No. 23-CV-128

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

v.

STEPHANIE TAYLOR, *et al.*,
APPELLEES.

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

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

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INTRODUCTION

The Superior Court fundamentally erred when it applied two different sets of evidentiary rules to the parties in this damages-only trial. The plaintiffs, Stephanie and Kawan Taylor, were permitted to inflame the jury with irrelevant and unfairly prejudicial evidence of the District of Columbia's liability and allegedly deficient training methods. Meanwhile, the District was barred from offering undeniably accurate evidence of Ms. Taylor's medical bills and lost wages, which would have fairly and persuasively undermined her claim that she suffered catastrophic injuries and life-altering pain when an unoccupied parking-enforcement van rolled onto a sidewalk and struck her in December 2017. Those errors, combined with a duplicative verdict form on which the jury awarded significant damages in each of four overlapping categories, almost certainly inflated the ultimate $1,000,000-plus verdict. This Court should accordingly reverse and remand for a new trial.

The Taylors urge this Court to ignore all of these errors. But they offer little legal or factual support for their position, ignore binding precedent, and often do not even try to defend the trial court's reasoning. Instead, they raise waiver arguments that are belied by the record and disparage the District's arguments as "unserious," "hollow," or "mealymouthed half-truths." Taylor Br. 22, 40, 45. But under this Court's decisions, a fair reading of the record shows that the trial court's errors were—individually and collectively—prejudicial and warrant reversal.

ARGUMENT

I. Allowing Fault-Related Evidence Was Prejudicial Error.

A. The District preserved its objections to the fault-related evidence, and the Taylors waived any contrary assertions.

Because it admitted liability, the District challenged the Taylors' fault-related evidence—including evidence of negligent training—through a motion in limine and a standing objection, and the Taylors expressly agreed at trial that the District had preserved this objection. District Br. 7-11, 32. Reversing course, the Taylors now complain that the "District did not object" to this evidence when their counsel questioned District employee Mark Cancelosi and that "the District itself introduced that evidence" while cross-examining Cancelosi. Taylor Br. 25-27 (emphases omitted). This is no basis to deny review of the District's challenge.

In its pretrial motion in limine, the District objected to any evidence "about how or why the accident occurred," including Cancelosi's testimony and the District's written operating procedures for parking-enforcement officers. JA 41-42 & n.1. The Taylors' opposition noted that Cancelosi (whom they deposed as the District's Rule 30(b)(6) designee) would admit that the accident was caused by the driver's negligence and the District's inadequate training. JA 48, 57. After the trial court denied its motion, JA 99-102, the District renewed its challenge at trial and registered "a standing objection to the evidence described in [the] motion in limine." JA 129. The District did this as a courtesy to the Taylors so that it was "not

interrupting the Plaintiffs' flow of evidence" by re-objecting each time such evidence was used. JA 129. Not wanting to "relitigate" the motion, the court approved the District's standing objection—and so did the Taylors, whose counsel stated: "[W]e're fine having a standing objection. *We're not going to say that [the District] waived anything or anything to that effect*." JA 129-30 (emphasis added).

The Taylors ignore all of this in now suggesting that the District waived its challenge by not objecting each time their counsel used fault-related evidence. Taylor Br. 26-27. But that was the entire point of the District's standing objection: not interrupting the Taylors' presentation of their case. JA 129. The Taylors cannot use that courtesy to manufacture a belated waiver argument on appeal that they expressly disclaimed in the trial court. *See Fairman v. District of Columbia*, 934 A.2d 438, 443 (D.C. 2007) (holding that appellees cannot take "one position on an issue in the trial court and the opposite position on appeal").

Nor did the District waive its objection by cross-examining Cancelosi. Once an objection is overruled, "no waiver" occurs if defendants "negatively rebut" disputed evidence or offer "other evidence which, under the theory of [their] objection, would be inadmissible." 1 McCormick on Evidence § 55 (8th ed. July 2022). A contrary rule would improperly put defendants "between a rock and a hard place," forcing them to either waive objections or leave improper testimony "uncross-examined." *In re Ty.B.*, 878 A.2d 1255, 1264 (D.C. 2005). Here, the

District asked Cancelosi about training methods and offered the standard operating procedures manual only after the trial court denied the motion in limine, only after the court and the Taylors accepted the standing objection, and only after the Taylors elicited from Cancelosi that "D.C.'s failure to properly train" the van's driver was a cause of the accident, JA 198. At that point, the District had every right to try to counter the prejudicial effect of the Taylors' improper evidence, and doing so did not waive its twice-preserved objection. *See Ty.B.*, 878 A.2d at 1263-64.

B. The fault-related evidence was inadmissible.

1. The fault-related evidence lacked probative value.

The Taylors' liability evidence had zero probative value given the District's admission of liability. District Br. 22-27. As this Court has recognized, evidence of fault generally has no "relevance whatsoever" when fault "is not disputed." *Curry v. Giant Food Co.*, 522 A.2d 1283, 1289-90 (D.C. 1987) (holding that evidence of "negligent training and supervision" was "irrelevant" where defendant "never disclaimed responsibility for the acts of its employees"). Just so here. The Taylors admitted that evidence of "liability" would "not be necessary," and that the jury did "not need to decide *why* the incident occurred." JA 49-50. Yet the trial court allowed the jury to hear such evidence and related argument anyway, JA 98-99, including that a District employee "negligently" failed "to safely park the van," that

the District "fail[ed] to properly train" him, and that "the D.C. Government has refused to accept responsibility of what happened." JA 180, 196-98, 216.

The Taylors dispute little of this. They instead accuse the District of trying to "force" them to accept a "colorless" stipulation of liability. Taylor Br. 19-23. Not so. At the outset, the District was willing to stipulate that the van "was unoccupied," that it "rolled down the street," that it "struck Ms. Taylor while she was on the sidewalk," and that the District was "at fault." JA 97-99. The District also made clear that it was "happy to continue talking to the plaintiffs" about a joint stipulation, but that it could not agree to the Taylors' prejudicial characterizations, including that the van "careen[ed]" down the street. JA 99; JA 47 (same). The trial court, however, effectively forced the District into a Hobson's choice: either accept whatever stipulation the Taylors wanted or suffer the prejudice of irrelevant fault-related evidence at trial. *See* JA 99-102. That was error because, regardless of any shortcomings in the District's proposal, the Taylors' liability evidence was still inadmissible as a matter law. *See Curry*, 522 A.2d at 1289-90.

The Taylors also insist that "the evidence in question" simply conveyed "the basic facts" necessary to prove damages. Taylor Br. 17-18. But the evidence went far beyond "basic facts." As the Taylors themselves suggest, the "evidence in question" told jurors a story about the District's "malfeasance" and "the abject disrespect with which the District had treated Ms. Taylor," including the negligent

failure to safely park the van, the District's training methods, and the alleged insincerity of the District's admission of fault. Taylor Br. 17-23, 30. None of that evidence or argument was at all probative of "the speed of the van," the "force of its impact," or "the injuries suffered by Ms. Taylor." Taylor Br. 17-23.

The Taylors, moreover, can muster no relevant case law to support their view. Concerns about "jurors' expectations" in criminal cases are immaterial here because, when liability is admitted in a civil case and the only jury issue is damages, jurors will not think the plaintiff is "papering over cracks in her case" by omitting liability evidence. *See* Taylor Br. 20-21 (internal quotation marks omitted). Nor can the Taylors draw support (Br. 19-21) from inapposite magistrate judge orders that, unlike here, did not involve a damages-only trial, *Wood v. Dalton*, No. 99-1, 2000 WL 1174991 (D.D.C. July 6, 2000), or which rejected a stipulation that improperly shifted "the entire focus of the trial to the intimate details of the plaintiff's life," *Briggs v. Dalkon Shield*, 174 F.R.D. 369, 375-76 (D. Md. 1997). Also misplaced is the Taylors' passing reference (Br. 19-20) to *Edwards v. Safeway, Inc.*, 216 A.3d 17 (D.C. 2019), for its unremarkable conclusion that fault-related evidence may be relevant to *punitive damages*, which were not sought here, *see id.* at 20-21.

Noticeably absent from the Taylors' brief is any mention of—let alone effort to distinguish—this Court's precedent in *Curry*. *See* District Br. 23-24, 26-27. The Taylors thus do not deny that, under this Court's case law, their counsel repeatedly

elicited irrelevant testimony by questioning Cancelosi on direct and redirect about the District's training methods. Nor do they offer any justification for their use of fault-related evidence in opening and closing to paint the District as blameworthy and remorseless. The Taylors' failure to meaningfully dispute either point only highlights the inconsistency of their argument with established precedent.

2. Even if relevant, the fault-related evidence was too unfairly prejudicial to be admissible.

Any minimal probative value the liability evidence may have had was far outweighed by its unfair prejudice. District Br. 27-29. Evidence is "unfairly prejudicial" when "it has a tendency to influence the outcome of the trial by improper means." *Smith v. Exec. Club, Ltd.*, 458 A.2d 32, 40 n.9 (D.C. 1983) (internal quotation marks omitted). Here, the liability evidence had little to do with Ms. Taylor's damages and everything to do with portraying the District as a negligent wrongdoer who "didn't train this guy right" and who "refused to accept responsibility" for causing a "horrific" accident—as the Taylors' counsel repeatedly urged to the jury in opening and closing. JA 180, 476-77; *see* JA 158-59, 176, 470.

The Taylors' responses lack merit. Contrary to their assertions (Br. 24), the District never said the trial court ignored its motion in limine. Rather, it noted that the court did not analyze the evidence of *training methods* at all and overlooked unfair prejudice until the post-trial order. District Br. 27-28. Also contrary to the Taylors' assertions (Br. 24), the District *has* shown precisely why the fault-related

evidence was unfairly prejudicial: the evidence said little about Ms. Taylor's injuries while provoking the jury to award damages as punishment rather than compensation, District Br. 27-29. And also contrary to the Taylors' assertions (Br. 24-25), their counsel's jury arguments had a direct "bearing on" this issue because they highlighted the liability evidence in opening and closing to drive home an unfairly prejudicial message that the District should be punished, District Br. 28-29.

C. Admitting fault-related evidence was not harmless error.

The liability evidence substantially swayed the verdict. District Br. 29-33. Harmless error is an "exception" that is "*sparingly employed*," and improper evidence warrants reversal unless "it was so inconsequential" that "it made no appreciable difference to the outcome." *Ty.B.*, 878 A.2d at 1267 (internal quotation marks omitted). The error here was anything but inconsequential: the fault-related evidence infected this case from start to finish, JA 159-60, 197-98, 216, 476-77, and the Taylors' damages claims were otherwise "less than overwhelming," *R.&G. Orthopedic Appliances & Prosthetics, Inc. v. Curtin*, 596 A.2d 530, 541 (D.C. 1991). Indeed, the Taylors do not deny that Ms. Taylor's compression fractures required no surgery. JA 297. They do not deny that her X-rays showed routine healing and no evidence of fracture within weeks of the accident. JA 314-15, 320. They do not deny that she was vacationing abroad by June 2018 and exercising in the gym within a year. JA 325, 346-47. And they do not deny that Ms. Taylor saw no doctors for

nearly three years after December 2018 and needed no physical therapy for over two years after August 2019. JA 325, 366-72. Without the improper liability evidence, then, the Taylors' case did not obviously warrant a $1 million verdict.

The Taylors try to shrug away this prejudicial error by observing that no trial is "perfect." Taylor Br. 27. True enough, but distorting a jury's view of the central issue in the case through improper evidence is not an excusable imperfection—it is prejudicial error. *See Curtin*, 596 A.2d at 541 (deeming evidentiary error "prejudicial, not harmless," where it "went to a central issue"). As this Court has held, when "irrelevant evidence, erroneously admitted, may have influenced the jury's verdict" on "the amount of damages," and thus "seriously prejudic[ed]" the District, "[*r*]*eversal is required*." *District of Columbia v. Cooper*, 483 A.2d 317, 321-22 (D.C. 1984) (emphasis added). Applying that rule here does not require a perfect trial, it simply ensures a fair one. *See id.* at 322-24.

Equally flawed is the Taylors' surmise (Br. 29-31) that the error here cannot be prejudicial because the jury only "hammered" the District with hundreds of thousands of dollars in damages (collectively totaling $1 million) on four of the six categories listed on the verdict form. But the fact that an error could have been even *more* prejudicial does not mean it was harmless. Otherwise, no error could ever warrant reversal in a civil-damages case since the jury could always in theory have awarded more. The Taylors' theory of prejudice is thus untenable and inconsistent

with this Court's rule that an evidentiary error is harmless only if it is "so inconsequential" and "insignificant" that it is "highly probable" the error "did not appreciably affect the result." *Ty.B.*, 878 A.2d at 1267.

Nor can the Taylors minimize the prejudice here with vague references to other testimony, much of which the District has already addressed (Br. 4-6, 30-31). The Taylors maintain that their fault-related evidence "could only have been harmless" because Ms. Taylor, her husband (Kawan Taylor), mother (Mary Kilby), friend (LaKisa Taylor), and physician (Dr. Yu) all testified that the compression fractures in three of her lower vertebra were a "severe injury" that will cause "chronic pain" for "the rest of her life," including "a permanently deformed spine." Taylor Br. 28-29. But even if true, none of that renders the error harmless because the "erroneous admission" of improper evidence can prejudicially affect a trial "even where there is sufficient admissible evidence to support" the verdict. *Ty.B*, 878 A.2d at 1266-67 (reversing based on hearsay even though "admissible evidence" might "have been sufficient"). That rule applies with particular force here, given the uniquely inflammatory nature of the fault-related evidence and the lengths to which the Taylors' counsel went to incense the jury with that evidence in the opening and closing arguments. *See, e.g.*, JA 159-60, 176-77, 180, 474-77, 499.

Besides, the Taylors' other evidence is not as strong as they suggest. Ms. Taylor noted that her pain "varies," and that "on a scale of 1 to 10" it is only

"a 2" in the morning. JA 357-59. She also admitted that some of that pain is in "the higher part of [her] back" near her "shoulder blades," JA 358, which is not where the compression fractures occurred in her lower vertebrae, *see* JA 167, 293. Moreover, while claiming to have had "[n]o significant improvement," JA 359, Ms. Taylor conceded that she can now jog on a treadmill, JA 367, and that physical therapy helped with her pain, JA 372. Additionally, although Mary Kilby noted that her daughter is sometimes "in pain" and "not as active" as she once was, JA 391, Kawan Taylor testified that his wife is "[a]bsolutely" still an active parent, JA 403.

Dr. Yu, the only witness qualified to opine medically on Ms. Taylor's condition, also said little to suggest that her injuries were uncommonly severe or that she will endure permanent, life-altering pain. Dr. Yu testified that many people will experience similar compression fractures during their lives, JA 297, and that any future "residuals" Ms. Taylor might feel are sensations "we all experience," such as "achiness, stiffness, soreness," JA 275-78. He further confirmed that Ms. Taylor had a preexisting degenerative disc disease, JA 316-18, 329-30; that the affected vertebrae showed "some deformity" but were not "significantly different" from the unaffected vertebrae surrounding them, JA 268; and that Ms. Taylor displayed "[n]o evidence of fracture" a few weeks after the accident, JA 314-15, and felt "no

significant tenderness" after a few months, JA 321-22. This appeal thus does not present the unusual case in which an evidentiary error can be excused as harmless.[1]

II. Barring Medical Bills And Lost Wages Was Prejudicial Error.

A. Medical bills and lost wages were relevant and fair.

The trial court swung to the opposite extreme in excluding medical bills and lost wages. District Br. 33-40. Such evidence is pertinent to noneconomic damages, *see George Wash. Univ. v. Lawson*, 745 A.2d 323, 329-31 (D.C. 2000), even when plaintiffs do not seek to recover those losses, *Barkley v. Wallace*, 595 S.E.2d 271, 272-74 (Va. 2004). Here, Ms. Taylor's medical bills and lost wages were uniquely relevant, and not misleading in any cognizable sense, as they provided an objective monetary benchmark for measuring damages. Specifically, this evidence proved an undeniable fact: Ms. Taylor incurred less than $63,000 in medical bills and lost wages. And that fact supported a fair and reasonable inference: Ms. Taylor had not endured the sort of catastrophic injury that would justify a seven-figure damages award, contrary to her counsel's assertions, JA 472-73.

Tellingly, the Taylors do not defend the trial court's conclusion that medical bills and lost wages are not "relevant" because they do "not *directly equate to*" pain

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[1] While the Taylors accuse (Br. 28) the District of relying on "hearsay from medical records," the Taylors themselves used the same medical records as the basis for Dr. Yu's testimony, JA 295, and the trial court correctly held that the records were not hearsay, JA 303-04—a ruling the Taylors do not challenge on appeal.

and suffering. JA 575 (emphasis added). That concession is prudent. The trial court's direct-equivalence test violates this Court's precedents, *see* District Br. 38-39, which require only a reasonable possibility of a link between the evidence and a material fact, *see In re L.C.*, 92 A.3d 290, 297-98 (D.C. 2014). Yet the Taylors nevertheless urge this Court to adopt a position on medical bills and lost wages that is in tension with this Court's decisions, misunderstands the relevant inquiry, and presumes that jurors cannot draw commonsense distinctions.

The Taylors first assert (Br. 33-34) that, after dropping their claim for medical bills and lost wages on the morning of trial, this evidence no longer bore on an issue "actually to be presented at trial." That is simply wrong because, as the District has explained (Br. 34-38), the medical bills and lost wages undermined Ms. Taylor's claims of pain and suffering, which was the *central* issue at trial. *See Gladstone v. W. Bend Mut. Ins. Co.*, 166 N.E.3d 362, 368 (Ind. Ct. App. 2021) (holding that "[c]ommon sense and experience dictate" that "medical expenses" bear on "pain and suffering"); *Stacey v. Sea-Drilling Corp.*, 424 F.2d 1272, 1274 (5th Cir. 1970) (same for "loss of earnings"). The Taylors' contrary theory is at odds with decades of state and federal court case law, District Br. 35 n.2, not to mention this Court's decision in *Lawson*, which relied heavily on special damages to assess the reasonableness of pain-and-suffering damages, *see* 745 A.2d at 329-31 (rejecting a verdict that was "more than four times" plaintiff's "special damages," e.g., "medical expenses" and

lost "income"). The Taylors ignore *Lawson* entirely, however, and make no effort to reconcile their few cited cases with that controlling precedent.

Next, the Taylors venture outside the record to claim (Br. 34-35) that, based on two newspaper articles, medical bills are "subjective, arbitrary" figures that do not capture the full scope of injuries. But this Court has held that medical bills *are* prima facie evidence of the reasonable value of those services. *See Montgomery v. Dennis*, 411 A.2d 61, 62 n.5 (D.C. 1980). And in any case, the Taylors' contrary argument goes at most to the *weight* of such evidence, not its *admissibility*. *See Gladstone*, 166 N.E.3d at 368-69. The Taylors, in other words, could have argued to the jury that Ms. Taylor's medical bills do not tell the whole story of her pain and suffering, but that argument, even if true, cannot categorically sever the commonsense connection between medical bills and compensatory damages for pain and suffering. *Cf. Doe v. Georgetown Ctr. (II), Inc.*, 708 A.2d 255, 257-58 (D.C. 1998) (upholding $10,000 verdict for "victim of a brutal attack that resulted in physical" and "emotional injuries" where "she introduced no medical bills or expenses for the jury to consider in assessing the magnitude of the injuries").

Moving on from relevance, the Taylors say (Br. 39-40) that their medical bills were prejudicial and misleading because jurors cannot "distinguish between using medical bills as proof of non-economic damages rather than economic damages." But juries competently draw such distinctions all the time in cases where medical

bills are offered to prove or disprove only noneconomic damages. *See, e.g.*, *Nestler v. Fields*, 824 S.E.2d 461, 463-64 (S.C. Ct. App. 2019) (recognizing "jurors' ability to weigh evidence" of "medical bills" in assessing "pain and suffering"). And this Court has in fact presumed that juries are fully able to do so in related contexts. *See Doe*, 708 A.2d at 257-58; *Moattar v. Foxhall Surgical Assocs.*, 694 A.2d 435, 440 (D.C. 1997) (reversing bifurcation of economic and noneconomic damages because "[m]uch of the same evidence involved in proving [plaintiff's] noneconomic losses would have to be presented to prove her economic losses").

The Taylors thus cannot plausibly claim (Br. 40) that a jury would be so confused by the medical bills that it would "substitute" those amounts for "noneconomic damages." *See Gladstone*, 166 N.E.3d at 369-70 (holding jurors are not "unable to grasp" the role of "medical bills" in assessing "pain and suffering"). Rather, as the Taylors' own cited case confirms, the risk of confusion with medical bills is not that jurors will *substitute* medical bills for pain-and-suffering damages, but that they will award damages for the medical bills *on top of* the pain-and-suffering damages. *Payne v. Wyeth Pharms., Inc.*, No. 08-119, 2008 WL 4890760, at *7 (E.D. Va. Nov. 12, 2008) ("The jury may be tempted to treat the medical bills as recoverable special damages rather than to only assess the medical bills as evidence that Payne experienced pain and suffering."). That concern is therefore no reason to affirm the trial court's ruling against the *defendant* in this case.

As a last-ditch effort, the Taylors posit (Br. 39) that the medical bills were "cumulative" of and "inferior" to their evidence about the "magnitude" of Ms. Taylor's injuries. Neither point makes sense. Defense evidence *undermining* a plaintiff's case cannot be "cumulative" of the plaintiff's evidence, and that is especially true here, where none of the Taylors' witnesses mentioned medical bills. *Gay v. United States*, 12 A.3d 643, 647 (D.C. 2011) (holding that "factually different" evidence is not "cumulative"). Also, the *jury* should decide whose evidence is "inferior" after considering all of it together, and here, nothing else in the record provided jurors an objective monetary benchmark for scrutinizing Ms. Taylor's subjective damages claims, *see* District Br. 40. Far from being "cumulative" or "inferior," then, the medical bills (and lost wages) would have been uniquely probative evidence in this case and the trial court erred in excluding them.

B. Excluding medical bills and lost wages was not harmless error.

The Taylors do not specifically deny that the exclusion of medical bills and lost wages, if error, was prejudicial. Nor could they. By prohibiting any mention of those figures, the trial court excluded evidence that would have undercut Ms. Taylor's claims, bolstered the District's theory, and provided jurors at least *some* verifiable monetary frame of reference. *See* District Br. 41-44. Instead, the trial court kept jurors ignorant of the salient fact that a $1 million verdict was nearly *16 times* greater than Ms. Taylor's medical bills and lost wages. *See Lawson*, 745

A.2d at 331 (upholding remittitur of noneconomic damages to about *four times* the special damages). An error of that magnitude cannot be excused as harmless.

The Taylors' only rejoinder concerns other verdicts the District cited (Br. 43-44) from similar cases to illustrate that the damages here were prejudicially inflated by the exclusion of medical bills and lost wages. The Taylors "speculate" that there may be other reasons why those smaller verdicts were more proportionate to medical bills and lost wages (e.g., jurors violated their duties). Taylor Br. 40-42. The point of those examples, however, was simply to show how out-of-step the verdict here was compared to similar cases. On that point, the Taylors ignore the only common denominator among the cases—those juries all heard evidence of medical bills and lost wages, and *none of them* returned a verdict anywhere close to $1 million, even to plaintiffs with permanent, chronic pain. District Br. 43-44. By all indications, then, the verdict here is an outlier, which underscores that the improper exclusion of medical bills and lost wages substantially swayed the jury's award.

III. The Confusing, Duplicative Verdict Form Warrants Reversal.

The trial court also erred in adopting the Taylors' confusing verdict form. District Br. 44-47. Verdict forms should be clear, simple, and easily understandable in order "to avoid even the slightest possibility of" a "misapprehension." *District of Columbia v. Banks*, 646 A.2d 972, 981 (D.C. 1994); *see Carpenter v. United States*, 475 A.2d 369, 377 (D.C. 1984) (upholding "clear and straightforward" verdict

form). Yet the verdict form here directed the jury to award a specific amount for each of several substantially overlapping categories, including the "Extent & Duration of Physical Injuries," the "Effects of Physical Injuries on Physical and Emotional Wellbeing," and "Physical Pain and Emotional Distress." JA 525. Those duplicative categories almost certainly inflated the $1 million verdict.

The Taylors have no viable response. To start, the District is *not* challenging the verdict form "for the first time on appeal." Taylor Br. 43 n.8. The District repeatedly argued below that, unlike its own proposal, the Taylors' verdict form had "redundant" damages categories, specifically explaining how those categories were "confusing" and "overlapping." JA 436-39; JA 74; *see* District Br. 16, 45. The trial court ruled on that objection before the case went to the jury, JA 439, and nothing more was required to preserve it for appeal. *Floyd v. Laws*, 929 F.2d 1390, 1401 (9th Cir. 1991) ("A question raised and ruled upon need not be raised again on a motion for a new trial to preserve it for review."); *see* 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2818 (3d ed. April 2023) (same).

On the merits, even if the verdict form "mirrored" a jury instruction, Taylor Br. 42, that does not make it any less confusing or improper. The instructions did not clarify or differentiate among the verdict form's categories, JA 510-12, and asking a jury to separately award money for each overlapping element of damages invites duplicative recovery, *see* District Br. 45-46. Nor was the District's form

"inferior" or "underinclusive" in proposing two distinct, easily understood categories: past and future "pain and suffering." Taylor Br. 42-43; *see Osterhout v. Bd. of Cnty. Comm'rs of LeFlore Cnty.*, 10 F.4th 978, 994-95 (10th Cir. 2021) (upholding verdict form with "a single line for total 'Compensatory Damages, if any"). "Pain and suffering" is a clear, commonly understood phrase capturing the full swath of "non-economic damages," *Williams v. Lumbermen's Mut. Cas. Co.*, 664 A.2d 342, 346 (D.C. 1995), which could have been easily explained to the jury. Thus, contrary to the Taylors' assertions (Br. 44), their verdict form was improper not because "jurors are unintelligent," but because their form was not written in the sort of "ordinary language" that jurors are presumed to understand.

As a fallback, the Taylors argue (Br. 43-45) that any error in the verdict form was "harmless" because "no evidence" showed "jurors were *actually* confused." But the best evidence of juror confusion here is the confusion evident in the Taylors' own brief. Despite noting (Br. 44) that the verdict presented six "distinct label[s]," the Taylors cannot give those "label[s]" independent meaning. They cannot explain, for example, how the "Extent & Duration of Physical Injuries" differs from the "*Effects* of Physical Injuries." JA 525 (emphasis added). Nor can they explain how the "Effects of Physical Injuries" on "Emotional *Wellbeing*" differs from "Emotional *Distress*." JA 525 (emphases added). That the Taylors' own brief cannot disentangle these categories is compelling evidence that a lay jury could not either.

Given the separate awards of several hundred thousand dollars in each of the four overlapping categories, the erroneous verdict form was prejudicial.

IV. The Taylors Do Not Dispute Cumulative Prejudice.

Even if none of the trial court's errors independently warranted reversal, their cumulative effect does. District Br. 47-49. The Taylors do not specifically dispute this point, and for good reason. The record simply provides no basis to deny the cumulative prejudice in this case. In permissively allowing fault-related evidence while excluding any mention of the amount of Ms. Taylor's objectively verifiable medical bills and lost wages, *and* in adopting a confusing, duplicative verdict form, the trial court's errors collectively skewed the outcome of this case in a way that can only be remedied by a new trial. *See Thompson v. City of Chicago*, 722 F.3d 963, 967 (7th Cir. 2013) (reversing based on "cumulative effect" of several errors).

CONCLUSION

The Court should reverse the judgment below and remand for a new trial.

Respectfully submitted,

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November 2023

REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

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   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;

     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;

     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;

     (4) the year of the individual's birth;

     (5) the minor's initials; and

     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the party protected under such order," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal

orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Bryan J. Leitch	23-CV-128
Signature	Case Number
Bryan J. Leitch	Nov. 8, 2023
Name	Date

Bryan.leitch@dc.gov
Email Address

CERTIFICATE OF SERVICE

I certify that on November 8, 2023, this reply brief was served through this Court's electronic filing system to:

Patrick M. Regan

Christopher J. Regan

/s/ Bryan J. Leitch
BRYAN J. LEITCH