived her right to judgment as a matter of law on the District's liability by failing to move for Rule 50 relief. In ruling on Coles-Green's Rule 59(a) motion, the most relief the trial court could have granted was a new trial. *See Juvenalis*, 955 A.2d at 190 n.1. Thus, entering judgment for Coles-Green on liability was error, mandating a reversal and remand for a new trial.

C. The trial court also abused its discretion in ordering a new trial on damages only.

Even if it were somehow permissible to enter judgment on liability for Coles-Green under Rule 59, it was an abuse of discretion to limit the new trial in this case to damages only. To be sure, under Rule 59(a)(1), "a new trial does not require a retrial as to all the issues that were part of the first trial." *Weinberg v. Johnson*, 518 A.2d 985, 993 (D.C. 1986), *abrogated on other grounds by Trump v. Carroll*, 292 A.3d 220 (D.C. 2023). "A limited new trial is appropriate, however, only where the issues in a case are separate and distinct and where certain of the issues have been fairly tried and determined." *Id*. More generally, "in reviewing whether a trial court abused its discretion—or, . . . exercised its discretion erroneously—[the Court's] task is to determine whether the decision maker failed to consider a relevant factor, whether [they] relied upon an improper factor, and whether the reasons given reasonably support the conclusion." *Porter v. Howard Univ.*, 317 A.3d 342, 347 (D.C. 2024) (quoting *Ford v. Chartone, Inc.*, 908 A.2d 72, 84 (D.C. 2006)).

Here, the trial court failed to consider a relevant factor: the fairness of the first trial on Green's contributory fault. When limiting the new trial, the court considered only whether damages were separate and distinct from liability. JA 1185-87. The court made no finding that Green's contributory fault had been "fairly tried and determined" at the first trial. JA 1185-87. Understandably so, because it was not.

To begin, Coles-Green took manifestly inconsistent positions before trial

about what the District had to prove about Green's contributory fault. Despite arguing at summary judgment that recklessness was required, she also twice moved to exclude the District's PCP evidence as irrelevant on the ground that the District merely had to show that Green failed to exercise reasonable care. JA 202, 208, 210, 214, 333-34, 337. And she succeeded: the court excluded the PCP evidence, in part, on relevance grounds under an ordinary negligence standard. JA 308-09, 671-72. Those motions and rulings signaled agreement that ordinary negligence was the applicable standard of contributory fault, even after summary judgment.

That impression was reinforced by Coles-Green's failure to object in the joint pretrial statement to a defense based on ordinary negligence or to ask for an instruction requiring recklessness. JA 766-810. "The pre-trial order limits the issues for trial and controls the subsequent course of the action, thereby precluding the interjection of new issues, absent modification of the order upon good cause." *Structural Pres. Sys., Inc. v. Petty*, 927 A.2d 1069, 1076 (D.C. 2007); *see* Super. Ct. Civ. R. 16(g). The court made this clear in its pretrial order: "No party may assert any claim or defense at trial other than those described in the Joint Pretrial Statement, unless the parties make a showing of good cause or excusable neglect." JA 973.

Coles-Green continued to sit on her objection throughout the trial. After the District made its case, she failed to move for judgment as a matter of law under Rule 50(a), depriving the District of notice and an opportunity to present more evidence.

See Teneyck v. Omni Shoreham Hotel, 365 F.3d 1139, 1149 (D.C. Cir. 2004). During the charging conference, she remained silent even when the District said explicitly that it did not have to prove that Green was grossly negligent. SR5 at 102. Coles-Green even submitted *her own* verdict form that included contributory negligence (not recklessness) as a defense. JA 1126-27.

Not until the last possible moment—8:20 p.m. on the Sunday before Monday morning closing arguments—did Coles-Green revert to her long-abandoned argument that the District was required prove that Green was reckless. JA 1134-35. On these facts, "[t]here can be no question that [Coles-Green's new objection] presented genuine surprise and prejudice to" the District, which had already presented its entire case on the premise that it needed to show only that Green was negligent (and which had been precluded from offering PCP evidence on that same premise). *Taylor v. Wash. Hosp. Ctr.*, 407 A.2d 585, 593 (D.C. 1979)

Moreover, Coles-Green did not even attempt to show good cause for her belated challenge. To the contrary, she claimed—incorrectly—that she preserved her objection all along. SR6 at 11-12; JA 1167. Although the trial court agreed that Coles-Green had not preserved the argument ahead of trial, it made no finding of good cause to excuse the omission, relying instead on the "administration of justice" to excuse her forfeiture. JA 1182. But even if the interests of justice required setting aside the jury's verdict despite Coles-Green's belated objection, there was no justice

in depriving the District of a new trial on liability.

III. The Trial Court's Erroneous And Prejudicial Evidentiary Rulings Independently Require Reversal For A New Trial On Liability.

Reversal is required for the independent reason that the trial court abused its discretion by excluding evidence that Green was driving under the influence of PCP and by admitting expert testimony from Miller on the safe operation of a fire engine. These errors substantially prejudiced the District's rights and require a new trial.

A. The trial court abused its discretion by excluding evidence that Green was driving under the influence of PCP.

This Court ordinarily reviews restrictions on a party's presentation of evidence for abuse of discretion. *In re Est. of Martin*, 328 A.3d 405, 411-12 (D.C. 2024). But "where the evidentiary ruling is based on the trial court's determination of a question of law, appellate review of that determination is *de novo*." *Campbell v. Fort Lincoln New Town Corp.*, 55 A.3d 379, 385 (D.C. 2012). "[I]t is necessarily . . . an abuse for the trial court to employ incorrect legal standards." *Martin*, 328 A.3d at 411-12 (quoting *Wilson v. United States*, 266 A.3d 228, 240 (D.C. 2022)). Reversal is warranted if an error affects a party's substantial rights. *See* Super. Ct. Civ. R. 61; *Pyne v. Jam. Nutrition Holdings Ltd.*, 497 A.2d 118, 126 (D.C. 1985). Here, over several rulings, the trial court committed multiple legal errors in excluding the evidence of Green's PCP impairment, affecting the District's rights.

First, given the trial court's belated determination that the District had to show

that Green was reckless, it was error to exclude evidence of Green's PCP impairment as irrelevant. Instead, that evidence was highly probative of whether Green acted recklessly. *See Vetter v. Miller*, 157 A.3d 943, 951-52 (Pa. Super. Ct. 2017) (evidence of intoxication relevant to driver's recklessness); *Moore v. Peak Oilfield Serv. Co.*, 175 P.3d 1278, 1280 (Alaska 2008) (similar); *Myres v. Nunsett*, 511 So. 2d 1287, 1289 (La. Ct. App. 1987) (voluntary intoxication can show a reckless disregard warranting exemplary damages); *Essex v. Commonwealth*, 322 S.E.2d 216, 221-22 (Va. 1984) (intoxication may elevate conduct to the level of gross negligence). Because this evidence was highly probative of recklessness, its exclusion was manifestly prejudicial to the District. And given how probative this evidence was, it would have readily overcome any claim of *unfair* prejudice to Coles-Green. *See United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1041 (11th Cir. 1988); *Keene v. United States*, 661 A.2d 1073, 1079 (D.C. 1995).

Second, the trial court compounded its error in holding that the District needed expert testimony on causation to establish that Green was driving under the influence of PCP. JA 669; SR15 at 5. This Court rejected that notion decades ago in *Harris v. District of Columbia*, 601 A.2d 21 (D.C. 1991). There, it found the evidence sufficient to support a conviction for driving under the influence of drugs even though "there was no expert testimony presented to show that the presence of drugs in [Harris's] system impaired her ability to drive a motor vehicle." *Id.* at 26. The

Court held "that the nature of the evidence required to support a conviction for driving under the influence of a drug is not different from the sort of evidence required to support a conviction for driving under the influence of alcohol." *Id*. "In both situations, circumstantial evidence will suffice even though it does not specifically quantify the amount of the substance ingested and relate it to the ability to drive." *Id*. The Court then explained that proving driving under the influence of alcohol "does not require expert testimony to establish the link between alcohol consumption and driving impairment." *Id*. at 27. Instead, it can be established by circumstantial evidence that might include "evidence of erratic driving by the accused, slurred speech, odor of alcohol on the breath, and evidence of a blood alcohol content of .05 percent or more." *Id*. (internal quotation mark omitted).

Thus, although the District believed that Dr. Copeland's testimony would aid the jury, it was not required. Likewise, Drug Recognition Expert testimony was not needed, nor was evidence of standardized field sobriety testing, and understandably so. Such evidence might be unavailable for many good reasons, such as injury to the impaired driver, a physical impediment that precludes testing, or the driver's outright refusal to cooperate. This Court has never suggested that the lack of this kind of evidence can defeat a criminal charge of DUI where there is other circumstantial evidence of impairment. It was thus necessarily a prejudicial abuse of discretion for the trial court to exclude evidence of Green's PCP impairment in

this *civil* case based on its mistaken understanding that the law required expert testimony.

Even if limited expert testimony is needed to explain the effects of PCP and the significance of the 220 ng/mL of PCP in Green's system, Dr. Copeland was qualified to testify to that. His education, training, and experience, and reliance on peer-reviewed publications, established his expertise, *see* JA 67-69, 87-88, 90-92, 106, and Judge Epstein did not find otherwise, ruling only that Dr. Copeland could not testify about *causation*, JA 302, 304, 310.

Third, the trial court again erred in finding the toxicology results inadmissible. The trial court's exercise of discretion must rest on a firm factual foundation. *In re K.C.*, 200 A.3d 1216, 1233 (D.C. 2019). Here, the court ruled that the toxicology report was "not relevant because while it found PCP in Mr. Green's system, [it] states that the PCP was ingested at some time in the past and was not affecting Mr. Green on the day of the [a]ccident." JA 986. This finding was clearly erroneous; the report says no such thing. *See* JA 379.

In addition to being highly relevant, the toxicology report was admissible as a matter of law as a medical examiner record. A medical examiner performing an autopsy must "make a complete record of the findings and conclusions of any autopsy and shall prepare a report thereon." D.C. Code § 5-1409(c). The Chief Medical Examiner (CME) must then maintain that report: "[t]he CME shall be

responsible for maintaining full and complete records and files, properly indexed, giving the name, if known, of every person whose death is investigated, the place where the body was found, the date, cause and manner of death and all other relevant information and reports of the medical examiner concerning the death." *Id*. § 5-1412(a). Section 5-1413, in turn, provides that "[t]he records maintained pursuant to § 5-1412, or reproductions thereof certified by the CME, are admissible as evidence in any court in the District," except for nonmedical matters. *Id*. § 5-1413.

The toxicology report was a "report[] of the medical examiner concerning [Green's] death." *Id*. § 5-1412(a). The toxicology report is indisputably part of the autopsy report, which was otherwise admitted at trial. JA 373-78, 1302. And the autopsy report contains the findings about the cause of Green's death, placing it squarely within the realm of reports that are admissible under Section 5-1413.

Despite the plain text of these statutes, the trial court concluded that the report was inadmissible:

> Information about a decedent which does not concern their death is not part of CME's regularly kept records and is therefore not admissible under § 5-1413 or Rule 803(5). Mr. Green's autopsy report states that his death was the result of blunt force trauma from the Accident. PCP did not contribute to the Accident. Evidence that Mr. Green had ingested PCP is not information "concerning the death" pursuant to D.C. Code § 5-1412. The toxicology report is therefore not admissible as a business record under D.C. Code § 5-1413.

JA 987-88. This reasoning defies fact and logic. The autopsy report does not say whether PCP contributed to the accident, *see* JA 372-79, and the trial court had no

basis to say it did not. Beyond that, the fact that PCP intoxication was not identified as the *cause* of Green's death that does not negate the relevance of the toxicology findings or change the fact that the toxicology report was one *concerning* Green's death. To the contrary, the toxicology testing was done at the medical examiner's request as part of uncovering the cause of Green's death. JA 382-83. That is sufficient to render it a "record[] maintained pursuant to § 5-1412" and thus admissible. D.C. Code § 5-1413.

Fourth, the court was just wrong to find that there was "no" evidence of Green's impairment. SR15 at 10-11. The District presented evidence of Green's driving that, when coupled with the toxicology results, would have permitted a rational juror to find that he was driving under the influence of PCP. The standard for DUI is "correctly expressed as that level of impairment at which a person is *appreciably* less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle as powerful and dangerous a mechanism as a modern automobile with safety to himself and the public." *Muir v. District of Columbia*, 129 A.3d 265, 272 (D.C. 2016) (internal quotation marks omitted). Green's irregular driving was ample evidence for a jury to conclude that he was appreciably impaired by PCP.

To begin, when Green stopped for the red light at Rhode Island, he left an unusually large gap between himself and the car in front of him—about two car

lengths. SR1 at 175. At the stop light, Green was distracted by something in his back seat and not focused on driving. SR1 at 170, 178-79. Once he turned around, Green failed to react when the light turned green and those ahead of him moved through the intersection. SR1 at 170, 173, 176-77, 179; SR2 at 164-65. Indeed, the testimony of both Clifford Miller and Michael Miller was that Tate faced a red signal, and thus Green faced a green signal, for about a minute before the accident. SR1 at 184, 204; SR2 at 137-41, 144-45, 164-65. During that minute, McKnight had to honk three times to get Green's attention. SR1 at 170, 173, 176-77, 179.

Green proceeded toward the intersection with his windows rolled down when McKnight and all the other drivers around him could hear Tate's sirens and had stopped. SR1 at 143-44, 155-56, 159, 191, 173, 177-80, 196. But Green did not react at all to the approaching fire engine. Although he would have seen the fire engine at least 90 feet before the point of impact, Green proceeded into the intersection at a slow, steady pace, without braking or taking any evasive action. SR1 at 161-62, 195-97, 204; SR5 at 20-24, 27-28, 31-32, 37. Green appeared oblivious to the impending danger, staring straight ahead and never looking toward the sound of the approaching fire truck. SR1 at 196-97, 202; SR4 at 89.

From all this evidence and Green's toxicology results, a rational juror could find that, more likely than not, Green was driving under the influence of PCP at the time of the accident and was thus contributorily reckless. The erroneous exclusion

of the evidence of Green's PCP intoxication prejudiced the District's substantial right to present its affirmative defense of contributory fault.

B. The trial court abused its discretion by qualifying Miller as an expert on safe driving practices.

This Court reviews "the trial court's determination whether an expert witness is qualified to give an opinion on a subject . . . for abuse of discretion." *Theatre Mgmt. Grp., Inc. v. Dalgliesh*, 765 A.2d 986, 992 (D.C. 2001). Under Fed. R. Evid. 702, a person may testify as an expert if they are qualified by "knowledge, skill, experience, training, or education" to render an opinion on a particular subject.

Perricone was Coles-Green's expert "experienced and trained in operating fire trucks in a safe manner." SR 15 at 23. In contrast, she proffered Miller as an expert on accident reconstruction and the District's laws, regulations, and policies applicable to a fire engine on an emergency run. SR15 at 26, 32-33; SR2 at 113. Miller was to give his opinion about how Tate's conduct violated legal standards. JA 29; *see* SR15 at 25-26. At trial, however, Coles-Green offered Miller as an expert in different area: "safe driving practices." SR2 at 132-35. The trial court qualified him as such over the District's objection, along with accepting him as an expert in accident reconstruction. SR2 at 132-35, 138. He was then permitted to testify that, "in [his] opinion," the manner in which Tate approached and entered the intersection—including "pass[ing] the red light at 54 miles an hour"—constituted "unsafe acts." SR2 at 164-66.

In allowing this testimony, the court abused its discretion. Miller was not qualified to render an opinion about the safe operation of a fire engine on an emergency run. There is no evidence that Miller had any "knowledge, skill, experience, training, or education" in the safe operation of *fire engines*. He admittedly was not an expert on operating fire apparatuses, SR3 at 3, let alone their safe operation. Instead, the trial court found that expertise in safe driving practices was "subsumed under the concept of accident reconstruction." JA 1199. This conclusion was erroneous for three reasons.

First, it has no support in the record. In establishing Miller's qualification as an expert on safe driving practices, Coles-Green did not rely on his background in accident reconstruction. Instead, she relied on his experience as an adjunct driving instructor training MPD recruits in "emergency vehicle operations with police vehicles, with high speed pursuits, turning, braking threshold," as well as teaching high school students how to drive. SR2 at 130. This experience did not establish his expertise about safe driving practices for *fire engines on emergency runs*.

Second, this testimony was presented in a line of questioning separate from his accident reconstruction. Indeed, it was adduced after Miller had already given his opinion that the accident would not have happened if Tate had driven no more than 40 mph. SR2 at 156-58. His testimony on unsafe driving was not integral to rendering that opinion or describing the results of his accident reconstruction.

In fact, he flatly contradicted his accident reconstruction testimony when he said that Tate's unsafe driving included *passing* the red light at 54 mph. SR2 at 166. Earlier, he testified that Tate was traveling about 52 mph when he started breaking well before reaching the intersection. SR2 at 153, 157; JA 1290, 1294-95. This testimony tracked MPD's investigation, which found that Tate was traveling about 40 mph at the point impact just inside the intersection, not 54 mph. JA 1364.

Third, Miller's testimony was untethered from any standard of care. Thus, it amounted to just an impermissible personal opinion, which alone is reversible error. *See Travers*, 672 A.2d at 568; *Cardenas*, 998 A.2d at 306-07.

These many errors amounted to an abuse of the trial court's discretion. Moreover, this improper testimony was prejudicial. To establish that Tate was grossly negligent, Coles-Green had to identify "serious aggravating factors" in Tate's conduct "beyond those necessary to establish simple negligence in the first place." *District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998). Miller identified just one: Tate's speed. But Miller's testimony that the accident would not have happened if Tate had been going no more than 40 mph (SR2 at 157-59) could have established no more than a breach of ordinary care, even assuming the FEMS policy actually set the standard. Instead, it was Miller's (improperly admitted) unsafe driving testimony that, if anything, made the case for gross negligence. Given this, there can be no "fair assurance" that the jury was not substantially swayed by

his improper opinion testimony. *See Kozlovska v. United States*, 30 A.3d 799, 803 (D.C. 2011); *R. & G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 540 (D.C. 1991). For this reason, too, a new trial on liability is required.

IV. The Trial Court Also Abused Its Discretion By Denying The District's Motion For Remittitur Or A New Trial On Damages.

Even if the Court sustains the entry of judgment as matter of law on liability—which it should not—at the very least, the District has a right to remittitur or a new trial on damages for two independent reasons. First, the verdict is entirely speculative insofar as the jury was given none of the tools it needed to discount its award to present value. And second, the jury's verdict is excessive, unsupported by the evidence, and based on improper considerations.

A. Legal principles.

1. Standard of review for excessive verdicts.

"The trial court's decision denying a motion for remittitur or new trial based upon a claim of excessive verdict will be reversed only for an abuse of discretion." *District of Columbia v. Watkins*, 684 A.2d 395, 403 (D.C. 1996). "An excessive verdict is one which 'is beyond all reason, or . . . is so great as to shock the conscience.'" *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 688 (D.C. 2007) (quoting *Wingfield v. Peoples Drug Store, Inc.,* 379 A.2d 685, 687 (D.C. 1977)). "Excessiveness refers not only to the amount of the verdict but to whether, in light of all the facts and circumstances, the award of damages appears to have been the

product of passion, prejudice, mistake, or consideration of improper factors rather than a measured assessment of the degree of injury suffered by the plaintiff." *Scott*, 928 A.2d at 688.

When deciding whether a verdict is excessive, the Court "must examine the extent and nature of the damages proved by the evidence." *District of Columbia v. Hawkins*, 782 A.2d 293, 305 (D.C. 2001). "[J]ury verdicts must strike a balance between ensuring that important personal rights are not lightly disregarded, and avoiding extravagant awards that bear little or no relation to the actual injury involved." *Phillips v. District of Columbia*, 458 A.2d 722, 726 (D.C. 1983).

2. Permissible bases for recovery under the District's wrongful death statute.

The District's Wrongful Death Act "provide[s] for close relatives benefits which they might reasonably be expected to have received from the decedent had he or she lived." *Lewis v. Lewis*, 708 A.2d 249, 251-52 (D.C. 1998). "Two main elements form the basis for recovery under the Wrongful Death Act." *Doe v. Binker*, 492 A.2d 857, 863 (D.C. 1985). "The first element compensates for pecuniary loss—calculated as the annual share of decedent's dependents in the decedent's earnings, multiplied by the decedent's work life expectancy, and discounted to present value." *Id*. "The second element compensates for the *value of the services* lost to the family as a result of decedent's death." *Id*. (emphasis added). Lost services include "loss of care, education, training, guidance and personal advice."

Hawkins, 782 A.2d at 303. Recovery for non-economic losses like pain, suffering, or loss of affection or emotional support is not permitted. SR6 at 80-81.

Under statutory schemes like the District's that allow for the recovery of economic losses only, the loss of parental guidance is treated as a financial loss, like the loss of household services. *See*, *e.g.*, *Milczarski v. Walaszek*, 969 N.Y.S.2d 685 (N.Y. App. Div. 2013). "Even when wrongful death damages are premised upon non-monetary losses, they are measured by the monetary value of the contributions that the decedent would have made to his survivors during his or her life had that life not been cut short." *Beim v. Hulfish*, 83 A.3d 31, 42 (N.J. 2014); *Am. R.R. Co. of Porto Rico v. Didricksen*, 227 U.S. 145, 149 (1913) ("Pecuniary" damages are "limited strictly to the financial loss thus sustained.").

Moreover, when a statute limits recovery to economic losses, courts do not usually award parental guidance damages to children beyond their minority. *See*, *e.g.*, *Oldham v. Korean Air Lines Co.*, 127 F.3d 43, 56 (D.C. Cir. 1997); *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 141 (5th Cir. 1986). The same is true under the District's Wrongful Death Act. *Balt. & Potomac R.R. Co. v. Golway*, 6 App. D.C. 143, 176-77 (D.C. Cir. 1895); *see*, *e.g.*, *District of Columbia v. Jackson*, 810 A.2d 388, 397-98 (D.C. 2002).

3. The need for expert testimony on damages.

"[W]here the existence of substantial future economic loss becomes an issue,

the use of expert testimony likely would be necessary since seldom will lay witnesses possess the requisite background to testify on a matter such as this—one not likely to be within the common knowledge of the average layman." *District of Columbia v. Barriteau*, 399 A.2d 563, 568-69 (D.C. 1979). Indeed, "arriving at a sum representing future loss of earnings often involves a complicated procedure." *Id*. at 568. "To arrive at a reasonable figure the trier-of-fact must have evidence pertaining to the age, sex, occupational class, and probable wage increases over the remainder of the working life of the plaintiff." *Id*. For this reason, "the task of projecting a person's lost earnings lends itself to clarification by expert testimony because it involves the use of statistical techniques and requires a broad knowledge of economics." *Id*. (quoting *Hughes v. Pender*, 391 A.2d 259, 262 (D.C. 1978)).

Because the amount of damages for the loss of earnings, household services, and parental guidance cannot be calculated with precision and the proof of damages is inexact, "the amount of damages to be awarded must be based largely on the good sense and sound judgment of the jury and all the facts and circumstances of the case." *Doe*, 492 A.2d at 864 (cleaned up). But even then, "there must be substantial evidence upon which the award is predicated." *Id.* at 860. "[A] jury should never be permitted to guess as to a material element of the case such as damages." *Courtney v. Giant Food, Inc.*, 221 A.2d 92, 94 (D.C. 1966).

B. The jury's award cannot stand because it is entirely speculative.

The trial court abused its discretion by denying the District's motion for remittitur or a new trial because the jury was not given the critical tools it needed for its damages calculation. The jury was instructed that it had to determine the net financial losses to Coles-Green and the children based on the expected value of Green's future earnings, household services, parental guidance, and gifts and other financial contributions. SR12 at 74-75. This included accounting for the effects of inflation on earnings and living expenses. SR12 at 75. The jury was also instructed that it had to discount the amount of these future losses to their present value. SR12 at 75. This meant that, for each beneficiary, the jury was charged to determine "the amount which, if invested at a particular rate of interest today over the number of years Mr. Green would have been expected to live, would have returned an amount equal to the net financial loss to that beneficiary." SR12 at 76. Coles-Green, however, did not give the jury three key pieces of information it needed to make these calculations.

First, Coles-Green did not give the jury a formula for calculating present value. Even under ideal conditions, "it may be a difficult mathematical computation for the ordinary juryman to calculate interest on deferred payments, with annual rests, and reach a present cash value," *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916), but with no formula at all that task is impossible. Even if some

juries might independently know how to calculate the present value of a future loss, this one did not: it is clear this jury had no formula in mind because it asked for one but did not receive it. *See* JA 1206.

In opposing the District's motion for relief, Coles-Green herself questioned the jurors' ability to "'crunch' their own present value." JA 1217-18. But she argued there was no need for them to do so here because they "could and did base their decision on the economists' testimony." JA 1217-18. Certainly, the economists' testimony provided a rational basis for the jury to award the amounts they calculated for lost earnings and household services, but the economists did not "assign a monetary value to" Green's parental guidance, let alone discount that amount to present value. JA 1218. As explained below, those damages necessarily represented the bulk of the jury's award. *Infra* pp. 69-71. But with no formula, the jury was left to its own devices to calculate present value, and it is anyone's guess how they arrived at $13.5 million when doing so, or if they even discounted anything at all.

Second, Coles-Green did not give the jury evidence of future inflation rates. This Court has held that if, as here, a jury is instructed to account for inflation, "there must be competent evidence which sets the future rate of inflation within reasonable limits." *Barriteau*, 399 A.2d at 568.

Third, Coles-Green did not give the jury the interest rates needed to calculate present value. "[T]here was no evidence as to what interest could be fairly expected

from safe investment which a person of ordinary prudence, but without particular financial experience and skill, could make, nor was any guidance given to the jury as to the method of computing, on the basis of that interest rate, the present value of" Coles-Green's and the children's losses. *Russell v. City of Wildwood*, 428 F.2d 1176, 1183 (3d Cir. 1970). "The determination of the appropriate interest rate and the computation of present value on the basis of it involved facts and mathematical procedures of which the jurors could not be assumed to have personal knowledge from their own prior experience." *Id*; *see Chesapeake & Ohio Ry. Co.*, 241 U.S. at 491. In that case, the jury's award is based on "sheer conjecture" and "cannot stand." *Russell*, 428 F.2d at 1183.

C. The jury's verdict is excessive and unsupported by the evidence.

The trial court also abused its discretion by denying the District's motion for remittitur or a new trial because the jury's award is excessive and unsupportable. The jury's $13.5 million award encompassed three types of damages: lost earnings, lost household services, and lost parental guidance. Although the jury did not ascribe dollar amounts to each category, it could not have rationally increased the first two categories to anything greater than what Coles-Green's own expert offered—approximately $1.6 million in total. That means that the jury necessarily awarded about $12 million under the third category, which is insupportable.

To begin, there was no evidence that would have supported an upward

departure from Dr. Borzilleri's top lost earnings calculation of $638,052. Dr. Borzilleri relied only on Green's SOME salary in calculating lost earnings. Coles-Green presented no evidence about Green's past earnings nor information suggesting that Green had the potential to earn more in the future. The District's evidence showed that his SOME salary was on par with his past earnings. JA 1400-04. Likewise, there was no evidence that he planned to work past age 70. Although Dr. Borzilleri's testimony was only a "guideline" and the jury was not bound to accept it, *Doe*, 492 A.2d at 864, there were no other facts that would have supported a greater award for lost earnings. Instead, on this record, awarding anything beyond what Dr. Borzilleri calculated would have been entirely speculative.

Similarly, there was no evidence that would have supported an upward departure from Dr. Borzilleri's calculation of about $1 million in lost household services. Dr. Borzilleri had no idea how much time Green actually spent providing those services. SR11 at 89-90. Instead, he relied on Dollar Value of a Day tables representing the average time men with children of similar ages spent on household services to calculate the number of hours Green might have spent performing various tasks for the family, as well as determining the value of those services. SR11 at 48-62; JA 1384-95.

Coles-Green's trial testimony did not add anything to the lost-services calculus. While she spoke generally about the types of household services that

Green performed, she did not try to quantify the time he spent on those tasks. There was simply no evidence that Green spent more than 50.85 hours a week on household services on top of his full-time job at SOME, and it would have been speculative for the jury to conclude otherwise.

But even if there were some wiggle room for the jury to exceed Dr. Borzilleri's conclusions based on the jurors' "good sense," *Doe*, 492 A.2d at 864, nothing would have justified an eightfold, nearly $12-million-dollar increase for lost earnings and lost household services beyond what the parties' economists calculated. Instead, that amount (or at least the vast majority of that amount) is necessarily attributable to the loss of parental guidance.

No doubt, the jury could award damages for parental guidance beyond what Dr. Borzilleri calculated for lost earnings and household services. But as with household services, recovery was limited to the *financial* value of lost parental guidance, not its emotional worth. Although the award did not have to be mathematically precise, it could not be based on improper considerations like passion, prejudice, or a desire to punish, nor could it be designed to compensate for pain, suffering, or loss of affection or emotional support. Yet precisely such impermissible factors were at play here.

While not dispositive, the size of the award alone—more than eight times the value Dr. Borzilleri assigned the value of Green's employment and all other services

to the family—strongly suggests that the jurors were swayed to consider more than the economic value of Green's parental guidance. There is no evidence that the award represents a fair approximation of the cost to replace Green's parental guidance by procuring services in the open market, such as cooking lessons, home repair classes, a tutor with Green's credentials (a GED), or a life coach or counselor—even if the jury were valuing that guidance over Green's life expectancy. *See Johnson v. Dobrosky*, 902 A.2d 238, 248 (N.J. 2006); *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913). Of course, that inquiry is limited to the period of the children's minority. *Balt. & Potomac R.R. Co.*, 6 App. D.C. at 176-77.

Beyond the absence of supporting evidence, the likelihood that the jury based its award on improper factors is bolstered by Coles-Green's closing argument, which urged the jury to base its decision on passion and prejudice and other improper considerations. Her parting thought implored the jurors to "fully give justice to this family. Because this defendant took their father from them, and that is what they have lost for the remaining 41 years of their life." SR13 at 42-43. She likewise argued that the jury had been "told to give full justice" where the District was responsible for Green's death. SR13 at 41; *see* SR1 at 128. But the jurors were not supposed to give "full justice" by compensating the children for the loss of their father; they were supposed to award them the value of his parental guidance.

Coles-Green also improperly argued that the loss of parental guidance was not

an "economic" loss and that the "quality" of Green's parenting "dwarfed" the economic losses. SR13 at 8, 9; *see* SR1 at 125. That was wrong. Loss of parental guidance is an economic loss, and non-economic losses were precisely the type of losses the jury was not supposed to consider: damages for the pain and suffering associated with Green's death. *Asal v. Mina*, 247 A.3d 260, 267 (D.C. 2021) (characterizing "non-economic compensatory damages" as damages "for pain and suffering"); *Hubb v. State Farm Mut. Auto. Ins. Co.*, 85 A.3d 836, 844 n. 8 (D.C. 2014) (same); *Maddox v. Francemone*, No. 5:19-CV-00678 (BKS/MJK), 2025 WL 1070361, at *5 (N.D.N.Y. Apr. 9, 2025) ("Case law plainly identifies loss of parental guidance as pecuniary, or economic, in nature."); Andrew Laurila, *Valuing Mom & Dad: Calculating Loss of Parental Nurture in A Wrongful Death Action*, 35 U. La Verne L. Rev. 39, 50 (2013) ("[L]ost nurture is properly categorized as a verifiable pecuniary element of economic damages.").

Coles-Green compounded this error by telling the jury that it was to "value" *Green* "as a father," not value the parental guidance he provided. SR13 at 9. She told the jury it could award more than the value for "the things he did." SR13 at 9. This included compensating for burdens to Coles-Green and the children in a single-parent household. SR13 at 9-10. She argued that she no longer had a "partner to help her, to balance that out, both *emotionally*, in terms of labor, physically, finances, all of it." SR13 at 10 (emphasis added). She maintained that all this was "another

cost to [Green] not being in the picture." SR13 at 10; *see* SR1 at 126 (asking the jury to compensate the family for the loss of "go[ing] on vacation together" where "they laugh and joke and spend time together").

Coles-Green's misunderstanding of what was before the jury is confirmed by her opposition to the District's post-trial motion, where she again asserted that losses from parental guidance were "non-economic." JA 1213, 1218. She maintained that the jury was to place a value on the "loss of a dad" and to award Coles-Green and the children an amount that would make them "whole." JA 1218, 1222. This necessarily encompassed much more than compensating for the loss of parental guidance, including things like the loss of emotional support and the pain and suffering associated with Green's death. Indeed, Coles-Green pointed out that the children were "suffer[ing] from his loss, each in his or her own way." JA 1218.

Moreover, Coles-Green plainly believed that the jury could *and had* awarded non-economic damages for pain and suffering because she relied on authority purporting to support the jury's right to do so—that the jury could award "intangible elements of damages, including pain, suffering, inconvenience, disability and the like." JA 1222-23 (quoting *WMATA v. Jeanty*, 718 A.2d 172, 180 n.14 (D.C. 1998)). But that authority was not from a wrongful death case, and this assertion is simply not true under the District's Wrongful Death Act. That Act allows for the recovery of economic losses only—not non-economic losses like pain, suffering, and loss of

society or consortium. *See Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 565-67 (D.C. Cir. 1993).

In short, Coles-Green's closing argument so infected the jury's analysis of damages that the inescapable conclusion is that the resulting enormous award was "the product of passion, prejudice, mistake, or consideration of improper factors rather than a measured assessment of the degree of injury suffered by the plaintiff." *Scott*, 928 A.2d at 688. For these reasons, it was an abuse of the trial court's discretion to deny the District's motion for remittitur or a new trial.

CONCLUSION

The Court should reverse and remand with instructions for entry of judgment in the District's favor or, alternatively, for a new trial on liability and damages.

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CERTIFICATE OF SERVICE

I certify that on June 30, 2025, this brief was served through this Court's electronic filing system to:

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