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

REPLY BRIEF FOR APPELLANT THE DISTRICT OF COLUMBIA

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

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

As the District explained in its opening brief, to prevail on her gross negligence claim, Coles-Green had to establish the standard of care for safely operating a fire engine on an emergency run through expert testimony. DC Br. 30-33. The experts had to identify a standard that was nationally recognized with reference to a practice generally followed by other comparable agencies or an express standard that comparable agencies had widely adopted. DC Br. 34-35. The standard could not be based solely on District law or custom, and had to be expressed in specific, concrete, and measurable terms. DC Br. 33-35.

Coles-Green does not challenge these guiding principles. *See* Green Br. 35-44. Instead, she first highlights that the District did not object to her experts' qualifications. Green Br. 10, 35, 37-38. But the District's standard-of-care argument is not about the experts' expertise; it is about what they said—and failed to say—on the witness stand. Whatever their qualifications, their testimony did not establish a national standard of care, let alone one expressed in specific and measurable terms. This entitles the District to judgment as a matter of law.

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

According to Perricone, NFPA 1002, Section 4.3.1 establishes the national standard of care for safely operating a fire engine on an emergency run. SR2 at 97, 100; DC Br. 35-37. This provision requires a firefighter trainee learning to drive a fire engine to take a driving test. JA 1311. During that test, the student must "[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; *see* SR2 at 95, 100. There are four independent reasons why Perricone's testimony was insufficient to establish the standard of care. *See* DC Br. 37-41.

First, Chapter 4 of NFPA 1002 does not say what Perricone claims it does. DC Br. 37-38. On its face, it is limited to fire engine driver qualifications; it says nothing about operating a fire engine on an emergency run. In response, Coles-Green emphasizes provisions found in Chapter 1 of NFPA 1002, although Perricone did not even mention them. Green Br. 39; *see* SR2 at 94-112. But Chapter 1 only confirms that NFPA 1002 is about driver qualifications, not emergency runs. Section 1.2.2 explains that "[t]he intent of [NFPA 1002] shall be to ensure that individuals serving as emergency response personnel who drive and operate fire apparatus *are qualified*." JA 1313 (emphasis added).

Coles-Green also points to the "requisite knowledge" and "requisite skills" listed in Chapter 4 that firefighting students are expected to develop. Green Br. 19, 39-40. But these provisions are irrelevant because it was undisputed that Tate was qualified to operate a fire engine and knowledgeable about things like "liquid surge." Green Br. 40; *see* Green Br. 18-20, 41, 44; SR2 at 155-66. No one has claimed that Tate's lack of knowledge or skills contributed to the accident.

In establishing that NFPA is about driver qualifications and not emergency runs, the District does not "misunderstand the evidence" or the text of NFPA 1002. Green Br. 42. While NFPA 1002 is published, express, and may well set *a* national standard, Perricone failed to show it establishes *the* standard relevant here. *See* Green Br. 8, 36, 42. Coles-Green fails to cite any evidence that anyone other than Perricone believes NFPA 1002 is the national standard for the safe operation of a fire engine on an emergency run, and its plain text shows why.

Second, even if NFPA 1002 said what Perricone claims, the standard would not be *national* because it requires compliance with local laws and departmental regulations. For this reason, it creates the sort of locality rule this Court rejected long ago. *See* DC Br. 38-39. In response, Coles-Green contends that the District forfeited this argument. Green Br. 1, 9. She is mistaken.

For one thing, courts "have distinguished between claims and arguments, holding that although claims not presented in the trial court will be forfeited . . . ,

parties on appeal are not limited to the precise arguments they made in the trial court." *Tindle v. United States*, 778 A.2d 1077, 1082 (D.C. 2001) (internal quotation marks omitted); *see Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). The *claim* here is that Perricone failed to establish the standard of care, and the District contested that issue at every turn. *See* SR5 at 64-79; JA 675-81; Green Br. 11, 15. Anyway, the District *did* make the specific locality argument it makes here. *See*, *e.g.*, D.C.'s Motions' Hearing Brief (7/13/2022) 3-4; SR5 at 64-79.

On the merits, Coles-Green's only response is that a locality rule "is sensible" because "the permissible speed of a fire truck operating in the desert of Arizona or the plains of Nebraska can differ from that allowed in Manhattan or Washington, D.C." Green Br. 42. Sensible or not, Coles-Green's argument just goes to show that a uniform national standard as to a fire engine's speed does not exist. That does not mean that Coles-Green could not have established the requisite national standard of care. But because the standard turns on differences across the geographical spectrum, she could have done so only by identifying "the practices in fact generally followed by other comparable governmental facilities." *Clark v. District of Columbia*, 708 A.2d 632, 635 (D.C. 1997). Perricone, however, had no opinion about that. *See* SR2 at 94-112.

Third, even putting aside the locality point, 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 rather than an objective standard requiring specific conduct. JA 1311; *see* DC Br. 39-40. In response, Coles-Green again asserts that this argument is forfeited. Green Br. 1, 9, 38. But the claim that Coles-Green failed to establish a national standard of care is preserved many times over, and that is all that is required. *See Tindle*, 778 A.2d at 1082; *Yee*, 503 U.S. at 534.

Beyond forfeiture, Coles-Green asserts that other provisions of NFPA 1002 Chapters 1 and 4, as well as the District's traffic regulations and FEMS policies, are not "ambig[uous]." Green Br. 38, 40-41. But that is no answer to the question whether Section 4.3.1's requirement to "compl[y] with all applicable state and local laws and departmental rules and regulations" imposes a vague, general duty rather than an objective, standard of conduct. Coles-Green's reliance on these other provisions is especially misplaced because Section 4.3.1 is what Perricone said established the standard of care, not anything else Coles-Green cites now.

Finally, according to Perricone, Section 4.3.1 required Tate to comply with "all" applicable traffic regulations and FEMS policies. SR2 at 107. While acknowledging that the District's traffic regulations and FEMS policies imposed different requirements for operating a fire engine on an emergency run, Perricone was unable to say which of the conflicting provisions controlled. SR2 at 105-07. The District explained that this was a critical failure in Perricone's testimony,

leaving the jury to impermissibly speculate about the applicable standard. DC Br. 40-41. Coles-Green has no answer. *See* Green Br. 20-23, 34-44. Instead, like the jury, she can only guess what standard applies. *See* Green Br. 18, 20-24, 40-41.

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

Miller's testimony did not cure the fundamental defects in Perricone's testimony and was equally flawed on its own. DC Br. 41-44. Miller identified three possible sources for the standard of care—the FEMS guidelines, the District's traffic regulations, and MPD's "drive to survive" campaign—but none could establish the standard of care. DC Br. 41-44. This Court has repeatedly held that internal agency policies cannot establish the standard of care; the traffic regulations impose an ordinary duty of care, not the specific guidelines necessary to establish professional negligence; and the "drive to survive" campaign is not even a regulation or a FEMS policy, and it also lacks a concrete standard for judging Tate's conduct. DC Br. 41-44. Beyond this, like Perricone, Miller failed to specify which of these different standards controlled. Coles-Green does not respond to any of these points, effectively conceding them all. *See* Green Br. 35-44.

Instead, Coles-Green emphasizes that, assuming that she established the applicable standard of care, the District does not challenge the sufficiency of the evidence to support the jury's finding of Tate's gross negligence. Green Br. 34-35, 43-44. But that argument goes nowhere. There is no need for the District to

separately challenge the jury's finding of gross negligence on the assumption that she established the standard of care to prevail in this appeal. "If 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). Because Coles-Green failed to establish the standard of care, the 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.

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

The trial court erred by entering judgment as a matter of law on the question of the District's liability because Coles-Green waived any right to this relief by failing to move for judgment as a matter of law under both Rules 50(a) and 50(b), as this Court's precedent makes clear. DC Br. 44-49. In response, Coles-Green suggests that Rule 50 was irrelevant to the relief the trial court awarded. Green Br. 55. Astonishingly, she claims that "[t]he [trial] court did not act as if there had been a motion for judgment as a matter of law." Green Br. 56. To the contrary, it did.

The court vacated the jury's verdict in favor of the District, refused to have a new trial on liability, and entered judgment as a matter of law for Coles-Green on that issue. JA 1169 ("The Jury's Verdict, rendered June 27, 2023, is VACATED and Judgment as to liability is ENTERED in favor of Plaintiff on all Counts."), 1182-

87. This is precisely the relief contemplated by Rule 50. Super. Ct. Civ. R. 50(a)(1), (b)(3). It does not matter that a separate written judgment was not entered on the docket until after the damages trial. *Contra* Green Br. 55; *see* Green Br. 3. The fact remains that the trial court entered judgment as a matter of law on liability when it had no power to do so. This error requires a new trial.

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 seeking Rule 50 relief, Coles-Green sought a new trial under Rule 59(a). In entering judgment on liability, the trial court erroneously relied on a provision of this rule that applies only to non-jury trials. DC Br. 47. Coles-Green now seems to agree that this was error. Green Br. 55. But rather than concede that the District is entitled to a new trial on liability, Coles-Green contends that the trial court could have entered judgment as matter of law on the District's liability "on its own initiative," without any motion at all. Green Br. 55-56 & n.49.

For support, Coles-Green now invokes Rule 59(d) for the first time. Green Br. 55-56; JA 1145-68. But like Rule 59(a)(1), that rule only permits the trial court to grant a new trial, not enter judgment as a matter of law. Super Ct. Civ. R. 59(d) ("No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion."); *see* DC Br. 46-49. Coles-Green's authorities do not indicate otherwise. *See* Green Br. 56 n.49. And while trial courts sometimes hold new trials on damages only, Green

Br. 56 & n.51, in no such example did the trial court vacate the jury's liability finding and then enter judgment as a matter of law absent a Rule 50 motion. Instead, Rule 50 *was* "the only road to" judgment as a matter of law. Green Br. 56.

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 to damages here because the trial court failed to consider the fairness of the trial concerning Green's contributory fault. DC Br. 50-53. In fact, the trial was fundamentally *un*fair because Coles-Green took manifestly inconsistent positions about what the District had to prove to establish its contributory negligence defense and sat on her objection until the last possible moment—a classic case of unfair sandbagging. While she argues now that the District should have known the standard was recklessness after a different judge's non-binding summary judgment ruling, she has nothing to say about her own tactics, nor any response to the District's claim that they were patently misleading. Green Br. 52-53. Instead, she spends her time responding to arguments the District has *not* made.

First, she devotes more than three pages of her brief to establishing that Green had to be contributorily reckless before his conduct could defeat Coles-Green's claim of gross negligence. Green Br. 45-49; *see* Green Br. 1. Though the District contested that point below, it has not argued otherwise in this appeal.

Second, Coles-Green argues that she did not waive her objection to the contributory negligence instruction. Green Br. 48-49; *see* Green Br. 12-14. But that is not what the District has argued. Instead, the District showed that she engaged in unfair sandbagging by sitting on her objection for far too long. *See* DC Br. 50-53. True, Coles-Green "consistently" objected to the contributory negligence instruction; but critically, she never objected on the ground that the District needed to show Green was reckless until the eve of closing arguments. Green Br. 53; *see* Green Br. 34; DC Br. 19-21; JA 1182. That was unfair surprise.

Third, Coles-Green spends another four pages arguing that the District waived any right to have the jury instructed on Green's recklessness and that the evidence would not have supported it. Green Br. 49-52; *see* Green Br. 1, 34. That argument wrongly assumes there was some reason for the District to request such an instruction or some obligation to do so. There was none. At that point of the proceedings, the trial court *agreed* with the District that ordinary contributory negligence was the standard and instructed the jury accordingly.

Relatedly, the District is not "criticiz[ing]" the contributory negligence instruction the trial court gave after having requested it. Green Br. 50-51. Nor does it argue on appeal that it was error for the trial court to have given that instruction in the first place. Thus, the invited error doctrine has no role here. *Contra* Green Br. 51 n.43; *see Morris v. United States*, 337 A.3d 872, 881 (D.C. 2025).

Fourth, Coles-Green questions why the District did not introduce Linette Genus's testimony on the issue of Green's recklessness, characterizing the decision as "inconceivable." Green Br. 53; *see* JA 595 (Genus deposition). She further asserts that the District is "bound by its counsel's tactical decisions" in this regard. Green Br. 53. And she concludes that the evidence would not have shown that Green was reckless in any event. Green Br. 54. But again, the District has not raised any issue in this appeal about Genus's testimony nor challenged any trial court ruling about it. Like her other arguments, discussing this issue is a pointless detour.

In sum, Coles-Green has no meaningful response to the District's actual argument on appeal: the trial court abused its discretion by denying a new trial on liability where Coles-Green's gamesmanship led to a fundamentally unfair trial.

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

A new trial is also required because the trial court abused its discretion when it excluded evidence that Green was driving under the influence of PCP and when it admitted expert testimony from Miller on safe driving practices.

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

The trial court committed four errors when excluding evidence of Green's PCP intoxication. DC Br. 53-60. Each independently supports reversal.

First, the court erred when it excluded evidence that Green had PCP in his system at the time of the accident as being irrelevant. Instead, evidence of Green's PCP intoxication would have been highly probative of Green's recklessness. DC Br. 53-54. Coles-Green does not defend the trial court's ruling in this regard, thus conceding this point. *See* Green Br. 66-73. Rather, her only response is to assert in a conclusory fashion that this highly probative evidence of recklessness was "unfairly prejudicial." Green Br. 71-72. Certainly, the evidence is prejudicial to Coles-Green in the sense that it supports the District's affirmative defense. But that does not make it "unfair." *See Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977) ("Of course, 'unfair prejudice' as used in [Fed. R. Evid.] 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial[,] or it isn't material. The prejudice must be 'unfair.'").

Second, the trial court further erred by ruling that expert testimony on causation was needed to establish that Green was driving under the influence of PCP. D.C. Brief 54-57. In support of reversal, the District principally relied on *Harris v. District of Columbia*, 601 A.2d 21 (D.C. 1991), a case specifically addressing the question and holding that expert testimony was not required. DC Br. 54-56. Coles-Green barely addresses *Harris* and has no response about the need for expert testimony on causation, other than to note what officers observed about the defendant's appearance and driving in that case. *See* Green Br. 66-73 & n.74.

To be sure, Coles-Green asserts that expert testimony is ordinarily required when "the key question is whether and how PCP continues to affect a particular individual hours after ingestion." Green Br. 72 (quoting *Jackson v. United States*, 210 A.3d 800, 806 (D.C. 2019)). But *Jackson* is distinguishable in two fundamental respects. First, there was no positive drug test result in that case, and certainly not one showing a high concentration of PCP like Green had in his system at the time of the accident. Second, the interval in *Jackson* between the drug use and the events in question was 18 hours. *Jackson*, 210 A.2d at 809-10. Here, there is no evidence that Green consumed PCP many hours before the accident; rather, the concentration of PCP in his system and accounts of his normal behavior on the morning of the accident suggest it was only a short time before. *See* JA 80, 82, 128, 345, 348, 397, 590. "[S]o unlike in *Jackson*, jurors could fairly infer that the [Green] remained high on PCP at the relevant time." *Jones v. United States*, 336 A.3d 657, 661 (D.C. 2025).

Relying only on Copeland's testimony, Coles-Green further argues that the testimony of a Drug Recognition Expert is needed to prove the criminal offense of driving under the influence of a drug. Green Br. 67-68. Of course, Copeland's opinion does not dictate what the law requires. Moreover, as the District explained, his view is not consistent with this Court's decisions. DC Br. 55-56. Coles-Green identifies no authority to the contrary. *See* Green Br. 67-68.

Third, the trial court was operating under a clear misunderstanding of the facts when it excluded the toxicology report, ruling that it was irrelevant because the report said PCP was not affecting Green. DC Br. 56. Coles-Green does not defend this part of the trial court ruling either, and rightly not, given that the face of the report shows the trial court was clearly mistaken. *See* Green Br. 66-73. The trial court also ruled the toxicology report inadmissible under D.C. Code § 5-1413. DC Br. 56-58. Coles-Green also declines to defend this ruling and seemingly concedes it was an admissible "business record." Green Br. 71.

Fourth, the trial court wrongly found there was no evidence of Green's impairment. DC Br. 58-60. But Green's irregular driving before the accident coupled with the toxicology result were more than sufficient to show that he was appreciably impaired by PCP. DC Br. 58-60. The evidence is not just the testimony of "one lay eyewitness," as Coles-Green claims, Green Br. 66, but many witnesses to the accident, DC Br. 58-60. This includes the testimony of Coles-Green's expert, which shows that Green sat at the intersection for more than a minute after the light turned green; even then, he began moving only after McKnight honked three times; and he showed no awareness of the approaching fire engine. DC Br. 58-60.

In arguing that there was no evidence that Green's driving was impaired, Coles-Green relies exclusively on McKnight's *pre-trial deposition*. Green Br. 68. But what matters is what McKnight and others said about Green's driving *at trial*.

And nothing about that testimony suggests that "Green's response mirrored that of McKnight." Green Br. 70.

Coles-Green also repeatedly suggests that Tate's speed rendered his sirens inaudible in an effort to explain why Green failed to react to the approaching fire engine. Green Br. 18, 21, 25, 41, 44, 74. But this contention is belied not only by the laws of physics (the speed of sound being roughly 767 mph) but also by the many witnesses who clearly heard the sirens as Tate approached the intersection. SR1 143-44, 155-58, 161-62, 171, 173, 177-80, 189-90, 192, 194.

Finally, it is quite unremarkable that, *after* the trial court excluded all evidence of Green's PCP intoxication during the liability phase of the trial, the District then agreed it could not argue that Green was "high that day" because "[t]here's no evidence of that." Green Br. 72 (quoting SR16 at 61).

In response to these many errors, Coles-Green once again chooses to raise irrelevant issues. To begin, Coles-Green mentions in passing that she was not able to test Green's blood sample to confirm the toxicology results. Green Br. 66. But "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Wagner v. Georgetown University Medical Center,* 768 A.2d 546, 554 n. 9 (D.C. 2001). In any event, she made a spoilation argument below, and the trial court declined to rule on it. *See* Green Br. 6-7. If this Court remands for a new trial, then Coles-Green can raise that issue

again. But because the trial court has not yet exercised its discretion, this issue is not ripe for review. *See Ashby v. McKenna*, 331 F.3d 1148, 1151 (10th Cir. 2003).

Next, Coles-Green argues that evidence that Green had PCP in his system, "alone," is insufficient to show that his driving was impaired. Green Br. 66-67. The District has not suggested otherwise; it pointed to test results coupled with his behavior. *See* DC Br. 58 ("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.").

Further, Coles-Green maintains that Copeland's "opinions were not reliable," Green Br. 68-69; his "testimony comprised opinions based only on [his] personal experience and subjective views," Green Br. 71 (internal quotation marks omitted); he lacked experience, knowledge, and training about PCP, Green Br. 4; and he plagiarized his report, Green Br. 4. From this, she concludes that his "questionable competence can sustain the order precluding" his testimony. Green Br. 70; *see* Green Br. 1. Of course, these assertions are belied by Coles-Green's reliance on Copeland's opinions to support her own arguments. Green Br. 4-5, 67-68. Regardless, the District is not challenging the trial court's decision to exclude Copeland's testimony on causation. Instead, the District has shown that his testimony was not needed, and it was error for the trial court to conclude otherwise.

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

The trial court also abused its discretion in three respects in permitting Miller to testify about "safe driving practices" for a fire engine on an emergency run because he had no expertise in this area. DC Br. 60-63. *First*, the court's conclusion that this expertise was subsumed within accident reconstruction is not supported by the foundation Coles-Green laid for his opinions, which was based on his experience as a driving instructor for vehicles other than fire engines. DC Br. 61. *Second*, his opinion was not offered in the context of his accident reconstruction and in fact contradicted his conclusions about how fast Tate was driving when he entered the intersection. DC Br. 61-62. *Third*, his opinion was not tied to any standard of care. DC Br. 62. Once again, Coles-Green has no meaningful answer to any of these arguments. *See* Green Br. 73-75.

Instead, she contends that Miller's testimony should have come as no surprise to the District. Green Br. 73. But she is unable to point to anywhere in the record where Miller claimed to be an expert in the safe driving of fire engines on emergency runs, such that the District would have notice that he would be offered as an expert in this area. *See* Green Br. 73. Beyond that, she asserts without citation to anything (including Miller's testimony) that "[d]iscovering an accident's cause must include identifying the unsafe-driving pieces of the puzzle." Green Br. 73; *see* Green Br.

73-75. That contention, which is based only on her own personal opinion, is not responsive to the District's arguments about Miller's qualifications.

Coles-Green also focuses on the District's claim of prejudice. Green Br. 74-75. As the District has explained, it was Miller's (improperly admitted) unsafe driving testimony about Tate's speed that, if anything, made the case for gross negligence. DC Br. 62-63. This is because Miller's accident reconstruction testimony—that the accident would not have happened if Tate had been going no more than 40 mph (SR2 at 157-59)—could on its own have established nothing more than a breach of ordinary care, and certainly not gross negligence. DC Br. 62-63; *see* Green Br. 23.

In response, Coles-Green argues that the District cannot establish prejudice because it did not submit special interrogatories to determine whether the jury based its finding of gross negligence on Miller's safe driving testimony or his accident reconstruction testimony. Green Br. 74. But this argument presumes that Miller's accident reconstruction testimony was a permissible basis for the jury to find gross negligence. It was not. That testimony could support only ordinary negligence. DC Br. 62-63. To find gross negligence, the jury necessarily had to rely on his improperly admitted safe driving testimony. Thus, erroneously admitting his testimony as an expert in this area was prejudicial and requires a new trial.

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

The District is also entitled to a new trial on damages for two independent reasons. First, the jury's verdict was excessive, and the jury improperly awarded noneconomic damages that are not recoverable under the Wrongful Death Act. Second, the jury had to account for inflation and discount its award to present value, but Coles-Green did not give it the tools it needed to do so.

A. The jury's verdict was excessive and unsupported by the evidence.

The jury's award of about $12 million for loss of parental care and guidance is excessive and unsupportable. Recovery was limited to the *financial* value of lost parental guidance and, although the award did not have to be mathematically precise, it could not compensate for pain, suffering, or loss of affection or emotional support. DC Br. 69-75.

In response, Coles-Green asserts that the Wrongful Death Act "provides recovery for noneconomic, intangible loss," including the loss of a "father" apart from the lost value of parental services he might have provided. Green Br. 59-60; *see* Green Br. 26, 34. The authorities that Coles-Green cites—*Doe v. Binker*, 492 A.2d 857, 863 (D.C. 1985), and *District of Columbia v. Hawkins*, 782 A.2d 293, 303 (D.C. 2001)—do not support this proposition. Green Br. 59 n.56. To the contrary, these cases, along with a mountain of other authorities, say just the opposite: that

only economic damages are recoverable in the form of lost earnings and the value of lost services. Coles-Green is simply wrong on the law.

The District's Wrongful Death Act was first adopted in 1885 and was "patterned after England's Fatal Accidents Act of 1846 (known as Lord Campbell's Act)." *Cole, Raywid & Braverman v. Quadrangle Dev. Corp.*, 444 A.2d 969, 971 n.5 (D.C. 1982). The purpose of the Wrongful Death Act "is to provide 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). Lord Campbell's Act and its progeny "have been continuously interpreted as providing only for compensation for pecuniary loss or damage." *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913); *see Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 565 (D.C. Cir. 1993). "Pecuniary damages" are those "that can be estimated and monetarily compensated." *Damages*, Black's Law Dictionary (12th ed. 2024). "Noneconomic damages," which are "[a]lso termed *nonpecuniary damages*," are "[d]amages that cannot be measured in money." *Id*. They include things like pain, suffering, and loss of affection or emotional support. *Joy*, 999 F.2d at 565-66. "Noneconomic damages also include the value of life itself." *Morga v. FedEx Ground Package Sys., Inc.*, 512 P.3d 774, 786 (N.M. 2022). Because the Wrongful Death Act permits recovery for pecuniary losses only, recovering for noneconomic damages is not permitted. *Joy*, 999 F.2d at 565-66.

Instead, "[t]wo main elements form the basis for recovery under the [District's] Wrongful Death Act." *Doe*, 492 A.2d at 863. The first is lost earnings: "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 is "the *value of the services* lost to the family as a result of decedent's death." *Id*. (emphasis added). Lost services include the "loss of care, education, training, guidance and personal advice." *Hawkins*, 782 A.2d at 303.

Under statutes like the District's that allow for the recovery of only pecuniary losses, the loss of parental guidance is treated as a financial loss, like the loss of household services. DC Br. 65. The value of parental services is "determined in accordance with what the marketplace would pay a stranger with similar qualifications for performing such services, with no value attached to the emotional pleasure" associated with the caretaking. *Beim v. Hulfish*, 83 A.3d 31, 42 (N.J. 2014) (internal quotation marks omitted)); *see Mich. Cent. R.R. Co.*, 227 U.S. at 71. In this way, "measuring the loss according to the market value of a therapist, business adviser or counselor, . . . eliminate[s] any assessment by the jury of a particular deceased parent's traits of character as bearing on the high or low 'quality' of the decedent and . . . the advice." *Johnson v. Dobrosky*, 902 A.2d 238, 248 (N.J. 2006).

Contrary to all these principles, Coles-Green contends that the jury instruction "emphasized" that the jury could award "noneconomic loss[es]." Green Br. 2; *see*

Green Br. 62. She is mistaken. The jury was instructed that the "amount to be awarded under the Wrongful Death Act is the *financial loss* suffered by" Green's family. SR12 at 74 (emphasis added). Thus, what the jury instruction emphasized was that "[t]he Wrongful Death Act does not permit," and thus the jury could "not, award the beneficiaries any amount for the sorrow, mental distress or grief, or for the loss of love and affection that they may have suffered." SR12 at 74.

Further, the jury was expected to "set a dollar amount on the *reasonable value of any services* that the deceased would have provided to each beneficiary." SR12 at 75 (emphasis added). In making this award, the jury was to "consider the loss of care, education, training, guidance, and parental advice that Mr. Green would have been expected to" provide. SR12 at 75.

Applying these principles, there is no evidence that the jury's award represents a fair approximation of the economic value of Green's parental guidance, DC Br. 72, and Coles-Green does not claim that there is, disavowing (incorrectly) the need for any such proof. Green Br. 60. Instead, Coles-Green confirms that the jury based its decision on improper considerations apart from the value of the services Green provided. Drawing an analogy to personal injury cases—which this is not—she readily acknowledges that the jury's damages award included compensation for noneconomic damages related to the loss of Green's life for purposes of making the family who had lost its "dad" and "father" "whole." Green

Br. 26, 30-32, 59-60, 63, 65-66. As a result, the jury's enormous award was necessarily "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" that was recoverable under the Wrongful Death Act. *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 688 (D.C. 2007).

Finally, as the District explained in its opening brief, DC Br. 65, minor children may not recover for the loss of parental services beyond the age of their minority. The D.C. Circuit made that clear in *Baltimore & P.R. Co. v. Golway*, 6 App. D.C. 143, 176-77 (D.C. Cir. 1895). The trial court plainly erred in instructing the jury otherwise. *See Newell v. District of Columbia*, 741 A.2d 28, 35 (D.C. 1999) (reviewing instruction for plain error or miscarriage of justice where there was no objection).

In arguing to the contrary, Coles-Green cites *Himes v. Medstar-Georgetown University Medical Center*, 753 F. Supp. 2d 89, 97 (D.D.C. 2010). Green Br. 61 n.59. But that case is of no help. After agreeing that the court in *Golway* "interpreted the language of a previous District of Columbia wrongful death statute, which is substantially identical to the current statutory language in all relevant respects," the district court declined to follow *Golway* solely because the "[c]ourt could not find[] a single District of Columbia court that has adopted this categorical exclusion in the *Golway* opinion's 115-year-old existence." *Himes*, 753 F. Supp. 2d at 97. Of course,

the district court also did not identify a single case from this Court that has rejected *Golway*'s interpretation, *see id.*; nor has Coles-Green, and the District is aware of none.[1] In any event, the Court is bound not by the district court's decision, but by *Golway*. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (D.C. Circuit decisions issued prior to February 1, 1971 "constitute the case law of the District.").

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

In calculating its award, the jury had to account for inflation and discount all future financial losses to present value. SR12 at 75. But as the District explained in its opening brief, Coles-Green did not give the jury the three key tools it needed to make this calculation: a formula for calculating present value, evidence of future inflationary rates, and interest rates for determining present value. DC Br. 67-69. Coles-Green does not claim otherwise. *See* Green Br. 57.

Instead, she contends that the jury could have accepted the experts' discounted calculations for lost household services and earnings, which totaled about $1.6 million of the $13.5 million award. Green Br. 58-59. The District does not disagree. DC Br. 68. But the jury also needed to discount the value of Green's services related to parental care and guidance to its present value—which represented the lion's share of its award—and it had no way to do so. This failure of proof requires a new trial.

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[1] Consistent with *Golway*, Borzilleri capped the loss of household services that Green provided to the children at age 18. Green Br. 29; SR 11 at 63; SR12 at 75.

Finally, the District preserved its arguments. *Contra* Green Br. 62. For example, it argued in its post-trial motion that "there was not sufficient evidence in the record regarding Mr. Green's contributions to his family to warrant an award in excess of $13.5 million." D.C.'s Post-Trial Mot. 11 (May 1, 2024). It moved for judgment as a matter of law because Coles-Green "failed to provide the jury with evidence that would allow it to discount the financial award," to "present value." *Id*. at 4-5. It specifically asserted that "the jury clearly factored in non-pecuniary losses that could have included damages for grief, mental anguish, or sentimental loss—which is prohibited in this jurisdiction under the Wrongful Death Act." *Id*. at 13. The District further objected that Green's daughter "was allowed to testify about the effect Mr. Green's death had on her." *Id*. at 14. And the District argued that "[t]he loss of the siblings' opportunity to be taught how to cook, paint, or lay tile by their father" did not support the jury's award. *Id*. at 15. Thus, the District has not forfeited its arguments. Instead, at the very least, it is entitled to a new trial on damages.

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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 22, 2025, this reply brief was served through this Court's electronic filing system to:

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