IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 24-CV-0942

MEDSTAR GEORGETOWN MEDICAL CENTER, INC., *ET AL.*,

Appellants

v.

DAVID S. KAPLAN

Appellee

Appeal from the Superior Court for the District of Columbia
(The Honorable Ebony Scott)
Case No. 2021 CA 004820 M

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The MedStar Providers deserve a new trial due to multiple abuses of discretion by the trial court: allowing inflammatory arguments during closings, allowing duplicative non-economic damages on the verdict sheet, and failing to grant remittitur for excessive damages awarded. Mr. Kaplan identifies no case—in the District of Columbia or elsewhere—in the District of Columbia or elsewhere – where a court allowed a plaintiff to parse out "past and future physical injury" and "past and future emotional distress," and thereby invite duplicative awards for a single category of non-economic damages. The redundant damages should be reduced or the case remanded for a new trial.

Mr. Kaplan's closing repeatedly and improperly conflated the legal standard of care applicable to the MedStar Providers with heightened inapplicable standards of "safety" and protecting patients. The trial court recognized the error. But it refused to give the jury a curative instruction to disregard counsel's improper exhortations to judge the MedStar Providers under a heightened "safety" standard. In urging this Court to overlook the error, Mr. Kaplan does not cite any instance where a trial court deemed the closing statement legally improper but nevertheless refused to give a simple, clarifying curative instruction.

Further compounding its error, the trial court refused to give a curative instruction or grant a new trial when Mr. Kaplan's counsel improperly anchored

the jury to $4 million non-economic damages. Because the trial court abused its discretion, the MedStar Providers are entitled to a new trial.

ARGUMENT

I. The verdict form improperly allowed duplicative non-economic damages.

A. The MedStar Providers preserved their objections to the verdict sheet.

The MedStar Providers timely and appropriately objected to the verdict sheet. While entertaining verdict sheet arguments, the trial court asked Mr. Kaplan's counsel to make edits to the verdict sheet to reflect its rulings. (App. 1727, 1733). After the trial court ruled that the verdict sheet would include a line for physical injury and another line for emotional distress, counsel for the MedStar Providers preserved their objection, stating: "The defendants still request one line, but we understand the ruling of the Court." (App. 1733).

The trial court then asked Mr. Kaplan's counsel to circulate the final verdict sheet. (App. 1733). Once received, the trial court asked, "And so is everybody in agreement with the verdict form *last sent by* [Mr. Kaplan's counsel]?" (App. 1741). It was to that specific question that counsel for MedStar Providers responded, "Yes, Your Honor. We're satisfied." (App. 1741).

Mr. Kaplan cites D.C. Civil Rule 51 to argue that the MedStar Providers failed to object to the trial court's erroneous verdict sheet ruling. But Rule 51

addresses the procedure for objecting to jury instructions, not verdict sheets. And even if Rule 51 did govern objections to verdict sheets, the MedStar Providers objected in a timely fashion. *See* D.C. Civil R. 51(c)(2) (recognizing that an objection is timely if made on the record, out of the jury's hearing, and before instructions and arguments are delivered). That is exactly what happened here.

A fair and full reading of the transcript shows that the MedStar Providers were "satisfied" that Mr. Kaplan's counsel accurately transcribed the trial court's rulings on the verdict sheet, but not "satisfied" with the trial court's ruling. (App. 1727). The MedStar Providers preserved their objection to the verdict sheet.

B. Mr. Kaplan identifies no case where a court condoned parsing out "physical injury" and "emotional distress" on a verdict sheet.

Instead of providing cases where trial courts were applauded for encouraging duplicative damages by allotting two separate lines for intertwined and inseparable non-economic damages, Mr. Kaplan repeats the truism that physical injury and emotional distress are recoverable in tort claims. That principle is not contested.

Non-economic damages – pain, suffering, anxiety, worry, nervousness, grief, humiliation, indignity, embarrassment – are recoverable. But because these non-economic damages are "subjective states, representing a detriment which can be translated into monetary loss only with great difficulty," they should not be

separately itemized on verdict sheet, lest they run the risk of duplicative recovery. *Capelouto v. Kaiser Found. Hosps*., 500 P.2d 880, 883 (Cal. 1972); *see Marxmiller v. Champaign-Urbana Mass Transit Dist.*, 90 N.E.3d 1064, 1066 (Ill. App. 4th 2017) ("We agree that emotional distress is a form of suffering and that itemizing emotional distress and suffering as separate elements of damages creates a risk of double recovery.")

This Court should be guided by *Rounds v. Rush Trucking Corp.*, 211 F.3d 185 (2nd Cir. 2000), where the U.S. Court of Appeals for the Second Circuit, applying New York law, held the trial court erred by allowing a verdict sheet with separate spaces for "past pain and suffering," "past emotional distress," "future pain and suffering," and "future emotional distress." *Id.* at 187, 190. The Second Circuit explained that "pain and suffering" is a "broad category" that subsumes emotional distress, shock and fright, mental suffering and anguish, and emotional anxiety. *Id.* at 188-89. Not only are the intertwined concepts of "pain and suffering" and "loss of enjoyment of life" inseparable, attempting to do so may cause duplicative non-pecuniary damages. *Id.*

Mr. Kaplan does not distinguish *Powers v. Ill. C. G. R. Co*., 438 N.E.2d 152 (Ill. 1982),[1] which is instructive. There, following the Illinois pattern jury

[1] Which Mr. Kaplan wrongly calls *Powell*. Appellee's Br. at 30.

instruction, the trial court allowed a separate verdict sheet line for "the nature, extent, and duration of the plaintiff's injury." *Id.* at 156-57. The Illinois Supreme Court recognized that was error because the jury was also instructed on other overlapping non-economic damages, specifically "disability" and "pain and suffering." *Id.* at 156-58. In so doing, the trial court erroneously invited the jury to award duplicative awards for *components*, rather than elements, of non-economic damages. *Id.*

Physical injury, pain, and suffering are part and parcel of non-economic damages and not separate elements. *See Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 809 (D.C. 2011) (noting that courts routinely allow recovery for pain and suffering as "parasitic" emotional distress damages when the plaintiffs have suffered "physical injury"). The dictionary definition of "suffering" includes "emotional distress," and "suffer" means "to endure death, pain, or distress." *Marxmiller*, 90 N.E. 3d at 1074-75 (quoting Merriam-Webster's Collegiate Dictionary (10th ed. 2000)). "Suffering means distress, whether physical or emotional. Suffering can be physical, in the form of pain, fatigue, or other bodily distress. Suffering also can be mental, in the form of fear, shock, anxiety, frustration, grief, depression, or boredom." *Id.* What is clear by the very definitions is that emotional pain and suffering are not separable from physical

pain and suffering and, as such, cannot constitute separate and distinct verdict lines or categories of damages.

What is glaringly absent from the Appellee's Brief is reference to any case where a court sanctioned the use of multiple lines for non-economic damages for an individual plaintiff asserting medical negligence and lack of informed consent. Instead, Mr. Kaplan attempts to distract the court with inapposite cases addressing the timelines of *Batson* challenges;[2] the invited-error doctrine;[3] damages in wrongful-death actions governed by D.C. Civil Jury Instruction 14.05 and damages for survival actions addressed by D.C. Civil Jury Instruction 14.01;[4] and special verdicts and interrogatories to consider negligence and contributory negligence.[5]

Mr. Kaplan's other cited cases demonstrate the appropriate use of verdict sheets, where separate lines are included for individual elements of a claim. For example, in a breach of contract action, the trial court allowed three questions:

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[2] *Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459, 470 (D.C. 1997).

[3] *Young v. United States*, 305 A.3d 402, 429-31 (D.C. 2023).

[4] *Batey v. Washington Hospital Center Corp.*, Case NO. 2019 CA 6716 M (McKenna J.,) Verdict Form (App 2890).

[5] *Robinson v. Washington Internal Medicine Assocs., P.C.*, 647 A.2d 1140, 1143-45 (D.C. 1994) (endorsing the use of special verdict forms whether there are different theories of liability, such as negligence, contributory negligence, and assumption of risk).

(i) was there breach of contract; (ii) did breach cause injuries; (iii) if yes, how much to award for medical expenses. *See Brooks v. D.C. Hous. Auth.*, 999 A.2d 134, 140 (D.C. 2010). In a medical-malpractice case, a verdict sheet separated elements of a medical malpractice claim into "distinct" and "individual" questions, *i.e.,* breach, causation, and whether breach caused death. *Blackwell v. Dass*, 6 A.3d 1274, 1276 (D.C. 2010). At the jury's request, the trial court condensed the three questions into one: did the physician breach the applicable standard of care and was a breach the proximate cause of the patient's death. *Id.* at 1277-78.

None of Mr. Kaplan's cited cases sanctions using multiple lines for non-economic damages for a single plaintiff asserting medical negligence and lack of informed consent. To the contrary, by presenting the jury with a verdict sheet with separate lines for "emotional distress" and "physical injury," the trial court invited redundant damages, which is precisely what happened here.

The Court should either reduce Mr. Kaplan's duplicative $1.5 million award for emotional distress, or, if it cannot determine which portion(s) of the jury's verdict is redundant, vacate the judgment and order a new trial on damages.

II. Mr. Kaplan's closing argument misstated the law, violated the Golden Rule, and improperly anchored the jury.

A. The MedStar Providers timely objected to Mr. Kaplan's closing argument.

There is no rule or case law that requires a party to interrupt closing arguments to lodge an objection. The "conventional requirement" is that a party should object at the "earlier possible opportunity" to "enable the trial judge to take the most efficacious action." *Hunter v. United States*, 606 A.2d 139, 145 (D.C. 1992) (describing repeated objections during closing as "lack of civility"). The requirement to object at the "earliest opportunity" is "relaxed" during "closing arguments in order to avoid disruptive interruptions. An appropriate objection or motion at the bench at the conclusion of [the party's] presentation is sufficient to preserve the point for appeal." *Chatmon v. United States*, 801 A.2d 92, 99 (D.C. 2002).

Counsel for the MedStar Providers objected to Mr. Kaplan's inappropriate "reptile theory tactics" and anchoring arguments before rebuttal argument, providing ample opportunity for the trial court to right the wrong with curative instructions. (App. 1845-47). The MedStar Providers should not be punished for their civility.

Likewise, the MedStar Providers objected to counsel's anchoring and asked the trial court to instruct the jury to disregard any suggestion of a specific amount

of damages. (App. 1846). The trial court acknowledged that some trial-court judges "have determined that anchoring is inappropriate" and that suggesting a range of damages "does in fact anchor" but declined to deliver a curative instruction. (App. 1849-51).

B. Although the trial court recognized Mr. Kaplan misstated the law by which the MedStar Providers were to be judged, it erroneously refused to issue a curative instruction.

It is undisputed that the trial court found improper Plaintiff's repeated encouragement to consider "safety." The trial court noted that the standard-of-care jury instruction "doesn't use the word 'safety.'" (App. 1845-46, 1847-49). The trial court also appreciated that "safe" and "safe zone" are "outside of the bounds of what the jury should consider" and not only inconsistent with the jury instruction and the rules but also contradict "the law in this jurisdiction" (App. 1849).

Despite finding it improper for Mr. Kaplan to inject "safety" into the standard of care, the trial court refused to issue a curative instruction to the jury to disregard all references to "safe," "safety," "safety zone," "safe time," "unsafe place," "safe window," (App. 1768, 1769, 1778). It could have easily done so to correct the prejudice and confusion Mr. Kaplan disseminated. "A well-established principle is that a curative instruction effectively remedies the prejudicial effect of irrelevant evidence, improper questions, or inflammatory argument." *Parker v. Randolph*, 521 A.2d 1156, 1163 (D.C. 1987).

Instead of curing the prejudice Mr. Kaplan sowed, the trial court made a garbled reference to Jury Instruction 9.02 and 9.04 to the further prejudice of the MedStar Providers:

> I want to start by reminding you of rule 9.2 – you'll have these with you – and rule 9.4. And these rules provide for the standard of care professionals – that's 9.02. And 9.04 is the standard of care for hospitals. The standard of care is – 9.02 says a professional has a duty to use the degree of care that a reasonably competent **person** follows under the same or similar person follows under the same or similar circumstances.
>
> You are only to consider the standard of care and the duty of care and how it's described in 9.02, 9.04, and in the jury instructions as I instruct you. Okay? And so any argument that you hear that doesn't use those words, you are not to consider that as the law that I've instructed you on.

(App. 1855 (emphasis added)). This muddled recitation further compounded the trial court's error, not only because it did not instruct the jury outright to reject all references to iterations of safety, but because it failed to remind the jury that professionals, including Dr. Mattar, are judged by the *professional* standard of care. (App. 1751-52). The trial court had easily instructed the jury to disregard Mr. Kaplan's inappropriate and inflammatory safety comments.

Mr. Kaplan cites *President & Dirs. of Georgetown College v. Wheeler*, 75 A.3d 280 (D.C. 2013) for the proposition that it is appropriate to emphasize "safety" when discussing the "standard of care." Appellee's Br. at 32. But in

Wheeler, the plaintiff's attorney used "safety" and "protect" only a few times, in contrast to Mr. Kaplan's repeated references, which were interspersed throughout the closing. *See Wheeler*, 75 A.3d at 292; *Moore v. Hartman*, 102 F. Supp. 3d 35 (D.D.C. 2015) (issuing a curative instruction because inappropriate statements during closing argument were "not made in a singular passing, but [were] repeated both at the beginning and ending of the summation and [were] comingled with golden rule appeals").

Mr. Kaplan's other cited authority supports the MedStar Providers. He points to a Virginia trial court decision where the court deferred ruling on a pretrial motion to preclude Reptile arguments and invocations to safety. Answer Br. 33 (*citing Mangum v. Inova Loudoun Hosp.*, 102 Va. Cir. 20, 25 (2019)). In so doing, however, the court reminded the parties that their arguments may not contain information or claims contrary to the court's instructions, nor can they suggest to the jury that it "supplant or alter that law." *Id.* at 24. Importantly, the *Mangum* court stressed that "safety rules," "protection of the public or the community," and similar phrases are inconsistent with the standard of care. *Id.* 24.

Given the pervasiveness of Mr. Kaplan's inappropriate remarks, the trial court's refusal to deliver a curative instruction and denial of a new trial was an abuse of discretion. *See Wheeler*, 75 A.3d at 292 (11th Cir. 2018).

C. Mr. Kaplan cannot deny the anchoring effect of his closing argument.

Mr. Kaplan ended his closing statement by anchoring the jury to $4 million: "Some of you might think it's worth $4 million. Some of you might think it's three. Some might think it's worth six. It's completely up to you, ladies and gentlemen. David Kaplan trusts you to decide." (App. 1788).[6]

Mr. Kaplan dismisses anchoring as "social-science" and "speculation" but does not counter its real and prejudicial effect. Appellee's Br. at 36, 37. He claims the jurors could have picked any one of the three numbers he proposed, ignoring that anchoring exploits a cognitive tendency to give undue weight to **initial** information when making decisions. Appellee's Br. at 37. Here, the jury was "anchored" and latched onto the first number counsel suggested: $4 million.

The psychological influence of anchoring is almost impossible to offset. "It is well recognized that a numerical anchor influences jurors' judgment about damages even if they do not recognize that the anchor affected their decision." M. Behrens, *Summation Anchoring: Is it Time to Cast Away Inflated Requests for*

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[6] This is a classic *Colston* argument, which admittedly has been affirmed by this Court. *See District of Columbia v. Colston*, 468 A.2d 954 (1983). As discussed in the MedStar Providers' Opening Brief, this Court should retreat from *Colston* and its progeny and bar plaintiffs from anchoring the jurors to unproven non-economic damages. *See* Opening Br. at 25-28.

Noneconomic Damages?, 44 Am. J. Trial Advoc. 321, 323 (2021). Even "when participants are aware that the anchor point is completely arbitrary, it still biases their judgment." M. Conklin, *Precise Punishment: Why Precise Punitive Damage Requests Result in Higher Awards*, 10 Mich. Bus. & Entrepreneurial L. Rev. 179, 182 (2021). The anchoring bias is so strong that it cannot be cured, even with instructions to disregard improper and irrelevant anchors.

What is undeniable is that in civil trials, "[a]nchoring is a strategy typically deployed by plaintiff's attorneys where they ask for numbers well beyond what they believe the jury will award with the expectation that the net effect will be an amount larger than what the jury would have otherwise awarded absent the anchor." T. O'Toole, *Jury Economics: Requests for Damages are Anchoring Strategies for Plaintiffs and Defendants*, 48 Mont. Lawyer 26, 26 (2023). "Defense counsel have their hands tied in responding to anchoring tactics," as they "are often reluctant to offer a counter-anchor because [it] could be viewed as a concession of liability,' and even "if a defendant counters an absurdly high request, the *plaintiff's counsel hopes that jurors will split the difference between the numbers*, which still allows a nuclear verdict to occur." M. Behrens, 44 Am. J. Trial Advoc. at 325 (emphasis added; quotation omitted).

Mr. Kaplan does not dispute the validity of this well-known phenomenon. Nor does he even attempt to distinguish cases cited by the MedStar Providers discussing the prejudicial and improper effect of anchoring.

As laypersons who generally lack litigation experience, the average juror is especially vulnerable to improper anchoring. Jurors' "lack of legal experience places them at a heightened risk of succumbing to the anchoring effect." M. Conklin, 10 Mich. Bus. & Entr'l L. Rev. at 181. In recent years, anchoring's profound impact on jurors has become undeniable. *Id.* "The empirical research on jury damages awards is replete with findings on the effectiveness of anchors." *Id.*; M. Behrens, 44 Am. J. Trial Advoc.at 323 ("Empirical research proves the effectiveness of anchoring."). This case offers the Court an opportunity to hold that the reference to any specific monetary amount for non-economic damages in closing is improper because it improperly "anchors" the jury to those amounts.

The prejudicial effect of Plaintiff's closing argument misled the jury, and the trial court abused its discretion in refusing to grant a new trial.

III. The trial court abused its discretion in failing to reduce the excessive $ 4 million judgment.

The jury anchored to the first number it heard: $ 4 million. The $4 million judgment is not the product of a reasoned calculation of Mr. Kaplan's non-economic damages. It was a number suggested by Mr. Kaplan's counsel and

subconsciously adopted by the jury. The amount is excessive, and the trial court should have reduced it.

The jury's award is not proportionate to Mr. Kaplan's injuries. Mr. Kaplan began to experience symptoms of severe Crohn's disease in late summer of 2018. (App. 46-47, 719). Dr. Frank diagnosed Mr. Kaplan with Crohn's Disease on September 13, 2018, and started him on prednisone. (App. 412-13, 722). Mr. Kaplan's experts endorsed Dr. Frank's care and testified that he complied with the standards of care. (App. 47, 151-52, 214, 237, 651). Mr. Kaplan continued to experience symptoms of Crohn's Disease while under the care of Dr. Mattar, but Dr. Mattar did not cause Mr. Kaplan's Crohn's Disease or its symptoms. Mr. Kaplan's experts did not criticize Dr. Mattar for failing to eliminate Mr. Kaplan's Crohn's symptoms. Rather, they faulted Dr. Mattar for not starting a biologic treatment at the end of November or in early December 2019. (App. 192, 204, 206, 637-38, 644-45). Mr. Kaplan testified he continued to experience the symptoms of Crohn's Disease from his diagnosis in September 2018 until March 2019. (App. 412-13, 719-22, 775-76). Any suggestion that Mr. Kaplan experienced prolonged Crohn's symptoms is belied by the evidence.

Mr. Kaplan testified he had hip pain and related complications from July 2019 through the recovery of his second hip surgery in November 2020. (App. 776-87). There is no evidence of subsequent hip pain or immobility or inability to

perform activities of daily living. Mr. Kaplan describes his left hip as "phenomenal" and his right hip as "pretty good too[.]" (App. 788). His active life is far from over.

According to Plaintiff's orthopedic surgery expert, there is a 58% chance, or more likely than not, that Mr. Kaplan's hips will last 25 years or into his 50s or 60s. (App. 542-43). He suggested Mr. Kaplan may need a revision surgery in the remote future but did not quantify the likelihood. (App. 543-45). He did not articulate to a reasonable degree of medical certainty that Mr. Kaplan will have future medical needs, nor did he estimate the cost of any future surgeries. In short, Mr. Kaplan's experts offer nothing more beyond a speculative possibility of future pain and suffering.

Mr. Kaplan summarily dismisses the excessiveness of his $4 million verdict and cites the deferential standard to be afforded trial judges in determining whether a verdict is excessive and should be remitted. But none of the cases he cites awarded damages as excessive or as groundless as those awarded here. The jury verdict here is excessive and warranted remittitur or new trial. *See Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 688 (D.C. 2007). It was abuse of discretion to deny the MedStar Providers' requested relief.

CONCLUSION

For the reasons stated above, the MedStar Providers respectfully request that this Court vacate final judgment grant a new trial or reduce the judgment by $1.5 million.

Dated: March 17, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that, on this 17th day of March 2025, a copy of the Appellants' Reply Brief was electronically filed and served via the Court's electronic filing system upon:

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