No. 24-CV-0942

DISTRICT OF COLUMBIA COURT OF APPEALS

MEDSTAR GEORGETOWN MEDICAL CENTER, INC., *et al.*,	)	
Appellants,	)	**Superior Court No. 2021-CA-004820-M**
v.	)	**(Scott, J.)**
DAVID S. KAPLAN,	)	
Appellee.	)	

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APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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RULE 28(a)(2) CERTIFICATE

The parties are Plaintiff-Appellee David S. Kaplan and Defendants-Appellants MedStar Georgetown Medical Center, Inc., and MMG-GI at Lafayette Center d/b/a MedStar Medical Group II, LLC.

Counsel for Mr. Kaplan in the court below were Catherine D. Bertram and Kieran Murphy, Esquires, Bertram & Murphy, 601 Pennsylvania Ave., NW, Washington, DC.; and on Appellants' post-trial motions, Alfred F. Belcuore, Esquire, Law Offices of Alfred F. Belcuore, 336 Constitution Ave. NE, Washington, DC. Mr. Belcuore, Ms. Bertram, and Mr. Murphy are counsel for Mr. Kaplan in this Court.

Counsel for the Appellants are identified in the Rule 28(a)(2) Certificate within the Brief for Appellants.

In the court below, Christian C. Mester and Michael J. Winkelman, Esquires, of McCarthy, Winkelman, Mester & Offutt, LLP, 4300 Forbes Blvd., Suite 205, Lanham, MD, entered their appearances on behalf of Mr. Kaplan on November 28, 2022, but withdrew their appearances on October 5, 2023. No other parties, intervenors, amici curiae, or counsel appeared below or are appearing in this Court.

/s/ Alfred F. Belcuore

_____

ALFRED F. BELCUORE
D.C. Bar No. 181560

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BRIEF FOR APPELLEE

JURISDICTION

This appeal is from a final judgment disposing of all claims of all parties.

STATEMENT OF THE ISSUES

1. By answering "Yes, Your Honor. We're satisfied[,]" when the trial court asked, "is everybody in agreement with the verdict form," did Appellants' trial counsel waive Appellants' objection to that verdict form?

2. In any event, in this medical malpractice action did the trial court abuse its discretion by using a verdict form separating "physical pain" and "emotional distress" as distinct components of compensatory damages?

3. Appellants' trial counsel failed immediately to object to two passages in Plaintiff-Appellee's closing argument, one on "standard of care" and the other

on damages. Instead Appellants' trial counsel objected only after he had delivered his own argument, and only then did he request "curative instructions" with respect to these passages. Did Appellants waive objection to those two passages?

4. In any event, did the trial court abuse its discretion by declining to give "curative instructions" at the time Appellants' trial counsel requested them, when (a) controlling caselaw permitted the challenged arguments, (b) the trial court already had instructed the jury, immediately before closing arguments, that they "may consider only the evidence admitted in the case" and that "arguments of lawyers are not evidence," and (c) with respect to "standard of care," the trial court, immediately before the jury retired to deliberate, gave the precise "curative" instruction Appellants' trial counsel had requested — emphasizing that the jurors must follow the court's instructions defining "standard of care," and that they were "not to consider" "any argument" of counsel "that doesn't use those words"?

5. Did the trial court abuse its discretion by declining to order a remittitur reducing the jury's assessment of the compensatory relief Plaintiff-Appellee should receive for his "physical pain" and "emotional distress"?

6. In all the circumstances, do Appellants raise any prejudicial error, or is the trial court's entry of judgment on the jury's verdict fairly and soundly based in the record?

COUNTERSTATEMENT OF THE CASE

A. Nature Of The Case

This action seeks compensatory relief for medical malpractice. Healthcare professionals of Appellants MedStar Georgetown Medical Center, Inc., and MedStar Medical Group II, LLC, hereinafter collectively referred to as "MedStar," treated Appellee David S. Kaplan for Crohn's disease. Kaplan, plaintiff below, contended that MedStar (i) failed to obtain his informed consent for treatment and (ii) breached the pertinent standard of care. Because of MedStar's conduct, Kaplan alleged he suffered prolonged, serious symptoms of the disease and severe injuries from excessive administration of steroid medication. MedStar denied any responsibility for Kaplan's injuries.

The jury agreed with Kaplan and awarded him $2.5 Million for "Past and Future Physical Injury" and $1.5 Million for "Past and Future Emotional Distress" (Joint Appendix ("JA") 1872-73). The trial court upheld that relief (JA 1874-1909).

In this Court, MedStar does not contest its liability.

B. Proceedings And Disposition Below

1. Overview

After more than two years of pretrial proceedings, the case proceeded to a ten-day trial by jury (Scott, J., presiding), with Kaplan presenting claims of

medical negligence and failure to elicit informed consent to treatment. The jury deliberated for over 3-1/2 hours spanning two days, with a day off for Emancipation Day in between (JA 15-16 (Minutes for 4/17/2024 and 4/15/2024 trial proceedings); JA 1861). The jury agreed that MedStar's employees had breached the national standard of care in their treatment of Kaplan and that they had failed to obtain his informed consent to that treatment (JA 1872). The jury found that MedStar's breach of the standard of care, but not its failure to obtain informed consent, had "caused the injuries and damages alleged by David Kaplan" (JA 1872-73). The jury awarded damages separately for Kaplan's physical injury and emotional distress (JA 1873).

MedStar sought post-trial relief, both on liability and damages. After full briefing, the trial court (Scott, J.) issued a comprehensive opinion upholding the jury's verdict in every respect (JA 1874-1909).

2. Pertinent Trial Rulings

a. The Verdict Form. Kaplan requested multiple lines for damages on the verdict form; MedStar requested just one line. To resolve the disagreement, the trial court looked to the standard-form jury instructions, how the jury was to be instructed on the law, and decided there would be two lines: one for "past and future physical injury" and one for "past and future emotional distress." (JA 1725-33.)

When the court announced its decision, MedStar's counsel said "[t]he defendants still request one line, but we understand the ruling of the Court" (JA 1733). Later, however, when the court asked "is everybody in agreement with the verdict form …?", MedStar's counsel pronounced, "Yes, Your Honor. We're satisfied" (JA 1741).

b. Requested Curative Instructions After Closing Argument. After the parties had delivered their closing arguments, but before Kaplan's rebuttal, MedStar's trial counsel requested "curative" instructions concerning two comments Kaplan's trial counsel had made without contemporaneous objection.

i. The References To "Safety." In her closing argument, Kaplan's trial counsel discussed the standard of care for treating a patient like Kaplan with steroids. She cited the standard's maximum time for steroid treatment — three months — and argued that allowing Kaplan to remain on steroids for seven months breached that standard and caused the physical and emotional injuries he has suffered. In an argument comprising 30 pages of transcript (JA 1757-88), on six occasions — without any objection — Kaplan's trial counsel characterized the standard's maximum three-month period, in words or substance, as a "safety zone" (*see* JA 1761, 1765, 1768, 1769, 1771, 1778).

After MedStar's counsel finished his own argument, he objected to these earlier references to "safety" as "improper argument" (JA 1845-46, 1847-49), and

requested a "curative instruction" telling the jury "that they are to rely on the jury instructions for what is the actual national standard of care" (JA 1846). After hearing the parties, the court agreed that the words "safe," "safety," and "safe zone" do not appear in the jury instructions on "standard of care" (JA 1849). The court said it "is fair to suggest" that these words were "outside the bounds of what they jury should consider" and "inconsistent with the rules" (JA 1849). Although the court said, in the circumstances "I don't think that I need to give a curative instruction," the court also said, "I think what I just need to do is … remind the jury that the standard of care is found in the jury instructions that I provided to them, and …that they are bound by those instructions." (JA 1849.) That is the relief MedStar had requested.

And so, in final instructions delivered immediately before the jury retired to deliberate, the trial court repeated the instructions' definition of "standard of care," and even provided the jury the numbers of the instructions so the jurors could read them in the jury room (JA 1855). The court admonished the jurors:

> "You are only to consider the standard of care and the duty of care … how it is described in [the instruction numbers] 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." (JA 1855.)

ii. The So-Called "Colston Argument." Before trial, MedStar filed a motion, *in limine*, "to Preclude a *Colston* Argument" (JA 10 (Docket Entry,

11/28/2023)).[1] At the pretrial conference, MedStar's counsel acknowledged the court's discretion to serve as "gatekeeper" managing closing argument (Pretrial Conf. Transcript ("Tr.") 79). The court denied MedStar's motion without prejudice (JA 22), but invited MedStar to renew it at trial, before closing arguments:

> "… [Y]ou are right, counsel, that the Court has the discretion to limit closing arguments of counsel.
>
> * * *
>
> "… [T]he Court is going to deny at this time the motion in limine.
>
> "But *before* we go to closing argument, I'd like to revisit this issue, Mr. McAfee [MedStar's trial counsel]. *This will be for you to revisit with the Court. If you don't mention it, then so be it* because the Court does serve as this gatekeeping function and must ensure that closing argument is consistent with what happened at trial.
>
> "I'm not in a position to determine that until after trial. So I will deny without prejudice and we'll revisit *if defendants so choose*." (Tr. 80-81; emphasis added.)

MedStar never renewed its motion and did not raise any pertinent objection at trial until *after* both parties had delivered their closing arguments.

At the end of her closing argument, Kaplan's trial counsel, without objection, gave a classic subdued "*Colston* argument":

> "So when you fill out that form — it's not my job, and I can't tell you what numbers to put in. But what I can tell you is that it's up to you as a collective group to decide

[1] *District of Columbia v. Colston*, 468 A.2d 954 (D.C. 1983).

> what you think the value of that is. Some of you might think it's worth $4 million. Some of you might think it's worth three. Some might think it's worth six. It's completely up to you, ladies and gentlemen. David Kaplan trusts you to decide. Thank you." (JA 1788.)

There was no immediate objection or motion for mistrial. Instead, after MedStar's counsel had given its own closing argument, but before Kaplan's rebuttal, MedStar's counsel objected and requested a "curative instruction to the jury that they are to disregard any suggestion as to the amount of damages that might be appropriate…" (JA 1846). After hearing argument, the trial court noted that "[t]here was no objection [when the *Colston* argument was made], but the objection comes later" (JA 1849-50). The court added it "did rule at the pretrial conference … that I would deny [MedStar's] motion, but that I would reconsider it [and] I also reminded that parties that the *Colston* argument was proper or that it could be proper …" (JA 1850). The court concluded that, in all the circumstances, "I'm not going to provide any curative instruction … but the objection is noted. I will remind the jurors that they are bound to the law as I instructed them …." (JA 1850-51.)

3. Post-Trial Rulings

After verdict, MedStar sought judgment as a matter of law, a new trial, and a remittitur. Canvassing the evidence and applying controlling authority, the trial judge affirmed the jury's decision (JA 1874-1909).

a. The court ruled that Kaplan's expert witnesses had established the standard of care and MedStar's breach of it (JA 1881-82). Reasonable jurors could find as these jurors did.[2] In addition, said the judge who presided at trial, "the Court does not find that the verdict was against the weight of the evidence or that it would be a miscarriage of justice to allow the verdict to stand" (JA 1883). "Based on the extensive testimony from Plaintiff's experts, as well as the instructions from the Court, the Court finds that the jury properly applied, and understood, their task of deciding whether to accept the expert opinions of [Kaplan's experts], and if they chose to accept those opinions, how much weight to give" them (JA 1883).

b. Rejecting arguments MedStar repeats here, the trial court held that neither the verdict form, nor Kaplan's closing argument, nor the size of the verdict had resulted in unfair compensatory relief.

(i) The verdict form did not elicit "duplicative damages": Consulting the authorities, once again the court held that "physical injury" and "emotional distress" are "two separate categories for which a plaintiff may recover against a negligent defendant" (JA 1888). "[B]ased on the Court's discretion, the categories of damages provided for in [the Standard D.C. Civil Jury Instructions], the

[2] *See, e.g.*, *Lyons v. Barrazotto*, 667 A.2d 314, 320-21 (D.C. 1995) (judgment as a matter of law is proper only in the "extreme," "unusual" or "exceptional" case where, "viewing the evidence in the light most favorable to" the plaintiff, the "only … conclusion [that] reasonably could be drawn from the evidence" is a verdict for the defendant).

Defendants' satisfaction [with the verdict form], and the instructions given to the jury, the Court does not find that the damages were duplicative or that Defendants were prejudiced by the language on the verdict form" (JA 1889).

(ii) The court found no impropriety in Kaplan's closing argument. The argument on standard of care "did not cross the line into 'golden rule' territory as Plaintiff's counsel did not ask the jurors to place themselves into Plaintiff's shoes, but stressed the severity of Plaintiff's case" (JA 1896). The court noted, too, that this jury presumptively followed its instructions, including the direction that lawyers' comments are not evidence (JA 1896). As for the *Colston* argument, the court added that what Kaplan's trial counsel said was "in line with the current prevailing law in this jurisdiction," that there was no plea for sympathy or invocation of the "golden rule," and that "Defendants did not object during closing argument to Plaintiff's counsel language" (1898-99).

(iii) Summarizing the record, the court concluded that it contained "detailed testimony of the impact [Kaplan's] injuries had on his physical capabilities and the emotional turmoil he suffered" (JA 1889). "[T]he Court does not find that the jury's award was unreasonable in light of the evidence and testimony presented … [or that it] shocked the conscience or was unsupported by the record" (JA 1891).

MedStar timely appealed, but only challenges the trial court's decisions on the verdict form, Kaplan's closing argument, and the remittitur.

C. Facts

Having "secured the favorable jury verdict," Appellee Kaplan is entitled to the facts viewed "in the light most favorable" to him.[3]

The jury received evidence from contemporaneous medical records; medical experts including Todd Eisner, M.D. (gastroenterology), Robert Schoen, M.D. (rheumatology), and Jeffrey Meisles, M.D. (orthopedic surgery); Kaplan and his sister Jamie Citron; and MedStar's own employees.

1. Kaplan And Crohn's Disease

In September 2018, a MedStar physician diagnosed Appellee David S. Kaplan, then 34 years old, with "probable Crohn's disease" (JA 1912 (Plaintiff's Trial Exhibit ("P. Ex.") 1, at Bates No. 3); JA 153 (Eisner)). Crohn's disease is "an inflammatory disorder" that can arise "anywhere" in the gastrointestinal (GI) tract (JA 149-50 (Eisner)). In Kaplan's case, it arose in his colon (JA 1912 (P. Ex. 1, at Bates No. 3); JA 149-50 (Eisner); JA 575-77 (Schoen)).

The treatment of "moderate to severe" Crohn's disease, which was Kaplan's condition, involves the short-term administration of steroids, an anti-inflammatory medication (JA 150-51, 161-62 (Eisner)). Steroids are used in the "acute" stage of

[3] *Bauldock v. Davco Food, Inc.*, 622 A.2d 28, 29 n.1 (D.C. 1993).

the disease to reduce the inflammation, to gain control of the disease, and "to get the patient into remission" (JA 150-51, 153 (Eisner)). Other, non-steroidal anti-inflammatory medicine may be combined with steroids for a time (JA 150, 155, 288-89 (Eisner)). But the "mainstay treatment" is to use "biologic agents" — medications coming from living organisms — not steroids (JA 150, 291 (Eisner)).

If the steroids are effective in the acute stage, the standard of care is to reduce the steroid dosages gradually, and to wean the patient off of steroids within three months (JA 153, 161-63 (Eisner)). If reducing the dosage does not yield effective treatment, however, the standard requires the treating physician to move more quickly to alternative, non-steroidal treatment (JA 163, 165, 174-76, 180-82, 184-85 (Eisner)). In any case, high-dose steroid treatment cannot be stopped abruptly; a patient must be tapered off of it (JA 221 (Eisner); JA 539 (Meisles)); and steroid treatment for more than three months breaches the standard of care (JA 161-62, 304-05 (Eisner); JA 639 (Schoen)).

2. MedStar's Failure To Avoid Excessive Steroids

a. In September 2018, in the acute stage of Kaplan's condition, his MedStar physician prescribed a steroid (prednisone), at 60 milligrams per day, beginning September 21, 2018 (JA 1912 (P. Ex. 1, at Bates No. 3); JA 213-14 (Eisner)). A dosage of 40-60 milligrams "is considered a high dose" of steroids (*e.g.*, JA 202 (Eisner); JA 590-91 (Schoen)).

b. Kaplan came under the care of Mark C. Mattar, M.D., a MedStar inflammatory bowel disease (IBD) specialist, on October 3, 2018 (JA 1916 (P. Ex. 3, at Bates No. 1); JA 333, 338-39 (Mattar); JA 727-30 (Kaplan)). After examining him, Dr. Mattar confirmed the diagnosis of Crohn's disease and, consistent with the standard of care, continued a high dose of steroid medication (prednisone), but reduced the dosage from 60 to 40 milligrams per day, and instructed Kaplan to reduce his dosage further by 5 milligrams each week (JA 1917 (P. Ex. 3, at Bates No. 2); JA 223 (Eisner); JA 727-28, 731-32, 812-13, 824 (told to taper "as tolerated") (Kaplan)). He also prescribed mesalamine, a non-steroidal medicine for inflammatory bowel disease, known colloquially as "aspirin for your colon" (JA 1917 (P. Ex. 3, at Bates No. 2); JA 155, 221-22, 225, 231, 291 (Eisner); JA 330 (Mattar); JA 728 (Kaplan)).

c. From October 2018 to January 2019, whenever Kaplan, as instructed, tried to reduce his dosage of prednisone, the serious symptoms of his Crohn's disease returned (frequent, bloody, and even nocturnal bowel movements and diarrhea, and mucous leakage) (*e.g.*, JA 1919 (P. Ex. 3, at Bates No. 4) ("unable to taper[] symptoms return"); JA 1920 (P. Ex. 3, at Bates No. 5 ("when tapers has increased symptoms"); *see also* JA 249 ("when he tried [to] decrease it, he had symptoms") (Eisner); JA 350 ("he was having problems getting off the steroids" (Mattar); JA 359-60 ("he's only getting down to 35 [mg] with symptoms")

(Mattar); JA 578-79, 592 (Schoen)); JA 740-42, 749-64, 822-24, 830, 860, 885, 889 (Kaplan)).

d. As early as October 15, 2018, and continuing over the next several months, Kaplan reported to MedStar his failed efforts to reduce the steroid dosages. No fewer than six times in October and November, Kaplan reported his problems with prednisone and asked Dr. Mattar for guidance (JA 2479 (P. Ex. 12 , at Bates No. 4) (**Oct. 15**; "blood in his stool after he decreased the prednisone dose to 35 mg")); JA 2481 (P. Ex. 12 , at Bates No. 6) (**Oct 26**; "blood in the stool if he decreases the prednisone any less than 40 mg")); JA 2488 (P. Ex. 12 , at Bates No. 13) (**Nov. 16**; "I am still taking 40 mg prednisone; the two times I tried to reduce last month it didn't work, but do you think it's worth trying to reduce it again …?"); JA 2489 (P. Ex. 12 , at Bates No.14) (**Nov. 28**; "[h]as only been able to wean prednisone to 35 mg without experiencing symptoms"; "he needs to communicate or s/w [speak with] you re his medical tx [treatment] moving forward"). *See also* JA 167-70, 173-74, 175, 177-84, 186, 248-49, 266 (Eisner); JA 642-44 (Schoen); JA 749-64 (Kaplan)).

e. When Kaplan reported that his symptoms returned upon lowering the dose, he was told variously to increase the dose of steroids or to continue to "try" tapering it (*e.g.*, JA 2479 (P. Ex. 12, at Bates No. 4) ("I recommend to continue … prednisone 40 mg daily and *try* to decrease the dose to 5 mg every week start next

week"; emphasis added); JA 2489 (P. Ex. 12, at Bates No. 14 ("[p]lease continue the prednisone taper …"); JA 188, 238-39 ("nothing was done differently, other than whoever he spoke to telling him to continue the steroids, continue the steroids"), 242-46 ("[h]e was told decrease it *as tolerated*"), 268 ("he's told to *try* to taper again"), 269-70 ("the instructions were to *try* to decrease the dose 5 milligrams every week and call back *if he couldn't*"), 285-86 ("he was following the instructions to taper *if you can*"), 310 ("[o]n multiple occasions, he was told to taper the steroids *if he was able to*" (Eisner; emphasis added); JA 741 ("I was instructed to stay at the 40"), 865 (Kaplan)). He was not told he needed to move more quickly to biologic medication, the alternative to steroids (*see, e.g.*, JA 190, 309 (Eisner); JA 742, 744, 760-61, 888-89 (Kaplan)).

f. More than once, Kaplan asked Dr. Mattar if he should come in for a visit (*e.g.*, JA 2488 (P. Ex. 12, at Bates No. 13) (**Nov. 16**; "should I schedule an appointment to see you anytime soon?"), JA 2487 (P. Ex. 12, at Bates No. 12) (**Nov. 26**; "[s]hould I schedule appointment with you?"). Most poignantly, Kaplan wrote to Dr. Mattar on December 27, 2018: "I feel like I am in limbo with everything and some symptoms have re-emerged … I am still on prednisone (started in mid/late Sept.) … [since reducing the dose] I noticed an increase in 'leakage' (mucus) which has become uncomfortable … there has been an increase in [bowel] movements … including [in] the middle of the night … [c]an you please

advise? … I'd also like to schedule an appointment to discuss next steps since it has been several months since I have seen you…" (JA 2495 (P. Ex. 12, at Bates No. 20); *see also* JA 292-96 (Eisner); JA 620-21, 675-77 (Kaplan's 11/16 message "is a cry for help, which should have prompted bringing him in"; it is "red flag") (Schoen); JA 747 ("I started to get a little frustrated") (Kaplan)).

g. Neither Dr. Mattar nor any other MedStar healthcare professional honored Kaplan's request to be seen until a nurse practitioner — not Dr. Mattar — saw him on January 23, 2019, almost four months after his previous visit and the start of his steroid treatment (JA 1919-21 (P. Ex. 3, at Bates Nos. 4-6); *see also, e.g.*, JA 631-32 (Schoen)). Dr. Mattar, the attending MedStar IBD specialist, never examined Kaplan after his initial visit on October 3, 2018 (JA 736 (Kaplan)).

h. MedStar did not move Kaplan to the alternative, non-steroidal long-term treatment until that visit on January 23 (JA 1920-21 (P. Ex. 3, at Bates Nos. 5-6) ("will proceed with Stelara [a biologic]")). Kaplan had his first infusion of the biologic, through an intravenous line (IV), on March 7, 2019 (JA 2514 (P. Ex. 12, at Bates No. 39); JA 206-07 (Eisner); JA 574, 634 (Schoen)), and then began regular treatment, through injections in 8-week intervals, beginning in May 2019 (JA 1920-21, 1924 (P. Ex. 3, at Bates Nos. 5-6, 9); JA 1924 (P. Ex. 12, at Bates No. 9)). He did not stop taking mesalamine, which he had been taking since early October 2018 (JA 224-25 (Eisner)), until January 2019 (JA 2502 (P. Ex. 12, at

Bates No. 27)), well beyond the typical "six to eight weeks [in which] you would know if it's working or not" (JA 201, 272 ((Eisner); *see also* JA 601, 619 (Schoen)). And Kaplan remained on prednisone through the first week of April 2019 (JA 1923-24 (P. Ex. 3, at Bates Nos. 8-9); JA 2587 (P. Ex. 33); JA 206-07(Eisner); JA 524, 539 (Meisles); JA 829, 871 (Kaplan)) — more than twice the three-month limit the standard prescribes for steroids.

i. Eventually, with treatment from the biologic (Stelara), Kaplan's symptoms abated (JA 770, 775-76 (no symptoms "since the Stelara kicked in") (Kaplan); *see also* JA 192 (Eisner)).

3. MedStar Breached The Standard Of Care

MedStar's employees' failures to (i) warn Kaplan about the risks of prolonged steroid usage, (ii) schedule Kaplan for timely post-treatment visits, (iii) heed his reports about the steroid's ineffectiveness and apparent toxicity, and (iv) wean him timely off steroids and transition him earlier to alternative biologic treatment: all were breaches of the standard of care.

(JA 164-65, 169-70, 173-91, 197-98, 201-02, 206-07, 238-39, 274, 279-82 ("that's not standard of care[;] [t]hat's horrible medicine"), 304-05, 307, 309-11, 317-19 (Eisner); *see also* JA 336-37, 340-42, 365-66 (steroid treatment is "short term … not a long-term goal"; "long-term use" is "[u]sually 8 to 12 weeks of an equivalent of more than 20 milligrams per day"; it would have been "reasonable"

to place Kaplan on biologic medication by November 28, 2018, within the three-month window the standard of care requires) (Mattar); JA 447-48, 451 (MedStar's nurse practitioner had "concerns" in January 2019 about the length of time Kaplan had been on steroids; the goal "is to get the patient off [steroids] promptly") (LeStrange); JA 583-85, 596-98, 600-04, 611-14, 617-19, 632-33 ("the time to start the Stelara would be shortly after the beginning of November"), 635-38 ("he would have been off of steroids by December 15th"), 642-47 (Schoen); JA 2587-95 (P. Ex. 33) (calendar showing steroid treatment into April 2019).)

4. The Consequences Of MedStar's Negligence

Beginning in September 2018, Kaplan, 34 years old, endured nearly seven months of steroids and then two more years of hip complications. And, the jury learned, he has suffered permanent effects from MedStar's malpractice.

- ***Prolonged Suffering From Crohn's Disease.*** Kaplan recounted his experience with Crohn's disease without proper and timely treatment; as Dr. Eisner put it, "he was on high doses of steroids, and he wasn't getting remission" (JA 272 (Eisner)). Kaplan described his abdominal pain; the frequency, nature, urgency, and volume of his bowel movements and diarrhea (99 in November, 85 in December); his inordinate time on the toilet, loss of sleep, and frequent nocturnal bowel movements (which are abnormal); his bloody, mucusy stools and substantial rectal bleeding; his "leakage"; and weight loss. He related his frustration at being

ignored by MedStar, his feeling he was in "limbo" or had reached his "breaking point," and finally his relief from these symptoms when, in 2019, MedStar belatedly placed him on biologic medication.

(JA 739-70 (Kaplan); *see also, e.g.*, JA 315-16 (Eisner); JA 2596 (P. Ex. 35) (Kaplan's "stool diary").)

- ***The Destruction Of Kaplan's Hips.*** Excessive steroid usage causes bone death or decay ("avascular necrosis" (JA 191 (Eisner); JA 468-69 (Meisles))). The steroids caused avascular necrosis of Kaplan's hips, causing pain and replacement of both.

(JA 2024 (P. Ex. 7; excerpt) (MedStar record acknowledging Kaplan's avascular necrosis as "secondary to high-dose steroids"); JA 2183, 2209, 2236 (P. Ex. 8; excerpts) (same); JA 2316 (P. Ex. 9; excerpt) (MedStar physician Postma's note: "[t]he reason for his underlying avascular necrosis comes from his high dose of steroids he was recently on"); JA 161-62, 169-70, 173-76, 180-82, 184-88, 190-92, 198, 201-02, 206-07, 316-19 (Eisner); JA 587-90, 638-41, 645-47, 687 (Schoen); *see also* JA 474-84, 510-11, 520-22, 528 ("more likely than not [Kaplan's] avascular necrosis was the result of his use of high-dose steroids for six or seven months, combined with his underlying … Crohn's disease"), 554 ("it's way beyond 51 percent" probability) (Meisles); JA 776-80, 806, 873 (reporting

MedStar's physician Postma's assessment that Kaplan's loss of hips was due to the steroids) (Kaplan).)

- ***Kaplan's Life As His Hips Deteriorated.*** "Pain is the primary presenting complaint" of avascular necrosis (JA 474-75 (Meisles)). Before his hip replacements, Kaplan's sister, a psychologist, observed that he "was in a lot of pain"; he "couldn't walk … [h]e was shuffling" and unable to do "everyday activities." He was "very nervous" about the delay the pandemic caused his hip surgery. As his condition worsened, he could not drive or even "leave the house"; his sister brought food to him, and he could not "come down the elevator" to receive it. "[I]t was too much of an ordeal because he was in so much pain." He was "upset about it"; "[y]ou could just see it on his face. He doesn't know what's wrong. He's hopeful … that this isn't going to be his life."

(JA 371, 373, 384-85, 389-91, 405 (Citron); JA 776-79 ("I was sort of in panic mode"), 872-73 (Kaplan); *see also* JA 485-87 (illustrating Kaplan's "extremely painful" bone decay and collapse) (Meisles).)

- ***Kaplan's Hip Surgeries.*** Kaplan's steroid-related hip condition required three separate surgeries. The first was a failed attempt to "salvage" one hip; the two others were to replace both hips. Kaplan and his sister described his "excruciating pain" before and after the surgeries, his anxiety due to pandemic-related delays, and his discomfort from being treated like a patient twice his age.

(JA 388-95 (Citron); JA 779-88 (Kaplan); *see also* JA 487-90 (describing the failed salvage operation and the pain and continuing avascular necrosis afterward), 491-97 (describing the hip replacement surgeries and pain accompanying them) (Meisles); JA 2602 (P. Tr. Ex. 44) (illustrating the "ream[ing]" and "remov[al]" of Kaplan's bones and insertion of "stems" and other "hardware").)

- ***The Need For Future Surgeries.*** Because of Kaplan's age, the medication he takes for his Crohn's disease, and the anticipated life-span of artificial hips, Kaplan faces the prospect of additional painful hip replacements, the first likely when he is in his mid-50's. These "hip revision" surgeries will be painful, more difficult, with greater risk of complications, "the results aren't as good," and the new hips will have an even lower life span. (JA 496-511, 542-51, 555-58 (Meisles).)

- ***Kaplan's Changed Life.*** MedStar's treatment has had a profound consequence for Kaplan's life. His hip conditions cause social embarrassment and have had an adverse impact on personal intimacy. According to his sister, Kaplan is "less social," "not living … as freely as he would have hoped to be living …." He is "sad" and "misses" "a piece of his core identity." Kaplan was a "very active" man who exercised, played tennis and competitive soccer, and enjoyed jogging. "[H]e would run daily," his sister said; Kaplan described it as "therapeutic." Now,

the jury learned, "he hasn't done those things"; he cannot even play tennis with his niece or soccer with his nephew. His physician has advised, "[A]ny high-impact activities … create[] vulnerability." Although he has "tried to find other outlets" for exercise, Kaplan said, "[i]t's hard to replace something [jogging] that is really important to you.… [I feel] [d]ifferent…. I'd obviously rather have my original hips …. I can't cross my legs well …. I just get sore more quickly in general with anything from driving to walking to being intimate…. [I]t just affects my everyday life in that sense." His sister summarized:

> "[I]t's not easy because you're not able to be back to … what your life is before … I think now he can walk and do like his daily living; but he definitely can't play soccer. He can't run. He can't play tennis.
>
> * * *
>
> "He is doing his best to take care of himself.… [H]e doesn't feel like as free spirited to me as maybe growing up. I think he's worried about hurting himself."

(JA 372, 374-75, 383-84, 395, 398-401, 405-06 (Citron); JA 714, 716-17, 788-92, 880, 890-91 (Kaplan); *see also* JA 551-53 ("I recommend … low-impact exercise …. I recommend against running"; "[h]e could play horse with … kids, but I wouldn't want … to see him playing a … full-court [basketball] game"; he can kick a soccer ball with a five-year old, but no longer play competitive soccer) (Meisles).)

STANDARD OF REVIEW

1. A ruling denying a new trial or remittitur is reviewable "only for abuse of discretion."[4] "The scope of this review is 'especially narrow' because 'the trial court's unique opportunity to consider the evidence in the context of a living trial coalesces with the deference given to the jury's determination of such matters of fact as the weight of the evidence.'"[5]

2. A trial court's crafting of a verdict form and control of closing argument are reviewable for abuse of discretion.[6]

3. Review on the abuse-of-discretion standard is "supervisory in nature and deferential in attitude."[7] Moreover, it "requires a two-part inquiry": "the court

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[4] *See, e.g., Asal v. Mina*, 247 A.3d 260, 277 (D.C. 2021); *Liu v. Allen*, 894 A.2d 453, 459 n.10 (D.C. 2006).

[5] *Asal*, 247 A.3d 277 (quoting other controlling authority); *accord, e.g.*, *Liu*, 894 A.2d 459 n.10; *Lyons*, 667 A.2d 324; *Louison v. Crockett*, 546 A.2d 400, 404 (D.C. 1988) (this Court "exercis[es] ... double deference, *i.e.*, deference to both jury and trial court"); *International Sec. Corp. v. McQueen*, 497 A.2d 1076, 1081 n.10 (D.C. 1988) (double deference "point[s] to 'very restricted review'").

[6] *See, e.g.*, *Brooks v. D.C. Hous. Auth.*, 999 A.2d 134, 140 (D.C. 2010) (verdict form); *District of Columbia v. Banks*, 646 A.2d 972, 982 (D.C. 1994) (verdict form); *President & Dirs. of Georgetown College v. Wheeler*, 75 A.3d 280, 292-93 (D.C. 2013) (closing argument); *see also*, *e.g.*, *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 715 (D.C. 2013) (overall trial management).

[7] *Johnson v. United States*, 398 A.2d 354, 362 (D.C. 1979); *id*. ("the concept of 'exercise of discretion' is a review-restraining one").

must determine 'whether the exercise of discretion was in error and, if so, whether the impact of that error requires reversal.'"[8]

SUMMARY OF ARGUMENT

1. The parties received a fair trial. No reversible error taints the jury's verdict and the trial judge's decision upholding it.

2. The verdict form was the product of the trial judge's exercise of informed discretion; it was consistent with the law; and in fact, MedStar's trial counsel expressed his satisfaction with it. "Physical injury" and "emotional distress" are two distinct elements of recoverable compensatory damages.

3. Appellee's closing argument was within the bounds of fair advocacy. This Court has approved the two challenged arguments.

4. Assuming MedStar's belated objections to the two passages were cognizable, the trial judge applied controlling jurisprudence and acted well within its discretion in its ruling and overall management. The court's jury instructions included the very curative instruction MedStar had requested with respect to one challenged argument. The court also charged the jury that it must base its decision only on the evidence, and that counsel's comments were not evidence. The jury presumptively followed these instructions.

5. The jury's damage award was reasonably based on the substantial

[8] *In re M.L.*, 28 A.3d 520, 528 (D.C. 2011) (quoting other controlling authority).

evidence of Kaplan's injuries. No inflammatory evidence or rhetoric, or error of law, influenced the jury, which was attentive and deliberate. Applying controlling authority, mindful of demeanor and other trial nuances, and stating its rationale in a clear and comprehensive opinion, the court below properly denied the requested new trial or remittitur. There was no abuse of discretion.

ARGUMENT

Fairness Commends Enforcing The Judgment Below

"The trial court's actions in this case were rational and reasonable, resulting in a trial that was certainly fair."[9]

A. The Verdict Form Introduced No Error; There Are No "Duplicative Damages"

1. MedStar Failed To Preserve Its Objection

A litigant must object to proposed jury instructions "on the record," "before the instructions and [closing] arguments are delivered," and by "stating distinctly the matter objected to and the grounds for the objection."[10] Instructing a jury on how to record its decision is an essential element of a trial judge's jury instructions.[11]

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[9] *Blackwell v. Dass*, 6 A.3d 1274, 1281 (D.C. 2010).

[10] D.C. CIVIL R. 51(c)(1), (2)(A).

[11] *See* D.C. CIVIL R. 49(a)(2), (b)(1).

MedStar's trial conduct reflected a collegial and cooperative effort to fashion a verdict form meeting the requirements of the law. After the court had discussed the form with the parties and indicated what it proposed to do, MedStar noted that it "still" requested its proposal "but we understand the ruling of the Court" (JA 1733). Later, however, just before the court was to instruct the jury, MedStar's counsel affirmatively reported MedStar's agreement with the court's verdict form and that MedStar was "satisfied" (JA 1741).

All litigants bear the consequences of their lawyers' tactical decisions, including whether to object. "Any other notion would be wholly inconsistent with our system of representative litigation."[12] MedStar's experienced trial counsel knew how to preserve objections; indeed, after MedStar's counsel had expressed satisfaction with the verdict form, MedStar's counsel also agreed with the other instructions but expressly said MedStar's agreement was "[s]ubject to the prior objections already argued" (JA 1741).

[12] *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962); *see also Bell v. Westinghouse Electric Corp.*, 483 A.2d 324, 327 (D.C. 1984) (losing a tactical benefit does not amount to a denial of a legal right).

There was no such reservation with respect to the verdict form. MedStar did not resurrect its criticism until after the jury had rendered its verdict.[13] MedStar may not belatedly criticize a form it helped develop and then approved.

2. The Verdict Form Was Soundly Based

In any event, the verdict form betrays no abuse of discretion; it embraced the pertinent "material factual issues" and follows controlling authority.[14]

MedStar does not dispute that Kaplan is entitled to recover for "Past and Future Physical Injury" and for "Past and Future Emotional Distress." It argues that the trial court abused its discretion by presenting these as separately recoverable elements of loss. MedStar's position is incorrect for several reasons.

First, as a matter of law, "physical injury" and "emotional distress" are separate and distinct and each may be recoverable. This Court's jurisprudence, and the common law, teach this fundamental proposition. MedStar's *ipse dixit* that they

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[13] *See Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459, 470 (D.C. 1997) (an "argument may not be kept in a litigant's 'hip pocket, to be produced only in the event that [the litigant] loses'"); *see also*, *e.g.*, *Young v. United States*, 305 A.3d 402, 429-31 (D.C. 2023) (appellants "agreed to this jury instruction at trial, thus inviting the error and waiving any right to raise the claim on appeal"; citing several cases); *Masika v. United States*, 263 A.3d 1070, 1077 (D.C. 2021) (same).

[14] *See Brooks*, 999 A.2d 134, 140 (D.C. 2010) ("[t]he controlling rule … is that a trial judge has discretion to decide the 'form and substance' of verdict-form interrogatories so long as they cover all 'material factual issues'").

are "indivisible" (Br. 16) is wrong.

> "If the applicable standard of care is breached, the person to whom the duty is owed may recover for damages proximately caused by the negligence, including damages for physical injury, monetary loss, and ancillary or 'parasitic' damages for related mental distress (sometimes referred to as 'pain and suffering'). *See, e.g., Washington & Georgetown R.R. Co.* v. *Dashiell*, 7 App. D.C. 507, 514 (1896) ('Where a party has suffered physical injury, it seems to be well settled, that mental pain and suffering, attendant upon and as a natural incident of such bodily injury, may be considered as an element in estimating the damages.').
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> * * *
>
> "We routinely allow recovery for pain and suffering as 'parasitic' damages when the plaintiff's emotional distress is caused by the defendant's invasion of another legally-protected interest, such as freedom from physical injury. *See, e.g., Bond v. Ivanjack*, 740 A.2d 968, 974-76 (D.C. 1999) (in medical malpractice case arising from doctor's failure to diagnose cancer, patient sought damages for 'mental anguish and emotional distress based on her fear of recurrence of her cancer')."[15]

Second, the trial judge gave the District of Columbia's Standard Jury Instruction on damages (JA 1754-57). That instruction informed the jurors that they were to consider "physical injury" and "emotional distress" separately. "The

[15] *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 795, 809 (D.C. 2011) (*en banc*); *see also* RESTATEMENT (SECOND) OF TORTS § 905 (Am. Law Inst. 1965) ("[c]ompensatory damages that may be awarded without proof of pecuniary loss include compensation (a) for bodily harm, and (b) for emotional distress").

jury is presumed to have followed these instructions, and this court will not 'upset the verdict by assuming the jury declined to do so.'"[16] (The trial court's jury instructions appear within the Addendum to this Brief.)

Third, MedStar argues as if the verdict form had one line for "pain and suffering" and another for "emotional distress." But, like the jury instructions, the verdict distinguished "physical injury" from "emotional distress" — two distinct injuries, both from the family of "pain and suffering."[17] The court below was correct: "the case law is very clear that pain and suffering include emotional distress" (JA 117-18).

Fourth, MedStar wrongly suggests that damages like "pain and suffering" and "economic loss" cannot be separated into their constituent elements. In wrongful death cases, for example, juries may be presented verdict forms breaking

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[16] *Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992) (*en banc*) (citations omitted); *accord*, *Parker v. Randolph*, 442 U.S. 62, 73 (1979) ("[a] crucial assumption underlying [our system of trial by jury] is that juries will follow the instructions given them by the trial judge," quoted with approval in *Weeda v. District of Columbia*, 521 A.2d 1156, 1163 (D.C. 1987) ("[i]f this is the rule to be applied in criminal cases where liberty is at stake, *a fortiori*, we must defer to it in litigation concerned only with money damages")); *Blackwell*, 6 A.3d 1278.

[17] *See, e.g.*, *Hedgepeth*, 22 A.3d 795, 809; *see also PBA Local No. 38 v. Woodbridge Police Dep't*, 832 F. Supp. 808, 820 (D.N.J. 1993) ("New Jersey courts have characterized the subjective symptoms accompanying emotional distress as within the definition of pain and suffering").

out "economic loss" into "lost wages" and "loss of household services."[18] This Court has emphasized its preference for verdict forms enabling a reviewing court to isolate the jury's consideration of separate issues.[19] That is exactly what Kaplan urged and the trial judge's form allowed (*see* JA 1729).

Fifth, MedStar ignores controlling authority and instead for its "duplicative damages" contention invokes four cases from California, Illinois, and Kentucky that in fact support the decision below. Like two of MedStar's cases (*Capelouto* (California) and *Marxmiller* (Illinois) in MedStar Br. 14), the trial court recognized "pain and suffering" as a "category" of damages that includes within its ambit "physical injury" on the one hand and "emotional distress" on the other. But unlike the two other MedStar cases, the 40-year-old and 100-year-old Illinois and Kentucky decisions,[20] the court below did not purport to treat separately the overlapping "nature, extent and duration" of injury, "disability resulting" from injury, and "pain and suffering" from injury (*Powell*) or damages "for injuries to [plaintiff's] person," "damages for physical and mental suffering," and damages

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[18] *See, e.g.*, *Batey v. Washington Hospital Center Corp.*, Case No. 2019 CA 6716 M (McKenna, J.), Verdict Form returned April 6, 2022, p. 3 (JA 2890).

[19] *See, e.g.*, *Robinson v. Washington Internal Medicine Assoc*s*., P.C.*, 647 A.2d 1140, 1143-45 (D.C. 1994).

[20] *Powell v. Ill. C. G. R. Co.*, 438 N.E.2d 152, 153-58 (Ill. 1982); *South Covington & C. S. R. Co. v. Vanice*, 278 S.W. 116, 120 (Ky. 1925).

for "impairment of [the injured person's] power to earn money" (*Vanice*). In this case, there was no overlap.

In sum, having been properly instructed that they "may" award Kaplan damages separately for his "physical" and "emotional" injuries (JA 1756), the jurors awarded him different amounts commensurate with their judgment about the extent of his injuries. Their decision is entitled to deference.

B. Kaplan's Closing Argument Was Proper

MedStar complains about two passages in Kaplan's closing argument: trial counsel's references to "safety" when discussing standard of care and her use of the so-called "*Colston* argument." MedStar's contentions lack merit.

1. MedStar Failed To Preserve Its Objections

MedStar delayed until after the parties' closing arguments, but before Kaplan's rebuttal argument, before objecting. There was no immediate objection and no motion for a mistrial.[21] MedStar's silence was particularly telling with

[21] *See, e.g., Doe v. Medlantic Health Care Group, Inc.*, 814 A.2d 939, 953 (D.C. 2003) (no new trial based on closing argument where, among other things, counsel failed to object or request a mistrial); *District of Columbia v. Bethel*, 567 A.2d 1331, 1336-38 (D.C. 1990) ("the court must be satisfied not only that there was misconduct by counsel but also that, after objection, 'the court, by failing to apply appropriate disciplinary measures or to give suitable instructions, left the jurors with wrong or erroneous impressions, which were likely to mislead, improperly influence, or prejudice them to the disadvantage of the defendant'" (citation omitted)).

regard to the *Colston* argument, since the court had admonished MedStar that, if it intended to object, its objection needed to come before closing arguments, or else "so be it."

Had there been a timely objection, and the Court agreed with it, Kaplan's trial counsel could have changed her syntax to meet any putative concern, or the Court could have given an immediate curative instruction. As the court below noted in its opinion after trial, MedStar's delay denied Kaplan and the trial Court that opportunity.

2. The References To Safety Were Soundly Based

a. This Court has upheld a trial court's approval of a litigant's even more pointed emphasis on "safety" when arguing "standard of care." In *President & Dirs. of Georgetown College v. Wheeler*, [22] plaintiff's counsel told the jurors:

> "You know, the jury system in our country exists to protect the community. And in this medical malpractice case, you will decide what standards doctors must meet in the community when they provide care and treatment to patients. You will decide what standards doctors must meet to protect patient health and safety . . . . Remember, the standards . . . in the medical community exist for a reason. They have been developed by doctors for doctors. They exist to promote patient safety. They exist to protect patient health. They're to provide a medical care system that above all prevents harm that's avoidable. And what these standards are in this community is what you will be deciding when you go back to the jury room."

[22] 75 A.3d 280, 292-93 (D.C. 2013).

Noting the "broad deference" afforded the trial judge "who has the advantage of observing the arguments as they occurred," and "[b]ased on our own reading of counsel's comments," this Court found the trial judge's decision that there was "no impropriety" in this argument to be "rational" and entitled to deference: "Counsel merely explained the jury's role in determining the applicable standard of care. She did not urge the jury to penalize the appellants based on irrelevant considerations or to return a verdict that would 'send a message.'"[23]

b. To borrow language from one Virginia trial judge, Kaplan's trial counsel "properly use[d] her argument to explain to the jury what the applicable standard of care is, why the applicable standard of care exists, and why Defendants had a duty to adhere to the standard of care."[24] The reference to "safety" was fair and apt:

> "Clearly, patient safety is at the heart of medical malpractice law and the standard of care upon which it is based. Indeed, the protection of the public from unreasonable risk is at the heart of civil negligence tort law in general. It can hardly be said[] that the discussion of such matters during argument would unduly inflame the passion or prejudice of the jury. Likewise, it would be very difficult for the Court to determine at this point of

[23] *Wheeler*, 75 A.3d 292-93.

[24] *Mangum v. Inova Loudoun Hosp.*, 102 Va. Cir. 20, 25 (2019) (deferring resolution to trial but declining, *in limine*, to forbid reference to "safety" when discussing standard of care in closing argument).

> the proceedings that, as a matter of law, Plaintiff may not refer in her arguments to 'safety rules' or to the 'protection of the public' or 'community' or to similar phrases that are not inconsistent with the applicable standard of care."[25]

c. MedStar claims Kaplan's counsel's use of the word "you" in her closing argument was an impermissible personal appeal to jurors (Br. 21). But MedStar is wrong; in the argument's context, "you" referred to the "patient" or to the "physician":

> "[A]ccording to the national guidelines, you're only supposed to stay on steroids for three months." (JA 1761.)
>
> "[T]he time is ticking. According to the standards, we have three months….We've used up a month. What [the experts] said is you've got to move. You've got to act. You need to protect this patient." (JA 1763.)
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> "[Y]ou can't treat patients through an email…. Patients deserve your attention. If you're going to take them on, do it right." (JA 1765.)
>
> "You're now another two weeks in. You're almost halfway through your safety zone, and he's still on 40 milligrams. This is the last chance. During November, you've got to act to get him off these steroids." (JA 1765.)
>
> "He's now been on the steroids for 10 weeks. Remember, you're only supposed to go to 12." (JA 1767.)

[25] *Mangum*, 102 Va. Cir. 25.

> "Our experts say this is your window. This is your window of time, based on the national guidelines, where you need to get him on a biologic." (JA 1767.)
>
> "[T]he earlier you … try to get off those steroids, the easier it is to get off them … and be safe and stay within the safety zone." (JA 1767-68.)
>
> "The science determines what's safe, and they tell the doctors … what's safe, what the safe window is. And you don't go outside it. Because you don't want to be the statistic and you don't want to get to an unsafe place … [b]ecause when you let people go seven months, you find it because David is it." (JA 1778.)

These words illustrated the force of Kaplan's standard-of-care evidence; they were well within the bounds of zealous but fair advocacy.

d. The notion of "safety" inheres in the definition and application of "standard of care."[26] The court below properly exercised its discretion declining to upset the verdict because of Kaplan's counsel reference to "safety" in her argument.

3. The "Colston Argument" Was Soundly Based

a. Not only has this Court approved the "*Colston* argument" in subsequent cases,[27] it also has rejected repeated efforts to revisit the rule, including

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[26] *See also Durphy,* 698 A.2d 465 ("'[t]he standard of care for contributory negligence is the degree of care a reasonable person would take for his or her *own* safety'"; emphasis in original).

[27] *Howard Univ. v. Roberts-Williams*, 37 A.3d 896, 912 (D.C. 2012); *Hechinger Co. v. Johnson*, 761 A.2d 15, 21-22 (D.C. 2000).

on the very social-science grounds MedStar advances here.[28] If there is to be a change in the law, it must come from this Court, sitting *en banc*, something it has declined to do.

b. Kaplan's argument was virtually identical to the arguments approved in *Colston*, *Hechinger*, and *Roberts-Williams*.[29] Neither this argument (nor the reference to "safety") were pleas to jurors to treat Kaplan as they would want Kaplan to treat themselves. These were not "golden rule" arguments.[30]

c. Under current law, it was within the court's discretion either to allow or disallow the argument. If, as MedStar suggests, jurors were mesmerized by

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[28] *See* Order, *Chucker v. Berger*, No. 12-CV-1904 (D.C. Aug. 13, 2013) (JA 2902) (denying petition for initial hearing *en banc*; "no judge in regular active service has requested that a vote be taken on the petition for initial hearing *en banc*"); Judgment, *Chucker v. Berger*, No. 12-CV-1904 (D.C. Sept. 18, 2013) (JA 2903) (granting motion for summary affirmance); Order, *Chucker v. Berger*, No. 12-CV-1904 (D.C. Dec. 30, 2014) (JA 2905) (denying petition for rehearing *en banc*; "no judge of this Court has called for a vote on the petition for rehearing *en banc*").

[29] *Colston*, 468 A.2d 956; *Hechinger*, 761 A.2d 22; *Roberts-Williams*, 37 A.3d 912.

[30] *See, e.g.*, *Colston*, 468 A.2d 958; *Mangum*, 102 Va. Cir. 25; *see also Evening Star Newspaper Co. v. Gray*, 179 A.2d 377, 382-83 (D.C. 1962) (approving use of "per diem" argument in circumstances presented; "sums were offered for illustrative purposes only, and [the argument] was so worded as to emphasize to the jury that theirs was the final responsibility of assessing the damages for pain and suffering"; court instructed jury to "decide the case solely upon the evidence admitted" and "statements of counsel" were not evidence).

"anchoring," nothing but speculation can account for why, in MedStar's world, the jurors without independent thought unanimously embraced one of the three numbers supposedly offered as "anchors."

d. MedStar's concern about alleged "anchoring" is made disingenuous by its counsel's failure timely to object, by his decision not to tell the jurors, when he rose to give his argument immediately following Kaplan's "anchors," that they should not heed Kaplan's effort to "anchor" their judgment, and even by his choice not to offer his own "anchors" in his closing argument.

In all events, the trial court's adherence to the law should not be branded an abuse of discretion.

4. The Court's Jury Instructions Fairly Assured The Absence Of Unfair Prejudice

In her belated objection, MedStar requested a curative instruction with regard to the reference to "safety." After completion of Kaplan's brief rebuttal, the trial court gave the precise curative instruction MedStar had requested. MedStar can point to no prejudice from the brief delay in giving the instruction.[31] This was a fair exercise of the Court's discretion.[32]

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[31] *See*, *e.g.*, *Battocchi v. Washington Hosp. Center*, 581 A.2d 759, 769 (D.C. 1990) (acceptance of curative instruction held to waive objection to improper argument).

[32] *See, e.g.*, *Pietrangelo*, 68 A.3d 715 ("It is well established that trial courts have broad discretion to manage trials.").

The trial court's overall instructions were firm safeguards against prejudice.[33] Immediately before Kaplan's closing, the court charged the jury that they "may consider only the evidence admitted in the case"; and that "[s]tatements and arguments of the lawyers are not evidence" (JA 1743). Immediately before the jurors retired to deliberate, the court twice admonished that they were not "partisans or advocates," but "neutral judges of the facts" (JA 1857). There is no basis to assume the jury failed to follow these instructions.

C. The Record Does Not Compel A Remittitur

"'Trial courts have historically given *great* weight to jury verdicts, granting a new trial *only* where there are unusual circumstances which convince the trial judge . . . that the jury had been improperly influenced by non-germane factors or that its verdict is clearly unreasonable.'"[34] The court below correctly found there were no such "unusual circumstances" here. No error of law or "miscarriage of justice" compelled the trial court to exercise its discretion to award a new trial.[35]

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[33] *See, e.g.*, *Doe v. Medlantic Health Care Group,* 814 A.2d 953 (no new trial based on closing argument where, among other things, "proper instructions were given as to the jury's role as the sole arbiter of the facts").

[34] *Louison*, 546 A.2d 403 (emphasis added) (citations omitted).

[35] *See, e.g.*, *Naccache v. Taylor*, 72 A.3d 149, 164 (D.C. 2013).

1.

"Pain and suffering" "cannot be quantified with mathematical precision," and so damages "'must be based largely on the good sense and sound judgment of the jury . . . [and] all the facts and circumstances of the case.'"[36] Facile comparison with other cases, particularly those 25 years old (MedStar Br. 30), provides cold comfort for MedStar.[37] Whether the $2.5 Million for past and future physical injury and $1.5 Million for past and future emotional distress is viewed individually, as it should be, or as a composite of $4 million for total "pain and suffering," as MedStar advocates (Br. 28-32), this relief was well within the jury's province to compensate Kaplan for what he has endured and will suffer in the future.

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[36] *Doe v. Binker*, 492 A.2d 857, 863, 864 (D.C. 1985) (quoting other controlling authority); *see also Magdalene Campbell & Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp*., 55 A.3d 379, 388 (D.C. 2012) ("[r]ough justice in the ascertainment of damages is often the most that can be achieved") (citation omitted).

[37] *See Daka Inc. v. Breiner*, 711 A.2d 86, 100 (D.C. 1998) ("excessive verdicts should not be measured strictly on a comparative basis"); *Finkelstein v. District of Columbia*, 593 A.2d 591, 598 (D.C. 1991) (*en banc*) (cautioning against "facile comparisons of verdicts"); *Capitol Hill Hosp. v. Jones*, 532 A.2d 89, 93 (D.C. 1987) ("[e]ach case . . . necessarily rises or falls on its own facts" (quoting *May Dep't Stores Co. v. Devercelli*, 314 A.2d 767, 775 (D.C. 1973))); *see also Batey v. Washington Hospital Center Corp.*, D.C. Sup. Ct. Case No. 2019 CA 006716 M (June 16, 2022), at 2-4, 10-11 (JA 2892-94, 2900-01) (McKenna, J., denying remittitur; $5 Million awarded each to three minor children for loss of parental guidance, care, support, and education).

2.

Kaplan's trial counsel told the jurors, "[W]e're not here for sympathy" (JA 1784). Plaintiff presented no ostentatious or maudlin displays. The jury heard from Kaplan's sister, Kaplan, and physicians, and saw medical illustrations, an x-ray, and some photographs of scars. There was no "day-in-the-life" video.

As the court recognized (JA 115, 1868), the jurors were attentive. They took notes, deliberated for over two hours, then had a day off for a holiday, and then resumed deliberating for nearly 1-1/2 hours before reaching their verdict. These were not "inflamed" jurors.

3.

"Kaplan had minimal physical injury," says MedStar (Br. 17). But that glib assessment ignores detailed and substantial evidence — discussed above (pp. 18-22) — showing the past, present, and future physical suffering MedStar caused, including pain from prolonged maltreatment of Kaplan's Crohn's disease, from the progressive decay and destruction of his hips, from his hip surgeries and their aftermath, and from the future hip-replacement treatments the evidence forecast. MedStar ignores the substantial evidence, too, of Kaplan's emotional distress from this ordeal, including frustration resulting from MedStar's failures to respond to his

pleas, anxiety arising from delays in treatment, and the debilitating experience of living the life of a man twice his age.[38]

"Weighing the credibility of witnesses, resolving factual conflicts, and determining the inferences to be drawn from the evidence are matters for determination by the trier of the facts."[39] MedStar had every opportunity at trial to trivialize Kaplan's damages. MedStar 's counsel cross-examined Kaplan and his witnesses vigorously and delivered a lengthy and critical closing argument (JA 1788-1844). MedStar argued, "Kaplan had a rough time … [b]ut … the rough time wasn't the result of any improper care or unreasonable care on MedStar's part" (JA 1842-43). "Now [Kaplan is] pretty much essentially back to his pre-Crohn's medical condition. . . . [H]e has no limitations. . . . He can do anything …" (JA 1790, 1843).

But MedStar's counsel also exhorted the jurors that he was "going to leave" the question of damages "to you … [t]his is your job" (JA 1843). And the jurors did their "job": They were quite capable fairly to "parse out" damages (MedStar

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[38] *See, e.g.*, *Reese v. Newman*, 131 A.3d 880, 883 n.5 (D.C. 2016) ("[w]e will not disturb a jury's verdict if there is 'any substantial evidence which will support the conclusion reached'"; "'[s]ubstantial evidence" is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'").

[39] *Lyons*, 667 A.2d 321; *accord, e.g.*, *District of Columbia v. Harris*, 770 A.2d 82, 89 (D.C. 2001) ("It is the jury's province, and not the court's, to weigh the evidence and to determine the credibility of witnesses.").

Br. 18) and to reject MedStar's view of Kaplan's past, present, and future experience.[40] The jury came to its own conclusion, and the trial judge correctly confirmed it.

4.

For good reason, this Court defers to a trial judge's decision to reject a requested remittitur.[41] We know of no reported decision in which this Court reversed a trial court's decision to deny a remittitur, save one where this Court remanded the case to assure that the trial judge provided the rationale for his decision.[42] Here the trial court explained its reasoning clearly and comprehensively (JA 1874-99).

Over ten days, the trial judge directly observed the jurors as they heard the witnesses, received the evidence, and listened to the court's instructions. The trial

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[40] *See, e.g.*, *Hedgepeth*, 22 A.3d 795, 818 (on jurors' difficulty in emotional distress cases of "parceling cause and effect": "we have already crossed that bridge[;] [t]his concern is universally applicable to emotional distress claims, including those routinely awarded as 'parasitic' damages in the context of common law … actions").

[41] *See also Vassiliades v. Garfinkel's, Brooks Bros.*, 492 A.2d 580, 595 (D.C. 1985) ("appellate courts give the benefit of every doubt to the trial court's judgment").

[42] *Louison*, 546 A.2d 401 ("we are unable to determine whether the trial court abused its discretion in denying appellant's motion unless we know the reasons for the trial court's action. Accordingly, we remand the record for a written statement of the reasons for the trial court's denial of appellant's motion for remittitur or new trial.").

judge was there to gauge jurors' reactions to the argument of counsel, and to appreciate the jurors' attention and fidelity to their oath. If — contrary to fact — there had been inflammatory rhetoric or other extreme behavior, from counsel or witness, the trial judge was in a position not merely to see it but to correct it.

5.

Affirming the denial of a remittitur, in *WMATA v. Jeanty* this Court approved this language from Judge Weisberg's Order:

> "The court cannot say with any certainty that the jury's award was based on passion, prejudice, pure sympathy or any other impermissible factor. On the contrary, the award, while substantial, represents a permissible exercise of the authority our system gives to jurors to arrive at an amount which, in their collective and unanimous judgment, will fairly and reasonably compensate a person injured by the negligence of another not only for so-called 'special damages,' but also for the more intangible elements of damages, including pain, suffering, inconvenience, disability and the like. The court is not empowered to deprive plaintiff of her verdict simply because it may think the jury should have awarded a lower amount."[43]

This teaching applies no less in this case. This record contrasts starkly with those where trial judges have granted remittiturs.[44] The verdict and judgment have

[43] 718 A.2d 172, 180 n.14 (D.C. 1998).

[44] *Compare*, *e.g.*, *Bond v. Ivanjack*, 740 A.2d 968, 977 (D.C. 1999) (verdict "in part motivated by passion" and "bias against the defendant"); *Moss v. Stockard*, 580 A.2d 1011, 1035-36 (D.C. 1990) (verdict resulted from a jury that was "improperly motivated").

earned this Court's deference.[45]

6.

MedStar does not now contest its liability. The trial court's post-trial ruling comes to this Court with a presumption of correctness,[46] and MedStar has failed to overcome that presumption.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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[45] *See*, *e.g.*, *Campbell-Crane & Assocs. v. Stamenkovic*, 44 A.3d 924, 945-47 (D.C. 2012) ("[i]t is not our role to credit or weigh the evidence of injury"); *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 902 (D.C. 2008) ("[w]e are obliged to respect the jury's prerogatives").

[46] *E.g.*, *Hill v. Medlantic Health Care Group*, 933 A.2d 314, 335 n. 21 (D.C. 2007).

Certificate of Service

This will certify that, on February 24, 2025, I caused the foregoing Brief for Appellee to be delivered to all counsel of record through the Court's electronic service.

/s/ Alfred F. Belcuore

_____

ALFRED F. BELCUORE
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ADDENDUM

Mr. Murphy, and I think it fixed the cause issue.

And so is everybody in agreement with the verdict form last sent by Mr. Murphy?

MR. MCAFEE: I haven't seen it, Your Honor. Can I --

(Counsel confer.)

MR. MCAFEE: Yes, Your Honor. We're satisfied.

THE COURT: Okay. And good on the jury instructions as well?

MS. VIGLIANTI: Subject to the prior objections already argued, Your Honor. Thank you.

THE COURT: Thank you. All right. We're ready?

MS. BERTRAM: Yes, Your Honor.

MR. MCAFEE: Yes, Your Honor.

THE COURT: We can go get the jury.

(The Court confers with the courtroom clerk.)

(The jury enters the courtroom at 12:18 p.m.)

THE COURT: Okay. Have a seat. Good morning, everyone. First of all, I do want to apologize. I should have asked that you all come a bit later. I probably should have taken into account the discussions that we would have this morning. And so blame me. I'm a bit long-winded. Don't blame the lawyers. They've been working really hard. So I really do apologize.

Now I have to read to you jury instructions, and

you will get a copy of these jury instructions when you deliberate in the jurors' lounge. But I have to read them, and I have to read them verbatim. Okay? So I'll give you preliminary jury instructions, and then you'll hear closing argument beginning with Ms. Bertram. And then you'll hear closing argument from the defendants, Mr. McAfee or Ms. Viglianti. And then you'll hear again from the plaintiff, and then you'll deliberate. Okay?

You will have lunch as you deliberate. Okay?

So here are the first set of instructions.

JURY INSTRUCTIONS

THE COURT: 1.2. So my job has been to conduct the trial in a fair and efficient manner, to rule on questions of law, and to instruct you on the law that applies to this case. It is your duty to accept the law as I state it to you.

Your job is to decide the facts. You are the exclusive judges of the facts. You alone determine the weight, effect, and value of the evidence and the believability of the witnesses. If I have said or done anything at any time that seemed to indicate my opinion about the way you should decide this case, then I instruct you to disregard it. Disregard whatever I have said or done to give you that impression. It is for you alone to decide the appropriate verdict in this case.

Evidence in the case. You may consider only the evidence admitted in this case. The evidence consists of the sworn testimony of witnesses, exhibits admitted into evidence, and facts stipulated to by the parties. You may consider any facts to which the parties have stipulated or agreed to be undisputed.

Statements and arguments of the lawyers are not evidence. They are intended only to help you to understand the evidence. Similarly, the questions of the lawyers are not evidence.

If anyone describes the evidence you have heard differently from the way you remember it, it is your memory that should control your deliberations.

Evidence. There are two types of evidence, direct and circumstantial. Direct evidence is the direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is indirect proof of a fact which is established or logically inferred from a chain or other facts or circumstances. For example, direct evidence of whether an animal was running in the snow might be the testimony of a person who actually saw the animal in the snow. Circumstantial evidence might be the testimony of a person who saw the tracks of the animal in the snow.

You may consider both types of evidence equally. The law makes no distinction between the weight to be given

to either direct or circumstantial evidence. The law does not require a greater degree of certainty for circumstantial evidence than it requires for direct evidence. You should weigh all the evidence in the case, both direct and circumstantial, and find the facts in accordance with that evidence.

Burden of proof. The party who makes a claim has the burden of proving it. This burden of proof means that the plaintiff must prove every element of his claim by a preponderance of the evidence. To establish an element by a preponderance of the evidence, the party must show evidence that produces in your mind the belief that the thing in question is more likely true than not true. The party need not prove any element beyond a reasonable doubt, the standard of proof in criminal cases, or to an absolute mathematical certainty. If you believe that the evidence is evenly balanced on an issue one party had to prove, then your finding on that issue must be for the other party.

In arriving at your verdict, you should consider only the evidence in this case. That said, in determining whether a party has carried its burden of proof, you are permitted to draw, from the facts that you find have been proven, such reasonable inferences or conclusions as you feel are justified in the light of your experience and common sense. You should not rely on speculation or

guesswork.

You should consider all the evidence bearing on the claim regardless of who produced it. A party is entitled to benefit from all evidence that favors the party no matter which party produced it. Whether there is a preponderance of the evidence depends on the quality and not the quantity of evidence.

Rulings. The lawyers in this case sometimes objected when the other side asked a question, made an argument, or offered evidence that the objecting lawyer believed was not proper. Objections are not evidence. You must not hold such objections against the lawyers who made them or the party they represent. It is the lawyers' duty to make objections if they believe something improper is being done.

If during the course of the trial I sustained an objection to a lawyer's question, you should ignore the question, and you must not speculate as to what the answer would have been. If after a witness answered a question I ruled that the answer should not be stricken, you should ignore both the question and the answer and they should play no part -- I'm sorry. Let me read that over.

If after a witness answered a question I ruled that the answer should be stricken, you should ignore both the question and the answer, and they should play no part in

your deliberations.

Stipulations. Stipulation of fact. The parties may stipulate -- that is agree -- to certain facts. You should consider any stipulation of fact to be undisputed evidence.

Stipulation of testimony. The parties may stipulate -- that is to agree -- to the testimony a particular witness would have given if he or she had testified in this case. You should consider this stipulated testimony to be exactly what the witness would have said, had he or she testified here. You must determine, based on all of the evidence, whether and to what extent to credit the testimony to which the parties have stipulated.

Credibility. In deciding what the facts are, you must weigh the testimony of all the witnesses who have appeared before you. You are the sole judges of the credibility of the witnesses. In other words, you alone determine whether to believe any witness and to what extent any witness should be believed. Judging a witness's credibility means evaluating whether the witness had testified truthfully and also whether the witness accurately observed, recalled, and described the matters about which the witness testified.

You may consider anything that, in your judgment, affects the credibility of any witness. For example, you

may consider the witness's age, demeanor, capacity to observe and recollect facts, and any other facts and circumstances bearing on credibility.

You may consider whether the witness has any motive for not telling the truth, any interest in the outcome of the case, or any friendship or animosity toward other persons involved in this case. You may consider the plausibility or the implausibility of the testimony of a witness. You may also consider whether the witness's testimony has been contradicted or supported by other evidence.

Number of witnesses. The relative weight of the evidence on a particular issue is not determined by the number of witnesses testifying for either side or the number of exhibits on either side. It depends on the quality and not the quantity of the evidence. It is up to you to decide whether to credit the testimony of a smaller number of witnesses or a small number of exhibits on one side or the testimony of a greater number of witnesses or a greater number of exhibits on the other side.

Specialized opinion testimony. In this case, you heard testimony from Todd Eisner -- Dr. Todd Eisner, gastroenterology; Dr. Jeffrey Meisles, orthopedic surgery; Dr. Robert Schoen, rheumatology; Dr. Marc J. Richard, orthopedic surgery; Dr. Neil Julie, gastroenterology;

Dr. Joel Pekow, gastroenterology; and Dr. Joseph T. Moskal, orthopedic surgery.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness who possesses knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters. You are not bound to accept this witness's opinion. If you find that the opinion is not based on sufficient education or experience, that the reasons supporting the opinions are not sound, or that the opinion is outweighed by other evidence, you may completely or partially disregard the opinion. You should consider opinion evidence with all the other evidence in the case and give it as much weight as you think it fairly deserves.

Depositions as evidence. A deposition is the testimony of a person taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

During the trial you heard deposition testimony that was presented by videotape. You should give deposition testimony the same fair and impartial consideration you give any other testimony. You should not give more weight or less weight to deposition testimony just because the witness

did not testify in court.

Impeachment. You have heard evidence that a witness previously made statements and that these statements may be inconsistent with the witness's testimony here at trial. It is for you to decide whether any of these prior statements were made and, if one or more was made, whether it is inconsistent with the witness's testimony during this trial. If you find that any prior statement is inconsistent with the witness's testimony here in court, you may consider this inconsistency in judging the credibility of the witness.

In one respect, the law treats prior statements that are inconsistent with court testimony differently depending on whether the prior statement was made under oath. If the prior inconsistent statement was made under oath, you may consider the statement as evidence that what the witness originally said was true. If the prior inconsistent statement was not under oath, you may not consider it as evidence that what the witness said in the earlier unsworn statement was true. Whether or not the prior inconsistent statement was under oath, you may consider the inconsistency in judging the witness's credibility.

If a witness testifies that a prior inconsistent statement is the truth, then you may consider the prior

inconsistent statement both to elevate the witness's credibility and as evidence of the truth of any fact contained in that statement.

Charts and summaries. The lawyers have shown to you charts and summaries to help explain the facts. The charts or summaries themselves, however, are not evidence or proof of any facts. If any chart or summary does not correctly reflect facts or figures shown by the evidence in the case, then you should disregard that chart or summary. In other words, the charts or summaries are used only as a convenience. You should disregard any chart or summary that does not state the truth based on the evidence.

You may consider both types of evidence equally. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. The law does not require a greater degree of certainty for circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case, both direct and circumstantial, and find the facts in accordance with that evidence.

Consideration of the evidence. The defendants in this case are corporations. A corporation can act only through individuals as its agents or employees. In general, if any agent or employee of a corporation acts or makes statements while acting within the scope of his or her authority as an agent or within the scope of his or her

duties as an employee, then under the law those acts and statements are of the corporation.

Agency. In this case, the defendants admit that the doctors' acts or failures to act were committed in furtherance of the business of the defendants. Therefore, defendants are responsible for their employees' negligent acts or failures to act.

Professional liability. Plaintiff alleges that defendants committed medical professional negligence. To succeed on a claim for medical professional negligence plaintiffs must prove each of the four elements. Number one, defendants should have met a standard of care. Number two, defendants did not meet this standard of care. Number three, defendants' failure to meet this standard caused plaintiff harm. Number four, plaintiff is entitled to damages as compensation for that harm.

Plaintiff must prove that each element is more likely so than not so. If plaintiff proves each element, your verdict must be for the plaintiff. If plaintiff does not prove each element, your verdict must be for the defendants.

General standard of care. Plaintiff must prove the professional standard of care. A professional has a duty to use the degree of care that a reasonably competent person follows under the same or similar circumstances. A

professional is not liable if he meets the standard of care in the field. Plaintiff must prove a standard of care that applies nationwide, not just regionally or locally.

General standard. Dr. Mattar is a nationally certified practitioner in gastroenterology. The standard of care for a nationally certified practitioner is the same degree of care that is used by a nationally certified practitioner in gastroenterology acting in a reasonable and prudent manner in the same or similar circumstances. A hospital has the duty to provide a patient with the degree of care that is reasonably required by the patient's condition. You must determine the applicable standard of care only through credible expert testimony.

9.06, bad result. A doctor is not negligent simply because his efforts are not successful. Unsatisfactory results from treatment or care alone do not determine whether defendants were negligent in treating the plaintiff. However, if the doctor's performance fell below the standard of care and thereby caused the patient's harm, then the doctor was negligent. In such circumstances, it is no defense to a charge of negligence that the doctor did the best that he could and that the doctor's efforts simply were not successful.

Disclosure of risks. Plaintiff contends that the defendants failed to obtain the plaintiff's informed consent

for his treatment plan. Every person has the right to make an informed decision about whether or not he or she will undergo a particular treatment. Therefore, before providing medical treatment to a patient, a doctor has a duty to inform the patient of his or her medical condition, the nature of the proposed treatment, the likelihood and degree of the benefits and risks of the proposed treatment, any alternative treatments, and the likelihood and degree of benefits and risks of any alternative treatment, and the likelihood and degree of benefits and risks of not getting any treatment.

You must decide whether defendants informed plaintiff of all significant risks and benefits of the proposed treatment and of the alternatives, including no treatment.

A risk is significant if it is a risk that a reasonable person, in what the doctor knows or should know to be the patient's position, would likely consider significant in deciding whether to undergo treatment. Whether a risk is significant depends on the frequency and severity of harm resulting from the procedure. For example, a significant risk might be a great likelihood of relatively minor, though troublesome, harm. A significant risk might also be a very small chance of very serious harm. A combination of very slight risks could also form a

significant risk.

There is, however, no duty to inform the patient of every insignificant risk of harm or risk -- excuse me -- of risk generally known to the average person, or of risks that the patient already knows. If you find that the defendants adequately informed the plaintiff of all significant risk, then you must find for the defendants.

Causation. Plaintiff must prove that it is more likely than not that the defendants' acts or failures to act caused the harm suffered by plaintiff. An act or failure to act is deemed to have caused harm if it was a substantial factor in bringing about the harm. In addition, the harm must either -- the harm must be either a direct result of a reasonable probable consequence of defendants' acts or failures to act. If plaintiff would have suffered the same harm even if defendants' conduct had not been negligent, then defendants' conduct is not a substantial factor in causing the harm.

Damages. If you find for the plaintiff, then you must decide what amount of money will fairly and reasonably compensate him for the harm that you find was caused by defendants. When you hear the term "damages" in these instructions, that term refers to the amount of money you may decide to award the plaintiff as I have described. When I refer to damages, I do not mean to suggest that you should

decide for or against any party on any issue.

Extent of damages. Plaintiff is entitled to compensation for any harm that defendants' negligent or wrongful conduct caused. Conduct causes harm if it plays a substantial part in bringing about the harm. In addition, the harm must be either a direct result or reasonably probable consequence of the conduct. Defendants are liable to pay damages only for the harm that defendants' conduct caused. If you find that his conduct caused only part -- if you find that the defendants' conduct caused only part of plaintiff's harm, then you should award compensation only for that part.

Burden of proof. Plaintiff must prove that it is more likely than not that he is entitled to damages. The evidence must establish the amount of plaintiff's damages with reasonable certainty. You may award plaintiff only those damages that are based on a just and reasonable estimate based on relevant evidence. Reasonable certainty does not require exact or mathematically precise proof of damages. You may award damages for future harm so long as plaintiff shows that injuries will probably continue. However, you may not award damages that are speculative, based on guesswork, or dependent upon merely remote possibility.

The elements of damages. If you find that

defendants' negligence caused plaintiff to suffer injury, then you must consider whether he is entitled to any damages. You may award damages for any of the following harms that you find defendants' negligence or wrongful conduct caused: Number one, the extent and duration of any physical injury sustained by the plaintiff; number two, the effects that any physical injuries have had on the overall physical well-being of the plaintiff or that plaintiff may experience in the future; number three, any emotional distress that plaintiff has suffered in the past or may suffer in the future.

You should not adjust the amount of damages you award, if any, based on whether or not those damages are subject to taxation.

Special susceptibility. Defendants are responsible for plaintiff's injury even if a prior injury, disability, or other condition made plaintiff more likely than a normal person to suffer injury because of defendants' negligence. Defendants may not avoid responsibility for its negligent actions by showing that the injury would have been less serious if it had happened to someone else.

Recovery for emotional distress. Plaintiff is seeking damages for emotional distress. If you find defendants' conduct caused plaintiff emotional distress, then you may award damages for the emotional distress.

Plaintiff has the burden to prove the amount of damages that fairly compensates him. There is no exact standard or mathematical formula for deciding the compensation to be awarded for this type of harm; nor is the testimony of any witness required about the amount of compensation.

To decide an amount that would fairly and reasonably compensate plaintiff for emotional distress, you should consider the facts in this case in the light of your own experience and common sense. Elements to consider when deciding a damages award include any mental pain and suffering, fear, inconvenience, nervousness, indignity, insult, humiliation, or embarrassment that plaintiff proves he suffered directly because of defendants' conduct.

We'll take a break. You'll hear closing arguments, and I'll have some concluding instructions.

Ms. Bertram.

MS. BERTRAM: Thank you.

Ready?

CLOSING ARGUMENT

BY MS. BERTRAM: Good afternoon, ladies and gentlemen. As the Court indicated, you have three jobs when you go back to finally get to start to deliberate on this case. Number one, you'll pick a foreperson. Number two, you'll share your ideas about what you've heard in the evidence and what you think about the credibility of the

THE COURT: I have just a few more remarks, and then you are off to deliberate. And so I want to start -- these are my concluding remarks, but 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 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.

So note taking. You will be permitted to take your notebooks back with you into the jury room during deliberations. You should remember, however, that your notes are only an aid, which is what I told you when we met two weeks ago, to your memory. They are not evidence in this case, and they should not replace your own memory of the evidence. Those jurors who did not take notes should rely on their own memory of the evidence and should not be

influenced by the notes of anyone else's.

During your deliberations, you must consider the instructions as a whole. All of the instructions are important. You must not ignore or treat any single instruction or part of an instruction differently than the other instructions.

Foreperson. This is very important. When you return to the jury room, the very first thing that you should do, and then you can get some food, is select a foreperson to preside over your deliberations and to be your spokesperson here in court. The selection of a foreperson is very -- is a very important decision. Consider selecting a foreperson who will be able to facilitate your discussions, who will help you organize the evidence, who will encourage civility and mutual respect among all of you, who will invite each juror to speak up regarding his or her views about the evidence, and who will promote a full and fair consideration of that evidence. That is the first thing that I ask that you do when you go back there.

The verdict must represent the considered judgment of each juror. In order to return a verdict, your verdict must be unanimous; that is, each juror must agree on the verdict.

Each of you has a duty to consult with other jurors in an attempt to reach a unanimous verdict. You must

decide the case for yourself. You should not surrenderer your honest beliefs about the effects or weight of evidence merely to return a verdict solely because of other jurors' opinions. However, you should seriously consider the views of your fellow jurors, just as you expect them to seriously consider your views. And you should not hesitate to change an opinion if you are convinced by other jurors. Remember that you are not advocates but neutral judges of the facts. You will make an important contribution to the cause of justice if you arrive at a just verdict in this case. Therefore, during your deliberations, your purpose should not be to support your own opinion, but to determine the facts.

It may not be useful for a juror at the start of deliberations to announce a determination to stand for a particular verdict. When a juror announces a firm position at the outset, the juror may hesitate to back away after discussion with other jurors. Furthermore, many juries find it useful to avoid a vote at the very beginning of deliberations. Calmly reviewing and discussing the case is often a more useful way to begin. Remember that you are not partisans or advocates, but judges of the facts.

If it becomes necessary during your deliberations to communicate with me, you may send me a note. You all know how to do that. The note must be signed by your

foreperson, who you'll choose, or by one or more members of the jury. If you have a note, the foreperson should knock on the courtroom door. The clerk will give the note to me. And if you have any questions about the instructions, you should feel free to send me a note. Any questions about the instructions must be in a note.

You should never communicate with me or the courtroom clerk about anything concerning the merits of the case or the conduct of the deliberations except by sending me a signed note. Also, you should never reveal in any note or otherwise how the jury is divided on any matter, how many jurors are voting one way and how many are voting another way. If you all cannot agree, I will bring you back in here and I will read you instruction 3.06, which more likely than not will tell you to keep going.

Now, 3.07, delivering the verdict. When you have reached your verdict, just send me a note telling me you have reached your verdict, and have your foreperson sign the note. Do not tell me in your note what your verdict is.

Okay. The foreperson should fill out and sign the verdict form that will be provided. We will then call you into the courtroom and ask you your verdict in open court.

Now, you have seen the verdict form. It has been used. You will be provided with a hard copy of the verdict form for use when you have concluded your deliberations.

The form is not evidence in this case, and nothing in it should be taken to suggest or convey any opinion by me as to what the verdict should be. Nothing in the form replaces the instructions of law I have already given you, and nothing in it replaces or modifies the instructions about the elements which the plaintiff must prove by a preponderance of the evidence. The form is meant only to assist you in recording your verdict.

So those are all of my jury instructions. You are free to deliberate. The jury instructions, the evidence that you may consider, and the verdict form will be sent back to you. You're free to grab some food before you start deliberating. We'll let you know when we get kicked out of here, but you all just go until we knock on that door. Okay? All right.

Madam clerk.

(The jury exits to begin deliberations at 3:45 p.m.)

THE COURT: Okay. Anything else?

MS. BERTRAM: Do you need our copy of the admitted exhibits or?

THE COURT: Do you have a copy for the Court?

MS. BERTRAM: Yes. We created a copy of what was admitted.

THE COURT: Do I have one from the defendants of