DISTRICT OF COLUMBIA COURT OF APPEALS
No. 24-CV-892

DISTRICT OF COLUMBIA,	)	
	)	
Appellant,	)	**Superior Court No.**
	)	**2019-CA-002633-B**
v.	)	**(Williams, J.)**
	)	
ESTATE OF DEANGELO GREEN,	)	
	)	
Appellee.	)	

****

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

OF COUNSEL:

WILLIAM P. LIGHTFOOT
DC Bar No. 313593

Lightfoot Law, PLLC
Franklin Square
1300 I Street, NW, Suite 400 E
Washington, DC 20005
blightfoot@lightfootlawdc.com
202-918-1823

ALLYSON KITCHEL
DC Bar No. 496687

Kitchel Law, PLLC
700 Pennsylvania Ave. SE, Second Floor
Washington, DC 20003
allyson@kitchellaw.com
202-949-7109

ALFRED F. BELCUORE *
DC Bar No. 181560

Law Offices of Alfred F. Belcuore
336 Constitution Ave. NE
Washington, DC 20002
alfred.belcuore@belcuorelaw.com
301-367-2992

Attorneys for Appellee

RULE 28(a)(2) CERTIFICATE

The parties are the Estate of DeAngelo Green (Plaintiff-Appellee) and the District of Columbia (Defendant-Appellant).

Counsel for Mr. Green's Estate in the court below were William P. Lightfoot, Esquire, Lightfoot Law, PLLC, Franklin Square, 1300 I Street, NW, Suite 400 E, Washington, DC 20005; Allyson Kitchel, Esquire, Kitchel Law, PLLC, 700 Pennsylvania Ave. SE, Second Floor, Washington, DC 20003; and on Appellant's post-trial motions after the new trial, Alfred F. Belcuore, Esquire, Law Offices of Alfred F. Belcuore, 336 Constitution Ave. NE, Washington, DC 20002. Mr. Belcuore, Mr. Lightfoot, and Ms. Kitchel are counsel for Mr. Green's Estate in this Court.

Counsel for the District of Columbia in the court below were several attorneys from the Office of the Attorney General: Patricia A. Oxendine, Charles J. Coughlin, Kerslyn D. Featherstone, Stephanie M. Corcoran, Jessica Krupke, Ashley Carter, Emma Lomax, Brendan Heath, and Michael Addo, Esquires. The District's counsel in this Court are identified in the Brief for Appellant.

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

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Jurisdiction

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

Counterstatement Of The Issues

1. The jury found that gross negligence of a District of Columbia fire truck driver caused the death of DeAngelo Green. Did sufficient evidence on standard of care support that finding, when among other things, Green's Estate relied upon a "nationally recognized" standard issued by a national organization?

2. Did the District preserve its current contentions on standard of care?

3. Did the trial court abuse its discretion and commit reversible error in its evidentiary rulings (I) disallowing testimony, as lacking a reliable foundation and unfairly prejudicial, that Green allegedly was impaired by PCP while driving his automobile; and (II) allowing the Estate's experts to opine that the District's fire truck driver had breached the pertinent standard of care?

4. Did the trial judge correctly conclude, after trial, that it had erred in instructing the jury to deny recovery if it found Green guilty of ordinary contributory negligence, not amounting to recklessness?

5. The District requested and received the jury instruction on contributory negligence, did not request a jury instruction on contributory recklessness, and accepted the instructions as given. Did the District waive its post-verdict contention that it was entitled to an instruction on contributory recklessness?

6. In any event, did the trial court abuse its discretion in ruling that (I) the evidence did not support a jury instruction on contributory recklessness, and (II) the parties were entitled to a new trial on damages alone?

7. In the damages trial, the jury awarded individual compensatory relief to Green's widow and six minor children. Did the trial court abuse its discretion in entering judgment on this verdict, where (I) the trial judge found this relief soundly based in the evidence, and declined the District's requested remittitur; (II) expert testimony, including from the District's own economist, had provided economic loss figures reduced to present value, with explanations on how they were determined; and (III) the evidence, the Estate's argument, and jury instructions to which the District did not object emphasized that any award for noneconomic loss was for each child's loss of their father's care, education, training, guidance and personal advice over their individual lifetimes, not for "pain and suffering" or sorrow?

Counterstatement Of The Case

A. Nature Of The Case

The jury found Green died as a result of a District firefighter's grossly negligent operation of a speeding fire truck. Green's Estate seeks relief on behalf of itself, Green's widow, and his six children. The District denies responsibility.

B. Proceedings And Disposition Below

1. Overview

After substantial pretrial proceedings, the case proceeded to trial by jury (Williams, J., presiding). The jury found Green died from the District driver's gross negligence but, on what the court later held were erroneous jury instructions, the jury also found Green's alleged contributory negligence barred relief.

Upon consideration of post-trial motions, the court (Williams, J.) held that sufficient evidence on standard of care supported the finding on the District firefighter's gross negligence. The court also concluded (i) it had erred by instructing the jury that ordinary negligence, not amounting to recklessness, could bar recovery, and (ii) the evidence did not support an instruction on Green's alleged recklessness. The court found, with these rulings, it unnecessary to retry liability but ordered a new trial, before a separate jury, on damages alone.

In that trial (Williams., J., presiding), the jury awarded Green's Estate no relief for its own benefit, but awarded Green's widow T'Anita Coles-Green and his six children, all minors at the time of his death, seven separately specified amounts totaling $13,574,680.95.

The trial court (Williams, J.) thereafter affirmed the jury's findings and, only then, entered final judgment.

2. Pertinent Pretrial Rulings

a. Striking The District's Retained "Expert" On PCP

According to a toxicology report, Green had 0.22 mg/L (.22 milligrams per liter) of phencyclidine (PCP) in his blood at the time of autopsy (JA 242). Nothing in the autopsy report tied PCP to the cause of Green's death (*see* JA 234; SR 3, at 29-31 (Giese)). Nonetheless, the District retained an "expert," Robert L. Copeland, Ph.D, to opine that Green was impaired by PCP when he died, and as here, the District persistently has insinuated that PCP was a factor in his death.

The Estate moved to preclude Dr. Copeland based on the requirements of *Motorola Inc. v. Murray*;[1] Dr. Copeland's lack of "experience, knowledge, and training on the subject of PCP"; and his plagiarism evident in "most of his report" (JA 39). The court below (Epstein, J.) granted the motion (JA 302-20).

Citing testimony and scientific literature, the court found that blood level of PCP alone may not support a finding of impairment (*e.g.*, JA 309 ("as the District's Chief Toxicologist testified, 'there is no correlation between levels of PCP and the symptoms that somebody under the influence can show' … [i]ndeed, Dr. Copeland agrees that PCP use, by itself, does not establish impairment")). A trained observer must see conduct displaying certain "clues," none of which were reported by the

[1] 147 A.3d 751 (D.C. 2016) (*en banc*) (adopting the standard of FED. R. EVID. 702).

lay witnesses who had observed Green's conduct. "[T]he District has not demonstrated … that Dr. Copeland's opinion is based on sufficient facts or data and is the product of reliable principles and methods, and [that] he has reliably applied the principles and methods to the facts of the case," the court held (JA 304). "Dr. Copeland does not demonstrate a reliable scientific basis for his opinion that PCP intoxication was a cause of the accident" (JA 310).

b. Denying The District Summary Judgment

The District may be liable only if its driver committed "gross negligence."[2] Seeking summary judgment, the District contended the Estate could not prove "gross negligence," and that in any event Green's "contributory negligence and assumption of the risk" barred recovery (District Mot. and Mem., 5/19/21, at 1). The District did not argue that Green had been "grossly negligent" or reckless.

The court (Epstein, J.) denied the District's motion (JA 302-20). Reasonable jurors could find the District driver "grossly negligent": the court pointed to the fire truck's speed, its failure to stop for a red light, its size and weight, evidence suggesting the District driver had lied about the incident, and other proof that he had "endanger[ed] life or property" in "wanton, willful and reckless disregard or conscious indifference for the safety of others" (JA 311-13).

[2] D.C. CODE § 2-412.

On Green's conduct, the court held that, if the District's driver had been grossly negligent, the District could avoid responsibility only if the jury found that Green had been contributorily reckless:

> "Contributory negligence is not a defense if the defendant acted recklessly, *unless the plaintiff also acted recklessly*…. The District does not contend that Mr. Green's conduct rose to the level of recklessness, or at least it does not establish that the evidence is so one-sided that any reasonable jury would have to conclude that he was not just negligent but reckless." (JA 316; citations omitted; emphasis added).

"In any event," the court added, "the District does not offer evidence establishing as a matter of law that Mr. Green was negligent" or had assumed the risk of a fire truck speeding through a red light (JA 316, 319). On the District's reliance on PCP, "The District does not offer admissible evidence that would require a jury to find that Mr. Green's use of PCP appreciably impaired his ability to drive" (JA 318).

c. Disallowing Reference To PCP

(i). Before the court had issued these rulings on Copeland and summary judgment, the trial court (Lopez, J.) had denied an early motion to disallow any reference to PCP (JA 294-301). Without considering whether alleged contributory negligence may allow a defendant to escape liability for gross negligence, the court held that the notation of PCP was relevant to the District's "contributory negligence defense" (JA 298, 300). The court "admonish[ed]" that the District

might suffer "an adverse inference" on "spoliation of evidence" because the District had failed to preserve Green's tissue (JA 301).

(ii). Later, with the benefit of the court's analyses on the Copeland and summary judgment motions, the trial court (Williams, J.) precluded the District from making any reference to Green's alleged PCP use (JA 667-72).

"[A]llowing the introduction of evidence that Mr. Green had PCP in his system at the time of the accident, without an expert, would lead to impermissible speculation by the jury," the court concluded (JA 669; *see also* SR 15, pretrial motions hearing, at 16-17). The court rejected the District's contention that other witnesses could generally describe the effects of PCP (*id.* 4-17) or that a witness who had participated in Green's autopsy could opine that Green had been impaired by PCP (JA 669-71). This opinion, the court held, suffered from the same faulty predicate that had rendered Copeland's opinion inadmissible (JA 670-71).

As it had earlier (JA 308), the court noted the illogic of the District's position — Green was negligent because he was impaired and he was impaired because he was negligent (JA 671-72; *see also* JA 308 (calling the argument "a tautology")). "This paradigm cannot be permitted to go forward to a jury" (JA 671).[3]

---

[3] *See* JUDGE RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 208 (3d ed. 1997) ("question-begging … assumes as true what is to be proved[;] [it] is to assume the truth of what one seeks to prove in the effort to prove it"; footnote omitted).

d. Finding The Foundation Sufficient On Standard Of Care

The court (Williams, J.) made these pre-trial rulings on standard of care.

First, the court held that (i) the Estate's standard-of-care expert, Alexander Perricone, properly identified the standard for "emergency vehicle operation" (National Fire Protection Association (NFPA) 1002) (JA 675-80); and (ii) "[t]here is sufficient evidence in the record to support a finding that the NFPA is in fact a national standard" (JA 680; *see also* SR 15, pretrial motions hearing, at 39-40).

Second, the court found that the Estate's accident-reconstruction expert, Michael Miller, "permissibly ground[ed] his opinions in the national standard of care set by Mr. Perricone" (JA 680). "The national standard of care *is to look at local laws*" (JA 679; emphasis in original); and Miller indeed had "relie[d] on local statutes and regulations" (JA 681; *see also* SR 15, pretrial motions hearing, at 26, where the court says Perricone "create[s] the larger national frame" and Miller "comes in and fills in the D.C. local law"; *id.* 39-40 ("it makes perfect sense to refer back to the localities"); SR 16, pretrial conf., at 12-13 (Perricone and Miller "sort of work together"); *id.* 69-70 (overruling objection to Miller)). Miller's opinion was "not 'pure speculation'"; he did not purport to make credibility determinations (JA 683, 685) and "base[d] his opinions on the District's own data and investigations," "on witness statements, his visit to the accident site,

calculations, [police] reports, and weather from the date of the collision, among other things" (JA 683, 685).

Third, the court ruled that Miller could "'break[] down [the] legal standard into its factual components'" (JA 682; citation omitted), but could not state conclusions on whether the District's driver was "grossly negligent," or whether Green had "acted reasonably" (JA 682; *see also* SR 16, pretrial conf., at 26).

When challenging the opinions of Perricone and Miller before trial, the District never argued, as it does here, that NFPA 1002 created an impermissible "locality rule," or that the standard the Estate offered is "vague … rather than the requisite mandate of specific conduct" (District Br. 26-27; *compare* SR 15, pretrial motions hearing, at 17-40; District's Omnibus Motion *In Limine*, filed 5/20/22, at 3-13; District's Reply, filed 6/2/22, at 1-4; District Motions Hearing Brief, filed 7/13/22, at 1-4; District's Reply, filed 7/26/22, at 1-3).

e. Other Pretrial Evidentiary Rulings

The court made additional *in limine* rulings, including these:

- The District's official investigative report, finding that the District's driver had violated DC Municipal Regulation §18-2002 (JA 1370, District Tr. Ex. 15), was admissible (JA 989-91; *see also* SR 16, pretrial conf., at 16-24, 42).

- The toxicology report, with its alleged blood level of PCP in Green at death, was inadmissible (JA 986-88) because, among other reasons, "it would lead

a jury to 'speculate about [whether Green] was impaired and unable to drive safely'" (JA 986).

- Only two photographs of Green and his family could be displayed to the jury (JA 978-81; *see also* SR 16, pretrial conf., at 3-10, 41-42; SR 17, first trial readiness hearing, at 46-48). "Evidence of what Mr. Green was like as a father and a person is much better developed through testimony which has a lower risk of unfair prejudice, covers more of his life, and can be cross examined" (JA 981).

3. The First Trial And Its Aftermath

a. The Estate's Retained Liability Experts

At trial, the District interposed no objection to the court's accepting Perricone as an expert on the national standard of care (*see* SR 2, at 94-97). On Miller, the District had "[n]o objection to accident reconstruction" (*id.* 132, 167 ("[w]e don't oppose that"); *see also* JA (778-79 (joint pretrial statement; no objection to Perricone; objection to Miller's criticism of the police department's investigation and his rendering legal opinions on Green's driving)). Claiming alleged lack of notice, the District objected, however, to Miller's testifying as an expert on "safe driving practices" (SR 2, at 132-33; *see also id*. 167-68). Noting that "we had a long hearing on this very issue," the court overruled the objection (*id.* 133-35, 167-68; *see also* SR 15, pretrial motions hearing, at 17-40; SR 16, pretrial conf., at 12-13 (where the court says, "Perricone … is going to establish

the national standard of care [and] Miller is then going to establish … the local rules and regulations"; "[t]hey sort of work together"; "we've had this conversation … and I have a whole order about it")).

b. The District's Motion For Judgment

At the close of the Estate's case, the District argued that the Estate had "not established a standard of care" "[n]ecessary to establish a claim of gross negligence" (SR 4, at 36-38; SR 5, at 64-79). According to the District, the Estate needed to point to other jurisdictions "comparable" to the District, Perricone had focused only on Baltimore, and he had "made no effort to establish that Baltimore is a comparable jurisdiction" (S.R. 5, at 65-66, 72, 74-75). The District argued that the District's local "departmental rules and guidelines cannot establish the standard of care" (*id.* 68, 72), and that Miller did not identify a standard applicable to fire truck operators but referred to "something … used in training," referred in part to a "slogan" and not a "standard," and testified "seemingly on his own personal experience within the fire department" (*id.* 69-70). In any event, the District argued, "Tate [met] those standards" (*id.* 70).

Denying the motion, the court held that Perricone and Miller together had established the standard of care and its breach, and the case was for the jury (SR 5, at 66-69, 72-73, 77-78). The court ruled (I) that Perricone had testified that the "national standard necessarily has to refer back to state and local regulations,

because there is no rule for every single jurisdiction and for every type of area, when it comes to compliance [with] traffic regulations" (SR 5, at 73), and (II) that Miller had identified the local requirements Tate was bound to follow (*id.* 66, 68-73, 77-79).

c. Jury Instructions, Ordinary Contributory Negligence, Contributory Recklessness

At the pretrial conference, two months before trial, the court informed the parties that jury instructions would be "discuss[ed] toward the end of trial" (SR 16, pretrial conf., at 67). "I don't finalize jury instructions until trial is almost over … because you just don't know what they're going to be until you've heard all the testimony. You don't know what you're going to need." (*id.* 73.)

At trial, the District disclaimed a contributory-recklessness instruction but requested an instruction on contributory negligence (JA 1102-25 (District's comments on court's proposed jury instructions); JA 1129-33 (District's proposed verdict form); SR 5, at 102; SR 6, at 7; *see also* JA 794-95 and 802-06 (District's proposed jury instructions in joint pretrial statement); JA 809-10 (District's proposed verdict form in joint pretrial statement). For its part, on multiple occasions, before and at trial, the Estate consistently and on a variety of grounds "dispute[d] that contributory negligence [was an] appropriate consideration[] for the jury" (JA 772 (joint pretrial statement); *see also* Opp. to District motion for summary judgment, filed 6/2/21, at 8-9 ("'Under District of Columbia law, in cases

of reckless conduct by the defendant[,] … the plaintiff's contributory negligence will not bar his action'"). Nonetheless the Estate offered its own verdict form and an instruction on "last clear chance" for use if the court disagreed with its position on contributory negligence. (*See* JA 772-73 (joint pretrial statement); JA 1126-28 (the Estate's proposed verdict form); JA 1135 (the Estate's written comments "toward the end of trial" invoking the court's earlier ruling that "'[c]ontributory negligence is not a defense if the defendant acted recklessly, unless the plaintiff also acted recklessly'; [t]he evidence is now in, and there was no evidence at trial that Mr. Green was reckless"); SR 5, at 86 ("[w]e believe there's no[] evidence to support" the District's requested contributory-negligence instruction); SR 6, at 11-12 ("we have consistently taken the position that contributory negligence should not be … given"; "this issue has been in this case for a long time"; "it was raised in front of Judge Epstein … and he cited cases supporting our position that contrib is not available as a defense to gross negligence"); SR 6, at 31-32 ("[t]hey have not met their burden of proof to show that Mr. Green was reckless in any way or that his conduct caused the incident"); SR 6, at 52 ("the facts don't show that Mr. Green was contributorily negligent, number one"; and "contrib would only be a defense if Mr. Green's conduct was reckless"); *see also* SR 18, hearing on post-trial motions, at 44-45 (where the court says, "Recklessness was something that had been discussed multiple times … because this issue kept coming up").)

In an extended discussion "toward the end of trial" (SR 6, at 3-59), the court expressed agreement with the Estate's view, but apparently acceding to the District's persistence, nonetheless ultimately determined to "just leave it as is" and give the contributory negligence instruction (SR 6, at 28-29, 57-59). And so the court charged the jury:

> "The District of Columbia alleges that Mr. Green was contributorily negligent. The District of Columbia is not liable for Mr. Green's harms if Mr. Green's own negligence is a cause of his harms. To establish the defense of contributory negligence … the District of Columbia must prove that it is more likely than not that Mr. Green was negligent and that Mr. Green's negligence was a cause of his own harm. If the District of Columbia proves these two elements, then your verdict must be for the District of Columbia." (SR 6, at 71-72.)

d. The Verdict And Post-Trial Motions

After the verdict finding gross negligence and contributory negligence, the court (Williams, J.) ruled that "[t]he jury should not have been instructed to make a finding as to mere contributory negligence" (JA 1179).[4] Citing "the strong majority of available persuasive authority," the court concluded that "[a]t common law,

[4] *See Moldea v. New York Times Co.*, 22 F.3d 310, 311 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994) (Edwards, J.) (on granting a petition for rehearing and changing the panel's original decision; "Like Justice Stewart, I will take refuge in an aphorism of Justice Frankfurter: 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.'").

contributory negligence is not a defense to gross negligence" (JA 1176-81). Only a finding that Green had been "contributorily reckless" could bar recovery for the District driver's gross negligence (JA 1172, 1176, 1183). No such instruction was requested; in any event it was unwarranted because "there is no evidence that Mr. Green was contributorily reckless"; the District "failed to present any evidence that Mr. Green willfully, wantonly, and recklessly disregarded his own safety" (JA 1183-85; *see also* JA 1190 (where the court writes, "[a]t trial, when discussing the proper jury instructions with the Parties, the Court noted that there was 'no evidence that Mr. Green acted recklessly'"); JA 1201-04 and SR 18, hearing on post-trial motions, at 27-49 (denying reconsideration) ("I wouldn't have sent the contributory recklessness instruction to the jury because there was no evidence of it. And I made that finding at trial …")). The District proffered a supposed "new" witness, but the court ruled she was neither "new" nor possessed "new" admissible evidence sufficient to support an instruction on Green's alleged recklessness (JA 1202-03; SR 18, hearing on post-trial motions, at 29-39, 47-49).

The court also held "there was sufficient evidence presented at trial … for a reasonable jury to properly find gross negligence" by Tate (JA 1199-1200). The court rejected the District's repeated challenge to the Estate's standard-of-care evidence, and the eligibility of Miller to testify about "safe driving practices" (JA 1198-99; *see also* SR 18, hearing on post-trial motions, at 4-27).

The court ruled a new trial on damages alone was the appropriate relief. "The Parties need not relitigate liability just for the jury to understand the case enough to grant a fair award." (JA 1187.)

4. The New Trial And Its Aftermath

The jury awarded no damages to the Estate under the Survival Act[5] but "allocate[d]" damages under the Wrongful Death Act[6] as follows: $1,305,367.00 for Green's widow T'Anita Coles-Green; $1,581,032.67 for Green's oldest child; $2,445,696 for his youngest child; and $1,860,305.35; $2,061,922.21; $2,127,666.87; and $2,192,690.85 for his middle children, from oldest to youngest, respectively (JA 1231-32).

After trial, the court held there was legally sufficient evidence supporting the jury's conclusions on damages (JA 1259-60). Finding the compensation to be consistent with the evidence and jury instructions, and rejecting the notion that it was "without merit," "'so great as to shock the conscience,'" or tainted by evidence suggesting the award had "'resulted from passion, prejudice, mistake, oversight, or consideration of improper elements,'" the court denied the District's request for a remittitur (JA 1259-60; citations omitted). The court found sufficient support for the jury's finding on present value of economic loss: based on the

[5] D.C. CODE § 12-101.

[6] D.C. CODE §§ 16-2701, 16-2703.

testimony of both parties' economic experts, the jury "had sufficient evidence in the record" to award damages "to present value" (JA 1253-54).

In sum, the court held, "[T]he jury's verdict was not against the weight of the evidence, the trial was not unfair, and there were no substantial errors regarding the admission or rejection of evidence…. [D]enying the District's request for a new trial would not result in a 'clear miscarriage of justice.' Consequently, the District is not entitled to a new trial." (JA 1254; citations omitted.)

The court set the start of post-judgment interest to coincide with the date of the verdict (JA 1231-32, 1252-53), and this appeal followed.

C. Facts

With the benefit of the verdict on gross negligence and damages, the Estate is entitled to the facts viewed most favorably to it.[7]

1. The District's Gross Negligence

On March 9, 2018, at approximately 12:31 P.M., a fire truck driven by District firefighter Joseph Tate, responding to an emergency call, struck Green's car, killing him. The crash occurred in a residential community at the intersection of 12th Street and Rhode Island Avenue in Northeast Washington, D.C. Travelling north, Green approached 12th Street on Saratoga Avenue, south of the intersection.

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

Travelling west, Tate approached 12th Street on Rhode Island Avenue, east of the intersection. *See* JA 1279-80 (Pl. Tr. Exs. 1a-1b), in the Addendum to this Brief.

As Tate approached the intersection, going downhill, his fire truck's speed was increasing and was at least 24 miles per hour greater than the posted speed limit (30 miles per hour) and at least 14 miles per hour greater than the standard of care permitted. The truck's lights and siren were on, although the truck's excessive speed likely outpaced the audibility of the truck's siren. Tate did not stop for the red traffic light controlling his passage through the intersection, and struck Green's car, which was then passing through the intersection, travelling with the green light. Tate admitted he never saw Green's gold car until the collision.

Before moving through the intersection, Green's car had been stopped, third in a line of traffic waiting for the light to turn green. When the light changed, the two cars in front of Green passed through the intersection without incident. The driver of the car waiting behind Green honked his horn for Green to move, and he did so, proceeding though the intersection with the light, only to be hit broadside by the fire truck. Before responding to the horn, while waiting for his light to change, Green had appeared to be reaching in the back seat of his car as if to retrieve something.

The jury heard from four eyewitnesses, three experts on liability, a deputy fire chief who confirmed Tate's knowledge of the requirements governing his

conduct, and a deputy medical examiner (SR 1, at 138-63 (Tobe); *id.* 164-82 (McKnight); *id.* 182-206 (lay witness Miller, driving another fire truck, out of service, coincidentally stopped at a traffic light on Rhode Island Avenue, directly facing east toward Tate, when the crash occurred); *id.* 207-17; SR 4, at 77-118; and SR 5, at 3-7 (Tate); SR 2, at 93-112 (Estate expert Perricone); *id.* 113-68 and SR 3, at 3-17 (Estate expert Miller); SR 5, at 7-57 (District expert Kline); J.A 1266-69 (Carter transcript ("Carter tr."), at 7-20); and SR 3, at 28-27 (Griese)).

a. The Standard Of Care

The National Fire Protection Association's "NFPA 1002" is the controlling standard (S. R. 2, at 94-97, 100-03, 105-10 (Perricone)). This standard specifies "the minimum job performance requirements … for emergency response personnel who drive and operate fire apparatus" (JA 1313, Pl. Tr. Ex. 10, at ¶¶ 1.1 -1.2).

The standard requires a driver, among other things, to operate his vehicle "in compliance with all applicable state and local laws and departmental rules and regulations"; to know about "speed" and "negotiating intersections"; to know the effects of "liquid surge" and "load factors" on controlling the vehicle; to be able "to … maintain control of his vehicle … given … traffic conditions"; and to understand that he is "responsible for the safe and prudent operation of the vehicle under all conditions" (JA 1311, Pl. Tr. Ex. 10, at ¶ 4.3.1).

Tate was a trained, 10-year veteran (SR 1, at 211-12 and SR 4, at 84, 86, 93-

96, 99-100 (Tate); *see also* JA 1266-68, 1269, Carter tr., at 8-13, 18-19; District Br. 5-6). He knew the standard and the District's "laws[,] departmental rules and regulations" governing his performance (SR 4, at 86-87, 95 (Tate)).

b. Tate's Breach Of The Standard

In the District of Columbia, the driver of an emergency vehicle on an emergency run must exercise "due care"; the "safety of the public is paramount" (SR 2, at 163 (Miller)). Tate's fire truck weighed "close to 40,000" pounds (SR 4, at 108 (Tate)); and Tate knew that when a fire truck is loaded with 500 gallons of water, as Tate's truck was, "[t]he water can affect the stopping ability" (SR 4, at 108-09 (Tate)). "[T]he larger the vehicle, the faster you go, the longer it takes to stop" (SR 2, at 163 (Miller)). As the Estate's expert told the jury, Tate's "a professional driver. He's been trained. He's given [the] responsibility" to drive with due care. (*Id.* 165-66 (Miller).) Approaching a red light, travelling downhill in a water-laden truck weighing as much as 20 tons, and with two cars passing through the intersection, Tate nonetheless was "speeding up," "gaining speed," did not "look at the speedometer," "passes the red light at 54 miles an hour, and then strikes Mr. Green's Honda." (*Id.* 165-66 (expert Miller); *see also* SR 1, at 181 (McKnight) ("it was coming at a quick rate of speed").)

Tate's conduct violated several specific municipal regulations and orders of the District (*see, e.g.*, JA 1267-68, Carter tr. 9-13). The official police investigation

concluded that Tate's "speed, combined with the weight, and maneuverability of [his fire truck] compromised the adequate stopping distance needed to avert a collision" (JA 1370, District Tr. Ex. 15, at 21). Tate "failed to slow down as may be necessary for safe operation when approaching the intersection," as required by the pertinent District municipal regulations (*id.*).

(i). Driving At Excessive Speed. The maximum allowable speed for Tate was 40 miles per hour (10 miles per hour over the posted speed limit of 30 miles per hour) (SR 2, at 154, 156 (Miller); *see also* JA 1267, Carter tr. 11-12; SR 4, at 107 (Tate)). Travelling downhill, Tate's truck reached a "minimum speed" of 54 miles per hour — and was accelerating — before Tate applied brakes (SR 2, at 153-54, 156-57, 164-66 (Miller); *see also* SR 4, at 34 (District admission in pleadings: "the speed limit … is 30 miles per hour"; "the District's driver was traveling ... at a minimum of 54 miles per hour before braking prior to the collision")).

(ii). Failure To Avoid Speeding And Its Consequences. Tate admitted that, at 55 miles per hour or more, the truck's speed may outrun the sound of its sirens (SR 1, at 215-16; SR 4, at 90, 109-10 (Tate)). Tate deliberately did not look at his speedometer and did not know his speed (SR 1, at 210; SR 4, at 107-08, 216; and SR 5, at 7 (Tate)).

(iii). Failure To Stop At The Red Light. Tate was required to bring his fire truck to a "full stop" at a red traffic light and not proceed "until it is consistent with safe operation to do so" (JA 1267-68, Carter tr. 9-11, 12-13; SR 1, at 203 (lay witness Miller); SR 1, at 211 and SR 4, at 104-05 (Tate)). The traffic light was red for Tate as he entered the intersection (SR 2, at 138-41, 146 ("[i]t never changed"), 164 (expert Miller)). Four eyewitnesses, including Tate himself, testified that Tate did not stop before entering the intersection (SR 1, at 163 (Tobe); *id.* 181-82 (McKnight); *id.* 185-86 (lay witness Miller); *id.* 209-10 and SR 4, at 88, 105 (Tate)). Indeed, the District admitted Tate "drove through a red light" (SR 4, at 35); s*ee also* SR 1, at 132-33 (District opening statement: "The last time [Tate] looked at the lights controlling that intersection, they were green … [b]ut *before he enters the intersection, it turns red*.") (emphasis added)).

(iv). Failure To Observe And Be Careful At The Intersection. Tate was required not only to stop at the red light but also (a) to wait until "all approaching traffic [had] yielded the right-of-way and it [was] safe to proceed" and (b) to "ensure that all approaching vehicles in all lanes [had] yielded the right-of way before advancing" (JA 1267-68, Carter tr. 12-13; *see also* JA 1370, District Tr. Ex. 15, at 21 (investigation report)). Tate admitted he did not even see all the vehicles, one of which was a large 11-ton postal truck (SR 1, at 166 (McKnight)), in the area of the intersection, including at least two vehicles passing through the intersection

before Green's car (SR 4, at 88, 98, 100-104; and SR 5, at 6 (Tate); *see also* SR 1, at 169, 170, 172, 175-76 (McKnight); SR 1, at 193-94 (lay witness Miller); SR 2, at 143 (expert Miller)). Tate said he did not see any cars going through the intersection (SR 1, at 214 and SR 4, at 101 (Tate)), did not see Green's gold car before entering the intersection (*id.* 106 (Tate)), and either "did not see [Green's] gold car at the time of the collision" (SR 1, at 214 (Tate)) or saw it "[o]nly at the time of our collision" (SR 4, at 102 (Tate); *see also* SR 1, at 159-60, 163 (Tobe) (the fire truck did not start braking until after Green's car was already in the intersection); SR 1, at 134 (District opening statement: "*When Firefighter Tate enters the intersection*, he hits his brakes.") (emphasis added)).

(v). Tate's Discipline. The District fire department disciplined Tate for "exceed[ing] the speed limit by more than ten miles an hour" and "not stop[ping] at a red light at an intersection" (SR 4, at 92, 107 (Tate); *see also* JA 1370, District Tr. Ex. 15, at 21 (investigation report))). Tate has not "driven a fire truck ever since" (SR 4, at 92, 107 (Tate)).

(vi). The Consequences. If Tate had met the standard of care, the fire truck "would have stopped in the crosswalk without impact"; "the crash would not have occurred"; "he would have been able to successfully come to a complete stop without striking the right side of Mr. Green's vehicle" (SR 2, at 156-59 (expert Miller)).

c. The District's Account At Trial

Although Tate "recall[ed] [he] had a green light," insisted he "protect[ed] the safety of others," "proceed[ed] with caution," did not "intentionally run a red light," and did not "think" he was travelling 54 miles per hour or even "exceed[ing] the posted speed limit" (SR 1, at 216; SR 4, at 86-87, 98-99, 106-08 and SR 5, at 7 (Tate)), the jury had reason to disbelieve him. For example, in addition to the evidence recounted above:

- Only after persistent questioning did Tate admit he had been trained to come to a complete stop before entering an intersection against a red light (SR 1, at 211-12 (Tate)). And only after the court intervened did Tate admit he failed to come to a complete stop before entering the intersection (*id.* 209-10 (Tate)).

- Tate gave contradictory testimony on whether he had even slowed his fire truck before entering the intersection (SR 4, at 111-12 and SR 5, at 5-6 (Tate)), despite acknowledging that, even if he had a green light, he was supposed to slow down (SR 4, at 105 (Tate)). Two eyewitnesses testified Tate did not slow down (SR 1, at 163 (Tobe); SR 1, at 182 (McKnight)).

- Despite driving in this residential area "[h]undreds of times" (SR 1, at 213 (Tate)), Tate did not know the correct posted speed limit; he thought it was 35 miles per hour (SR 4, at 104 (Tate)). In fact, it was 30 miles per hour.

The District's expert did not address Tate's speeding, failures to stop, slow down, or observe other vehicles in or near the intersection, and other aspects of Tate's performance (*see*, *e.g.*, SR 18, hearing on post-trial motions, at 15 (District acknowledges it did not "provide an expert related to gross negligence … or in response to the standard of care testimony" of Perricone and Miller)). Instead the District's expert opined that "there was sufficient time for [Green] to recognize the approaching … fire truck, and react accordingly" (SR 5, at 31-33 (Kline)). The jury could reasonably reject this testimony.

d. Green's Circumstances

When stopped at the red light, Green had been looking into his back seat, but then after the light changed and he had been prompted by a honking horn, he proceeded normally into the intersection at approximately 15-20 miles per hour (SR 1, at 145-46, 149-50, 162 (Tobe); *id.* 170, 173, 178-79 (McKnight); *id.* 185, 204-05 (lay witness Miller); *see also* SR 2, at 140-41 (expert Miller)). The topography (a church on a hill) may have obstructed Green's view of the fire truck (SR 1, at 144, 148-49 (Tobe); *id.* 167-69, 177, 181 (McKnight)), and the fire truck's speed may have affected his ability to hear the truck's siren (SR 1, at 215-16 and SR 4, at 90, 109-10 (Tate)). According to McKnight (in the postal truck immediately behind Green), Green's car began to move into the intersection before McKnight had heard the siren (SR 1, at 171, 173, 176-77, 179-80 (McKnight);

District Br. 10 ("[i]t was then that McKnight heard the sirens")). The Estate's expert opined, Green "could not have stopped to avoid the crash"; "the crash is going to occur" (SR 2, at 159-62 (expert Miller)).

2. The Compensatory Relief

a. No Survival Act Damages. The Estate did not seek recovery for Green's pain and suffering. The only possible recovery under the Survival Act would have been for Green's personal savings, *i.e.*, the portion of Green's lost income remaining after deductions for personal consumption and his financial support of his wife and children.[8] On the evidence, and as the District argued (SR 13, at 27-28 ("you go with Dr. Borzilleri and he says, well, he [Green] just would have spent everything on the family")), none of Green's income would have been available for Green's personal savings. The jury properly awarded nothing under the Survival Act (SR 14, at 9; JA 1231).

b. Wrongful Death Damages For Green's Heirs. There was evidence of both economic loss and noneconomic loss. The economic loss was twofold: (i) loss of income Green was contributing to support the family and (ii) the value of lost household services Green was providing to the family. The jury determined an amount for this economic loss and awarded it all to the surviving head of the

[8] *See, e.g.*, *Runyon v. District of Columbia*, 463 F.2d 1319, 1323 (D.C. Cir. 1972).

household, T'Anita. The noneconomic loss was the children's loss of their father's care, education, training, guidance and personal advice over their lifetimes. The jury determined individual amounts for each child according to his or her age.

(i). Economic Loss

Two economists testified on the economic loss, Thomas C. Borzilleri, Ph.D., for the Estate and Charles L. Betsey, Ph.D., for the District. Their testimony explaining their analyses appears in the record at SR 11, at 25-67 (direct), 67-107 (cross), and 109-10 (re-direct) (Borzilleri); and SR 12, at 16-46 (direct) and 47-61 (cross) (Betsey)).

A. Lost Support From Lost Earnings

Green, 31 years old, was earning $35,963 per year when he died. T'Anita — Green's spouse and mother of four of his children — recounted Green's experiences with prior employment, his "love" of work, his service as a "handyman," his care for his children, the "financial support" he provided to the mother of [D'SG], born outside his relationship with T'Anita, and the security he provided his entire family. Examples of Green's financial support included purchasing groceries for the family and driving his children to school and doctors' appointments. The loss of Green's financial support resulted in T'Anita's loss of their apartment, automobile and furniture. (SR 9, at 88, 91-92, 97-99, 110-11, 114, 123, 133-37 (T'Anita); SR 10, at 18-19 (T'Anita); *id*. 50-51, 53 (Dontrell).)

Both economists looked to Green's salary at his death as the base for calculating his lost earnings. (Dr. Betsey calculated an average from Green's work history and used a slightly lower figure.) Both extended that base for Green's work-life expectancy by resort to generally accepted data accounting for possible future unemployment (the data assumed Green would have worked a cumulative total of 28 or 29 additional years). Both economists then consulted other standard references to reduce the resulting figure by what Green would spend on himself (his "personal consumption"), adjusted the result for inflation, reduced that result by taxes Green would be expected to pay, and finally, reduced that result to its "present value." The end result was the total lost financial support.

Dr. Borzilleri calculated the present value of that loss to be $553,781 (if he worked to age 61) and $638,052 (if he worked to age 70). Dr. Betsey's figure was $579,708. Both economists testified that these lost earnings would have been available to Green's spouse, T'Anita, for their joint life expectancy of 41 years.

B. Lost Value Of Household Services

Green was responsible for household duties like cleaning, cooking, grocery shopping, home repairs, and the daily activities of the children, including their morning routine, bathing, transportation to and from school and doctor's appointments, homework, and attending church and teacher conferences (SR 9, at

92-93, 101-02, 112-15, 123, 128-29 (T'Anita); SR 10, at 16-18 (T'Anita); *see also id.* 50-52 (Dontrell)).

Dr. Borzilleri explained how he calculated the value of this loss to T'Anita and the children "until the children turn 18" and "then … it's just the services to the spouse" for their joint life expectancy. He related how he calculated the value, adjusted it for inflation, and reduced the result to present value. Using the same resources, Dr. Betsey, the District's economist, performed a similar calculation but arrived at a lower figure.

Dr. Borzilleri calculated the present value of Green's lost household services to be $1,016,125; Dr. Betsey's figure was $708,547.

C. Total Economic Loss

Thus, for Dr. Borzilleri, the total economic loss was a range of $1,569,906 ($553,781 lost financial support to age 61 plus $1,016,125 lost value of household services) to $1,654,177 ($638,052 lost financial support to age 70 plus $1,016,125 lost value of household services); for the District's economist Dr. Betsey, the comparable figure was $1,288,255 ($579,708 lost financial support plus $708,547 lost value of household services).

The jury awarded T'Anita $1,305,367 — an amount substantially lower than Dr. Borzilleri's figures but slightly higher that Dr. Betsey's estimate.

(ii). Noneconomic Loss

Green was a "very active, hands-on" dad (SR 9, at 116-17) (T'Anita)). "Whatever" the children "were interested in, [Green] made sure that he was interested in as well"; he even taught them how to swim (*id.* 116-17 (T'Anita)). When Green was "unable to find full-time employment … he gave most of his full time to his children" (*id.* 92 (T'Anita)). He was "pretty much the glue … keeping all his kids together," and fostered appreciation of extended family (*id.* 106-07 (T'Anita); SR 10, at 3 (T'Anita)). Accepting his own "bad choices" in life, he taught his children that "every decision … comes with consequences" and "you have to learn from [your] decisions" (SR 9, at 116 (T'Anita)). A "churchgoer," he explained his religious faith — corroborated by the number attending his funeral — to his children, took them to church, and taught them how to pray (*id*., 86-87, 115-16, 131 (T'Anita)). As his eldest daughter put it, "he made his mission to tell me and my siblings [to]… live your teenage years, go to college, get good grades, stay on top of yourself, stay driven, always work hard no matter what" (SR 11, at 114 (D'NG)). He was very protective of his daughters (SR 9, at 124-25 (T'Anita)). "All you need is your father," he would tell them (*id*. 125 (T'Anita); *see also* SR 11, at 115 ([D'NG])).

Green "knew how to divide the time to be that all-around parent" for each child (SR 10, at 54 (Dontrell)). Examples abound.

- [D'MG], Green's eldest son, was 15 when Green died. "[D'MG] basically learned everything from" Green (SR 9, at 117 (T'Anita)). Green was "really good with his hands" (*id*. 97 (T'Anita)), taught [D'MG] skills like painting and laying tile (*id*. 105 (T'Anita)), and took him on handyman jobs (*id*. 107 (T'Anita); *see also* S. R. 10, at 53 (Dontrell)). As [D'MG] got older, Green focused on his "school work," and exhorted him to earn "a high school diploma" (SR 9, at 117-18 (T'Anita)); Green would be "highly upset" to know that [D'MG], after losing his dad, did not finish high school (*id*. 118 (T'Anita)).

- [D'NG], Green's eldest daughter, was 11 when he died. Green taught her how to cook; she was "the apple of his eye" and he took "tremendous[]" interest in her school work, helped her effort to become fifth-grade class president, and then helped her accept defeat (SR 9, at 102, 119-20 (T'Anita)). Like her father, [D'NG] is "very oriented with family" and helps with everything at home, including child care (*id*. 120-21, 126 (T'Anita)).

- [D'AG], his second daughter, was nine when Green died. Green helped her live with Crohn's disease, including overcoming teasing because of her visible feeding tube, her "special" "magic tube," he called it (SR 9, at 88-90, 103-05, 121-22 (T'Anita)).

- Daughter [D'SG], born outside his relationship with T'Anita, was eight when he died. She was with them "regular[ly]"; Green treated her the same as his

other children, and helped with her health needs (SR 9, at 122-23 (T'Anita); *see also id.* 54 (Dontrell)).

- Daughter [D'G] was six when Green died. Her early life was marked by illness and Green "was there every step of the way" (SR 9, at 94-95 (T'Anita)). He had "a special type of relationship" with her (*id.* 123-24 (T'Anita)).

- [D'KG], Green's second son, was two when Green died. "[T]heir relationship was a perfect bond," "like two peas in a pod" (SR 9, at 125-26 (T'Anita)).

For loss of Green's care, education, training, guidance and personal advice over their lifetimes, the jury "allocate[d]" $1,581,032.67 to Green's oldest child; $2,445,696 to his youngest child; and $1,860,305.35; $2,061,922.21; $2,127,666.87; and $2,192,690.85 to his middle children, from oldest to youngest, respectively.

Standard Of Review

A trial court's ruling on judgment as a matter of law is reviewable *de novo*.[9] A trial court's ruling denying a new trial or remittitur is reviewable for abuse of discretion.[10] A trial court's trial management, including rulings on admissibility of

[9] *E.g.*, *District of Columbia v. Bryant*, 307 A.3d 443, 450 (D.C. 2024).

[10] *E.g., Asal v. Mina*, 247 A.3d 260, 277 (D.C. 2021).

expert testimony and other evidentiary matters, on the scope of a new trial, and on whether to give a requested jury instruction, is reviewable for abuse of discretion.[11]

The abuse-of-discretion standard is "supervisory" and "deferential."[12] With an order denying a motion for new trial or remittitur, the scope of review is "especially narrow" because of both the trial court's "unique opportunity to consider the evidence" and "the deference given to the jury's determination …."[13]

---

[11] *E.g.*, *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 715 (D.C. 2013) (trial management); *Coates v. United States*, 558 A.2d 1148, 1152 (D.C. 1989) (admission of expert testimony); *Nunnally v. Graham*, 56 A.3d 130, 136 (D.C. 2012) (evidentiary rulings); *Weinberg v. Johnson*, 518 A.2d 985, 993 (D.C. 1986), *language on another issue "disavow[ed],"Trump v. Carroll*, 292 A.3d 220, 234 n. 13 (D.C. 2023) (*en banc*) (scope of new trial); *Lewis v. United States*, 263 A.3d 1049, 1067 (D.C. 2021) (declining requested jury instruction).

[12] *Johnson v. United States*, 398 A.2d 354, 362 (D.C. 1979) ("review-restraining"); *accord, e.g.*, *Russell v. Call/D, LLC*, 122 A.3d 860, 867 (D.C. 2015) ("'deference . . . is the hallmark of abuse of discretion review'"); *Girardot v. United States*, 398 A.2d 1107, 1113 (D.C. 2014) (same; affirming preclusion of expert); *see also In re M.L.*, 28 A.3d 520, 528 (D.C. 2011) (court must consider whether discretion exercised erroneously and if so whether the impact requires reversal).

[13] *Asal*, 247 A.3d 277; *accord, e.g.*, *Liu v. Allen*, 894 A.2d 453, 459 n. 10 (D.C. 2006); *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'"); *see also Lyons v. Barrazotto*, 667 A.2d 314, 321 (D.C. 1995) ("scope of review is a narrow one when the trial court denies a motion for a new trial and sustains the jury's verdict").

Summary Of Argument

1. The Estate presented admissible, legally sufficient evidence establishing the standard of care governing Tate's conduct. Applying this standard, reasonable jurors could find Tate grossly negligent; indeed the District's argument concedes the finding was reasonable if the evidence on standard of care was sufficient.

2. Only if jurors could reasonably find Green reckless could the District avoid liability. The Estate repeatedly and timely objected to a contributory-negligence instruction. The District proposed only a contributory-negligence instruction, never requested a contributory- recklessness instruction, and accepted the final instructions. The court correctly held the evidence could not support an instruction on Green's alleged recklessness, even if the District had requested one.

3. The error on the contributory-negligence instruction required a new trial, but the District's gross negligence did not require reconsideration. Determining liability was unnecessary; the new trial only required ascertaining the loss arising from Green's death.[14] The circumstances of his death were irrelevant.

4. The Wrongful Death Act allows recovery not only for economic loss but also for noneconomic loss, for which no expert testimony is necessary. The parties' economists provided a basis for compensating economic loss. The jurors'

[14] *See* CIVIL RULE 59(a) (a court may order a new trial on "all or some" of the issues).

collective judgment and common sense provided a basis for compensating noneconomic loss, just as the District had requested.

5. The District has not overcome the presumption of correctness.[15] The record reflects the trial court's careful management. It resolved the District's contentions in multiple rulings canvassing the record and controlling caselaw. The attentive jury determined fair relief based in law and evidence. No "miscarriage of justice" compelled a new trial or remittitur.

Argument

I. The Record Supports The Finding On The District's Gross Negligence

A. If The Estate Established The Standard Of Care, The District Does Not Challenge The Jury's Finding

The District does not contest the finding of gross negligence if the evidence establishing the standard of care was sufficient. *See* District Br. 1, 3-4 (Issue 1), 18-19, 25, 26-27 (Summary of Argument, Point 1), 30-44 (Argument I.)

B. The Estate Established The Standard Of Care

1. Perricone Identified The Standard

Alexander Perricone identified the national standard of care without objection to the foundation for his testimony (*see* SR 2, at 94-97 (Perricone)).

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

The National Fire Protection Association (NFPA) is a national "consensus body that develops standards for any fire service-related item" (*id*. 95). Its members "all have something to do or somehow interact with the fire service"; and they have developed national "job performance requirements" for various aspects of firefighting, including driving (*id*.). Perricone identified NFPA 1002 as the standard pertinent to this case, and highlighted § 4.3 of NFPA 1002, which requires a driver like Tate to operate his fire truck "in compliance with all applicable state and local laws and departmental rules and regulations" (*id*. 95-97, 100-03, 105-110; *see also* JA 1311, Pl. Tr. Ex. 10). This standard is recognized nationally, including within the District of Columbia (SR 2, at 101-02 (Perricone)).

NFPA 1002 thus qualifies as a published authority stating the national standard of care.[16] The District does not honor the full holding of *Clark v. District of Columbia*: "the expert must clearly relate the standard of care to the practices in fact generally followed by other comparable governmental facilities *or to some standard nationally recognized by such units.*"[17] The court correctly relied upon the italicized language (*e.g.*, JA 675-78); there was no abuse of discretion.

---

[16] *See*, *e.g.*, *Hawes v. Chua*, 769 A.2d 797, 806 (D.C. 2001) (noting the importance of "reference to a published standard" for establishing a national standard of care); *accord, e.g.*, *Savage v. Burgess*, 71 A.3d 718, 720-21 (D.C. 2013).

[17] 708 A.2d 632, 635 (D.C. 1997) (emphasis added; footnote omitted); *accord*, *Phillips v. District of Columbia*, 714 A.2d 768, 775 (D.C. 1998) (applying the italicized language to hold that the expert identified a national standard of care).

2. Miller Applied The District's Requirements

NFPA 1002 required Tate to comply with the laws, rules, and regulations of the District of Columbia, and Michael Miller was competent to identify and apply those requirements.[18] He served over 25 years with the District's police department; served as investigator in major crash investigations; "reconstructed" "[a]t least one other" crash involving a District fire truck; testified approximately 30 times; received training in accident reconstruction; earned and maintained certification as an Accredited Traffic Accident Reconstructionist; [19] and has taught "safe driving practices" (including for emergency vehicles) for the District's police department. (*See* SR 2, at 114-16, 129-32 (Miller).) He based his opinions about the accident on the laws, regulations, and policies of the District of Columbia; witness accounts; photographs; police reports; the GPS unit tracking Tate's fire truck; and his study of the scene, maps, and diagrams (*see* SR 2, at 115, 125, 128, 130-31, 135-53 (Miller)).

---

[18] *See, e.g.*, *Snyder v. George Washington Univ.*, 890 A.2d 237, 245-46 (D.C. 2006) (expert qualified based on personal experience, education, attendance at meetings, discussions with colleagues, keeping up with the literature); *accord, e.g.*, *Savage v. Burgess*, 71 A.3d 720-21 (*quoting Hawes v. Chua*, 769 A.2d 806, 808); *Cardenas v. Muangman*, 998 A.2d 303, 309-11 (D.C. 2010); *Kordas v. Sugarbaker*, 990 A.2d 496, 500-01 (D.C. 2010); *Convit v. Wilson*, 980 A.2d 1104, 1124-25 (D.C. 2009); *Aikman v. Kanda*, 975 A.2d 152, 160-62 (D.C. 2009).

[19] *See* the Accreditation Commission for Accident Reconstruction web page at actar.org.

The District accepted Miller's expertise in accident reconstruction; it objected, only on alleged lack of notice, solely to Miller's competence to discuss "safe driving practices" — a subject Miller taught and the court regarded as subsumed within accident reconstruction.[20] (*See* SR 2, at 132-35 (Miller).)

3. The Standard Is Clear

a. The District Waived Its Current Contention. Before verdict, the District did not contend this standard was too vague to enforce. The District failed to preserve this argument.[21]

b. The Contention Lacks Merit. There is nothing ambiguous in the standard. The trial court acted within its discretion to admit the standard in evidence, and the jury reasonably applied it.[22]

---

[20] *See, e.g.*, *Jung v. George Washington University*, 875 A.2d 95, 104-05 (D.C. 2005) ("'[w]hether a witness possesses the requisite qualifications to express an opinion on a particular subject is within the trial court's discretion'"; reviewable only for "abuse" resulting in a "manifestly erroneous" ruling).

[21] *Iron Vine Sec., LLC v. Cygnacom Solutions, Inc.*, 274 A.3d 328, 338 (D.C. 2022) ("[a] party who omits from its [Rule 50(a) pre-verdict] motion a particular evidentiary ground is precluded from later raising that theory … in an appeal"; footnote omitted); *see also Bloom v. Beam*, 99 A.3d 263, 266 (D.C. 2014) (this requirement is "strictly construed").

[22] *See, e.g., Burke v. Scaggs*, 867 A.2d 213, 219 (D.C. 2005) ("[d]etermining the applicable standard of care is a question of fact for the jury"); *Bahura v. S.E.W Investors*, 754 A.2d 928, 945 (D.C. 2000) ("[a]dmissibility and sufficiency … present different issues"); *District of Columbia v. Bethel*, 567 A.2d 1331, 1333 (D.C. 1990) ("it is for the jury, with the assistance of vigorous cross-examination, to measure the worth of the [expert's] opinion").

(i). The standard, NFPA 1002, provides, among other things:

> "This standard identifies the minimum job performance requirements (JPRs) for emergency response personnel who drive and operate fire apparatus."
>
> "JPRs for each … position are the tasks personnel shall be able to perform to carry out the job duties."
>
> "Emergency response personnel who drive and operate fire apparatus shall remain current with the general knowledge, skills, and JPRs addressed for each … position … and shall demonstrate competency on an annual basis."
>
> "The JPRs shall be accomplished in accordance with the requirements of the authority having jurisdiction (AHJ) and all applicable NFPA standards."
>
> "Performance of each requirement of this standard shall be evaluated by personnel approved by the AHJ."
>
> "The JPRs for each … position shall be completed in accordance with recognized practices and procedures or as defined by law or by the AHJ."
>
> "Emergency response personnel who drive and operate fire apparatus shall meet the requirements of Chapter 4 for each type of apparatus." (JA 1313, §§ 1.1, 1.2.5, 1.2.6, 1.3.1, 1.3.3, 1.3.4, 1.3.5.)

"Chapter 4" requires that, "[p]rior to operating fire department vehicles, the fire apparatus driver/operator shall meet the job performance requirements defined in Sections 4.2. and 4.3" (JA 1311, § 4.1). Section 4.3 specifies the "Requisite Knowledge" and "Requisite Skills" to assure "that the vehicle is operated in compliance with all applicable state and local laws and department rules and

regulations" (JA 1311, § 4.3.1). The "Requisite Knowledge" includes "recognition that drivers of fire apparatus are responsible for the safe and prudent operation of the vehicle under all conditions; [knowing] the effects on vehicle control of liquid surge, braking reaction time, and load factors; [the] effects of high center of gravity on … speed …; applicable laws and regulations; … negotiating intersections …; identification and operation of automotive gauges; … operational limits … principles of safe vehicle operation … the common causes of fire apparatus accidents … [and the] policies and procedures of the jurisdiction" (JA 1311-12, §§ 4.3.1(A), 4.3.2(A), 4.3.3(A), 4.3.4(A), 4.3.5(A), 4.3.6(A), 4.3.7 (A)). The "Requisite Skills" include "[t]he ability to … maintain control of the vehicle while accelerating [and] decelerating … given road … and traffic conditions; … and use automotive gauges and controls" (JA 1311-12, §§ 4.3.1(B), 4.3.6(B)).

There is no ambiguity in these words.

(ii). Nor is there is ambiguity in the requirements of the District. Tate was required "[t]o adhere to all Department procedures"; and "[t]o operate [his] emergency vehicle in a safe and prudent manner all times" (JA 1316, 1317). He was bound "to drive with due regard for the safety of all persons" (JA 1314, § 2002.4; *see also* JA 1319). He was required to "come to a full stop" at the red light, to wait "until all approaching traffic ha[d] yielded the right of way and it [was] safe to proceed," and to "ensure that all approaching vehicles in all lanes [had] yielded

the right-of-way before advancing" (JA 1318). His "maximum speed" was to be no more than 40 miles per hour (ten miles per hour above the posted speed limit) (JA 1318; emphasis in original), and he needed to control his speed mindful of "the design and capabilities" of his fire truck (JA 1317). *See also* SR 2, at 156-59, 162-66 (Miller) (discussing Tate's violations of the District's regulations).) In addition, Tate was bound to assure that his siren was "audible" (JA 1314, § 2002.3); the District's "Special Order" governing Tate's performance provides:

> "The use of warning lights and audible warning devices does not automatically grant the right-of-way to an emergency vehicle. These devices are intended to make other drivers aware of the presence of an emergency vehicle. Other drivers are required to yield the right-of-way to an emergency vehicle; however, *they cannot be expected to yield the right-of-way if they do not see or are not aware of the emergency vehicle*.
>
> "Never assume that another vehicle will yield the right of way; it is *always* the emergency vehicle driver's responsibility to ensure the other driver has yielded the right -of-way." (JA 1317; "General Safe Driving Procedures"; emphasis added.)

(iii). Tate was trained in these rules; he knew them; and he was punished for violating them. *See* JA 1316 ("Drivers and officers will be held accountable"). These rules are more detailed than some judicially approved standards governing other professions.[23] And the District's contention that NFPA 1002 relates only to

[23] *E.g.*, *Burke v. Scaggs*, 867 A.2d 221 (for delivering a baby, "gentle" traction (pulling) of the child's head is the standard; "excessive force" is not).

training betrays the text of the standard and common sense. Only one section of NFPA 1002 (§ 1.3.2) directed the "authority having jurisdiction" to establish a training program "to meet the JPRs of this standard" (JA 1313). More fundamentally, the District's reading of NFPA 1002 would require a driver to learn the job performance requirements before he drives, but then permit him to ignore them thereafter. We train doctors, lawyers, or fire truck drivers to assure they meet their obligations throughout their careers, not merely as students.

4. The Standard Is National

As it did below (*see, e.g.*, SR 5, at 66-69, 72-79), the District misunderstands the evidence. Perricone identified the standard applying nationwide. To identify that national standard, Perricone did not need to know the local requirements in Baltimore, the District, or anywhere else. He simply needed to have a basis for identifying the national standard. He did that, without objection.

The national standard, among other things, requires fire truck drivers to comply with the laws, rules, and regulations of the jurisdictions in which they operate. This standard does not vary from jurisdiction to jurisdiction, even if the individual jurisdictions' requirements might. The standard is sensible: the permissible speed of a fire truck operating in the desert of Arizona or the plains of Nebraska can differ from that allowed in Manhattan or Washington, D.C.

C. The Jury Reasonably Found Gross Negligence

Assessing Tate's performance was for the jury.[24] The jurors presumptively followed their instructions defining "gross negligence" (SR 6, at 69-70).[25]

The District does not challenge the jury's finding on Tate's gross negligence if the evidence on standard of care was sufficient. "We are obliged to accept the jury's prerogatives."[26] Absolving Tate was not the sole conclusion available for reasonable jurors.[27] The jury reasonably found that Tate's violations of the District's requirements met the threshold for gross negligence (*see* JA 1267-68, (Carter Dep. 11-13)). There were multiple aggravating factors: With knowledge

---

[24] *Tillery v. District of Columbia,* 227 A.3d 147, 153 (D.C. 2020).

[25] *E.g.*, *Harris v. United States*, 602 A.2d 154, 165 (D.C. 1992) (*en banc*); *see also Parker v. Randolph*, 442 U.S. 62, 73 (1979) ("[a] crucial assumption underlying [trial by jury] is that juries will follow the [trial judge's] instructions").

[26] *NCRIC, Inc. v. Columbia Hospital for Women Med. Ctr., Inc.*, 957 A.2d 890, 902 (D.C. 2008).

[27] *Osman v. First Priority Management*, 308 A.3d 1233, 1237 (D.C. 2024) (judgment as a matter of law is proper only in "extreme" cases where "'the evidence is so clear that reasonable men could reach but one conclusion'"); *accord*, *e.g.*, *Ramey v. Foxhall Urology, Chartered*, 334 A.3d 141, 157 (D.C. 2025) (movants "face a high hurdle"); *Oxendine v. Merrell Dow Pharms*., 506 A.2d 1100, 1103 (D.C. 1986) (judgment as a matter of law "unusual" in negligence cases); *see also 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'").

that 500 gallons of water sloshing around in his 20-ton truck made it even more difficult to control, Tate deliberately ignored his speedometer while accelerating to at least 54 miles per hour, at least 135 percent greater than the speed his orders allowed, and more than 20 miles per hour above the posted speed limit.[28] He knowingly accelerated likely beyond the capacity of his siren to alert others. Professing familiarity with this residential area, he sped by a church at the intersection, and a hill partially obstructing Green's line of sight, and ran a red light without slowing. On a clear mid-morning day, Tate failed to see multiple vehicles in the intersection, and never saw Green's gold care until the collision. As the District touts (Br. 5-6) Tate was well-trained and knew better.

This record compares favorably with others this Court has found sufficient to support "gross negligence" in emergency-run cases.[29]

---

[28] *See generally* DC CODE § 50-2201.04 (c) (2) ("aggravated reckless driving" is driving "20 miles per hour or more above the speed limit" and "[causing] bodily injury to any other person").

[29] *Atkinson v. District of Columbia*, 281 A.3d 568, 571 (D.C. 2022) (police driver "failed to look where he was going, failed to correct his course after [the victim] honked her horn, and veered into [the victim's] lane"; *Tillery*, 227 A.3d 151-53 (failing to slow down or stop at a stop sign; excessive speed; accelerating when approaching intersection; failing to assure warning siren was audible); *District of Columbia v. Chambers*, 965 A.2d 5, 15-16 (D.C. 2009) (speed of 50 miles per hour through populated streets); *Duggan v. District of Columbia*, 783 A.2d 563, 570 (D.C. 2001), *reinstated*, 884 A.2d 661, 662 (D.C. 2005) (*en banc*) (*per curiam*) (police chase "in a busy commercial and residential area"; "busy time of day"; vehicles "traveling at least 30 miles per hour over the 25 miles per hour posted speed limit"); *District of Columbia v. Hawkins*, 782 A.2d 293, 303 (D.C. 2001)

II. The Scope Of The New Trial Was Soundly Based In the Court's Discretion

A. The District Was Not Entitled To An Instruction On Contributory Negligence

With a tortfeasor guilty of gross negligence, liability may be avoided only if the victim also was guilty of gross negligence. That is the teaching of *Sinai v. Polinger Co.,*[30] other authorities of this Court,[31] the Federal courts in the

---

(excessive speed "in a densely populated urban neighborhood, near schools and into an intersection known to be crowded during rush hour"; police drivers were "familiar with the conditions which created the hazard"); *compare Thorne v. District of Columbia*, __ A.3d __, 2025 D.C. App. LEXIS ** 12-21 (D.C., June 26, 2025) (police officer reasonably believed he was not on an emergency run; did not activate lights or siren; drove in alley "at a normal rate of speed" ("about" 15 miles per hour); came to a full stop at end of the alley; allegedly looked both ways before proceeding, entered road, and collided with an oncoming vehicle); *Dickson v. District of Columbia*, 938 A.2d 688, 690-91 (D.C. 2007) (*per curiam*) (officer "exceeded the speed limit by only five miles per hour" and took measures to assure others were aware of his presence); *District of Columbia v. Henderson*, 710 A.2d 874, 875-77 (D.C. 1998) (officer exceeded the speed limit by only five to ten miles per hour and took measures to alert others).

[30] 498 A.2d 520, 525 n.7 (D.C. 1985) ("in cases of reckless conduct by the defendant … the plaintiff's contributory negligence will not bar his action").

[31] *See Martin v. George Hyman Constr. Co.*, 395 A.2d 63, 71 (D.C. 1978) ("ordinary" contributory negligence is not a defense to an "employer's breach of the statutory duty to provide reasonably safe working conditions"; but '"aggravated … negligence, approaching intent, which has been characterized variously as "willful," "wanton," or "reckless,"'" will bar recovery); *see also Payne v. Soft Sheen Prods.*, 486 A.2d 712, 721 n.9 (D.C. 1985) ("contributory negligence is not a defense to a strict liability action"; *Prezzi v. United States*, 62 A.2d 196, 198 (D.C. 1948) ("if appellant drove at an immoderate rate of speed and such act was a proximate or direct cause of the accident, appellant is not relieved from responsibility because of the negligence of" the victim).

District of Columbia,[32] the Restatement,[33] and the courts of Maryland,[34] Virginia,[35] and other jurisdictions.[36]

"The defense[] of contributory negligence … may not conflict with the

---

[32] *See, e.g.*, *Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 166 (D.C. Cir. 2007) (even if the victim had been contributorily negligent, defendant's "reckless disregard for his safety would render it liable for his death").

[33] RESTATEMENT (SECOND) OF TORTS § 482 ("a plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety," except where the plaintiff's conduct was "in reckless disregard of his own safety"); *id.* §§ 503(1) and (3) (same).

[34] *See, e.g.*, *State v. Thomas*, 211 A.3d 274, 278, 301 (2019 Md.) ("contributory negligence is not a defense" to "gross negligence involuntary manslaughter"; *Duren v. State*, 102 A.2d 277, 282 (Md. 1954) (same); *see also Liscombe v. Potomac Edison Co.*, 495 A.2d 838, 847 (Md. 1985) (assuming without deciding that contributory negligence is not a defense where gross negligence has been shown); *see In re A.W.K.*, 778 A.2d 314, 319 (D.C. 2001) ("the jurisprudence of [Maryland] [is] the source of the common law of the District of Columbia").

[35] *See, e.g.*, *Griffin v. Shively*, 315 S.E.2d 210, 213 (Va. 1984) ("while contributory negligence … is not a defense to a defendant's willful and wanton negligence, a plaintiff's wanton and reckless disregard for his own safety bars recovery").

[36] *See, e.g.*, *Merkel v. Scranton*, 193 A.2d 644, 649-50 (Pa. Super. 1963) (contributory negligence in an intersection collision is no defense to a fire truck driver's reckless operation of the fire truck while responding to an emergency); *see also Yancey v. Lea*, 550 S.E.2d 155, 157 (N.C. 2001) ("[c]ontributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries"); *Knight v. Alabama Power Co.*, 580 So. 2d 576, 577 (Ala. 1991) (same); *Wilson v. American Chain & Cable Co.*, 364 F.2d 558, 562 (3d Cir. 1966) (same; applying Pennsylvania law).

benefit intended by [a] statute or regulation."[37] The statute governing the District's liability here confers a benefit — waiver of governmental immunity upon proof of gross negligence. The defense of contributory negligence "may not conflict with [this] benefit."

In addition, the statute bestowing this benefit limits the District to defenses available at common law; and "[a]t common law a defendant's recklessness made it impossible for him to invoke the plaintiff's contributory negligence in order to bar the plaintiff's recovery."[38]

This rule of law recognizes that, "when two persons are equally at fault in producing the injury, neither's negligence is the proximate cause of the injury."[39] Correcting its earlier error,[40] the court's ruling after trial hit the bull's eye:

> "The jury should not have been instructed to make a finding as to mere contributory negligence. Such a result makes plain sense. The contributory negligence doctrine exists to prevent unfair recovery when both a plaintiff and a defendant are ordinarily negligent. But if a defendant's conduct rises to the level of 'wanton, willful

---

[37] *Martin v. George Hyman Constr. Co.*, 395 A.2d 69.

[38] Comment, *The Role of Recklessness in American Systems of Comparative Fault*, 43 OHIO STATE L. J. 399, 400 (1982) (footnote omitted; citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 184-85 (4th ed. 1971)).

[39] *Griffin*, 315 S.E.2d 213.

[40] *See, e.g.*, *Coleman v. Lee Washington Hauling Co.*, 388 A.2d 44, 46 (D.C. 1978) (new trial motion may correct the consequence of an erroneous jury instruction).

> and reckless disregard or conscious indifference for the rights and safety of others,' then a defendant should not escape liability just because a plaintiff was ordinarily negligent." (JA 1179, Order 11.)

B. The Estate Preserved Its Objection To The Contributory-Negligence Instruction

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."[41] This rule assures that instructions are based on evidence actually admitted. The court below honored this requirement by admonishing the parties, well before trial, that it would consider jury instructions "toward the end of trial" (SR 16, pretrial conf., at 67; *see also id.* 73).

The Estate met this requirement; the record rejects the District's plea of "waiver." At least from the pretrial conference, to the day before the hearing on jury instructions, to this charging conference itself: the Estate emphasized its objection to any contributory negligence instruction, and on the eve of and during the charging conference, even expressly invoked the court's earlier ruling that only a finding that Green had been reckless would bar recovery if the District was responsible for gross negligence. *See* pp. 12-14 above.

---

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

No waiver attended the Estate's proposed verdict form containing a line for contributory negligence (District Br. 52). The Estate made clear that this proposal, and its proposed instructions on "last clear chance," were intended only if the court disagreed with the Estate's position that no contributory-negligence instruction was warranted. The Estate may not be faulted for wearing suspenders and a belt. The Estate's alternatives were marks of conservative advocacy, not the intentional relinquishment of a known right.

C. There Was No Basis Requiring An Instruction On Green's Alleged Recklessness

1. The District Waived The Instruction

From pretrial litigation through verdict, the District never sought an instruction finding Green guilty of contributory recklessness. Its positions before and at trial proclaimed, tacitly at least, that as a matter of objective fact, the proposition was not provable.

On a full record in support of summary judgment, the District argued, "Though Coles-Green must show gross negligence, not simple negligence, to prevail in this case, the District need only show that Green's negligence contributed to the collision and his death" (District mem., filed 5/19/21, at 9). In its opinion denying the District's motion, the court wrote, "The District does not contend that Mr. Green's conduct rose [to] the level of recklessness, or at least it does not establish that the evidence is so one-sided that any reasonable jury would

have to conclude that he was not just negligent but reckless" (JA 316, Order 15). The District never moved to reconsider this ruling.

For the pretrial conference, the District did not list a "Green was reckless" defense (*see* JA 769-71, 773-74), cite any authority supporting it (*see* JA 776), propose jury instructions for it (*see* JA 793-95, 802-06), or include it within its proposed verdict form (*see* JA 796, 809-810). Then at trial, after all the evidence was in, the District affirmatively disavowed an assertion that it was trying to prove Green had been reckless (SR 5, at 102 ("Our position was that we have to be grossly negligent, but Mr. Green does not")). It offered an additional verdict form excluding the defense (JA 1129-33) and submitted a detailed "re-write" of the court's proposed instructions with not one syllable about alleged recklessness or gross negligence on Green's part (*see* JA 1103-25).

Green's fault *vel non* was an affirmative defense. A party bears responsibility for requesting an instruction it wants.[42] The District argued only for a contributory-negligence instruction, and accepted *without objection* the court's final instructions (which included the District's requested contributory-negligence

[42] *See, e.g.*, *NCRIC, Inc.,* 957 A.2d 893 (even if NCRIC "might have been entitled to an affirmative defense instruction to that effect, … it never requested one[;] [t]he trial court was under no duty to craft such an instruction for NCRIC *sua sponte*"); *Allen v. United States*, 495 A.2d 1145, 1150 (D.C. 1985) ("The trial court has no general duty to instruct the jury *sua sponte*.").

instruction) (*e.g.*, SR 5, at 86, 102; SR 6, at 5-29, 49-50, 53, 57-87, 136-38; SR 7, at 3, 50-60). The District may not now criticize instructions it helped develop.[43]

The District took these positions after the proceedings on summary judgment had alerted everyone that ordinary contributory negligence could not absolve a defendant's gross negligence. The District acted in the face of the court's findings, on summary judgment, that "the District does not offer evidence establishing as a matter of law that Mr. Green was negligent" (JA 316, Order 15), or that, as a matter of law, "[a]t a minimum, a reasonable jury could conclude that the District's evidence does not prove that Mr. Green was aware of the danger" or "that any risk to which he voluntarily exposed himself was reasonable" (JA 319, Order 18). At trial's close, when discussing final jury instructions, the court correctly observed "there is no evidence that Mr. Green acted recklessly"; there was no basis for a jury instruction, the court ruled, and any argument to that effect would be "[h]ighly speculative" and not reasonably based on the evidence (SR 6, at 14-18).

---

[43] *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); *accord, e.g.*, *Masika v. United States*, 263 A.3d 1070, 1077 (D.C. 2021) (because counsel "did not merely fail to object" "but rather affirmatively agreed" to the instruction, "appellant waived this claim of instructional error")*; see also Durphy v. Kaiser Found. Health Plan of Mid-Atlantic States*, 698 A.2d 459, 470 (D.C. 1997) (a litigant may not keep an argument in its "hip pocket, to be produced only in the event that [the litigant] loses")).

2. If Requested, The Evidence Would Not Have Supported The Instruction

The law prescribes that only Green's "aggravated form of negligence" — equal in degree to the District's — could bar recovery in these circumstances. There was no such evidence here: There were no aggravating factors branding Green's conduct as reckless. There was no evidence Green tried to outrace the fire truck, or proceeded knowing it was arriving; indeed, the evidence cast doubt on whether Green even saw or heard the truck before he drove into the intersection.

"It is elementary that an instruction should not be given if there is no evidence to support it."[44] The court below correctly held that the evidence did not support the instruction (SR 6, at 14-18; JA 1183-85).

D. The District's Plea Of Surprise Is Hollow

When moving for summary judgment, more than two years before trial, the District ironically relied upon *Sinai v. Polinger Co.* (Memo., filed 5/19/21, at 11). When opposing the motion, the Estate argued that contributory negligence is not a defense to gross negligence (Memo., filed 6/2/2021, at 8-9). At least since the denial of that motion — 1-1/2 years before trial — the District knew it needed to

[44] *Ceco Corp. v. Coleman*, 441 A.2d 940, 949 (D.C. 1982) (citations omitted); *see also Gebremdhin v. Avis Rent-A-Car Sys., Inc.*, 689 A.2d 1202, 1204 (D.C. 1997) ("[j]ury instructions must have an evidentiary predicate"); *Carter v. United* States, 531 A.2d 956, 959 (D.C. 1987); *Taylor v. United States*, 380 A.2d 989, 994-95 (D.C. 1977); *Rhodes v. United States*, 354 A.2d 863, 864 (D.C. 1976).

prove recklessness and that, in the court's view, reasonable jurors could find Green free of fault altogether (JA 315-19, Order 14-18). Yet the District consistently requested only a contributory-negligence instruction, the Estate consistently objected to it, and at trial the Estate specifically relied upon the earlier ruling requiring the District to prove recklessness.

With knowledge of this record, aware that an eyewitness (Linette Genus) had died before trial, and having forecast an intent to read portions of her discovery deposition at trial (SR 17, Trial Readiness Hearing, at 36-37), the District's trial team never did so. During the conference on jury instructions, the District never argued prejudice from the absence of Genus's testimony, or sought to re-open its defense case. Instead the District introduced this argument in its motion for *reconsideration* (pp. 11-12) of the order granting the new trial on damages.

It is inconceivable that the District deliberately would withhold evidence of what it perceived was probative of Green's fault. Nor can the District claim ignorance of the law, as if that were an acceptable excuse. In any event, the District is bound by its counsel's tactical decisions.[45] The plea of unfair prejudice comes too late to avoid the consequences of its waiver.

---

[45] *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) ("[a]ny other notion would be wholly inconsistent with our system of representative litigation"); *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).

Furthermore, the court found nothing in Genus's deposition transcript that it regarded as sufficient to warrant an instruction on Green's alleged recklessness. Genus's account "was replete with inadmissible conjecture, … cumulative of other testimony[,] [and] could not demonstrate" that Green had acted in "bad faith" or "in conscious disregard of an obvious risk" (JA 1202-04, Order 14-16; *see also* SR 18, at 27-49). That evidentiary ruling was well within the court's discretion.

E. The New Trial Properly Considered Damages Only

1. Civil Rule 59 Authorized The Remedy

After the post-trial rulings (a) rejecting the District's motion for judgment on the Estate's claim of gross negligence, (b) correcting the error on the contributory-negligence instruction, and (c) finding no evidence to support an instruction on Green's alleged contributory recklessness, the only issue remaining was to measure the loss, if any, suffered by Green's estate and his family. To resolve this issue, re-trying Tate's gross negligence was unnecessary.

There was no claim either for pre-impact fright or post-impact pain and suffering. So the circumstances of Green's death were irrelevant; the jury needed to know only that the District was responsible for it. *See also* SR 19, at 15 (where the District agrees that, "[o]n the damages," the trial is "just damages expert against damages expert" and evidence about Green's relationship with his family). This is not a case where the details of the tortious conduct were important factors

for considering the nature and extent of compensable relief.[46] How Green died did not matter for measuring the impact of his death.

A trial court may limit a new trial to "all or some of the issues."[47] Although the court, in the text of its ruling, noted that judgment would be "entered" on liability, no judgment was entered until after the verdict in the new trial on damages. And whether or not the court below may have referred to an inapplicable subparagraph of Civil Rule 59, or understated the scope of the Rule (District Br. 47-48), there is no reversible error. """Appellate courts review[] judgments, not statements in opinions."""[48]

2. Invoking Civil Rule 50 Was Not Necessary

The Estate need not have sought relief under Civil Rule 50. No motion was

---

[46] *See Finkelstein v. District of Columbia*, 593 A.2d 591, 600 n.14 (D.C. 1991) (*en banc*) (claims for gross physical and emotional abuse; without knowing facts supporting liability, jurors "would be at a loss to know the specific conduct for which it was being asked to consider damages"; issues of fault and damages are "intertwined").

[47] D.C. CIVIL RULE 59(a); *see, e.g.*, *Weinberg v. Johnson*, 518 A.2d 993 ("a new trial does not require a retrial as to all the issues that were part of the first trial"); *see also Howard Univ. v. Lacy*, 828 A.2d 733, 739 n. 9 (2003) (after new trial on damages alone, this Court remands for a trial only on liability, "the sole issue in the case that remains undecided"; trying damages "would be incompatible with 'good judicial husbandry'"); *accord*, *Robinson v. Sarisky*, 535 A.2d 901, 908 (D.C. 1988) (new trial on punitive damages); *Lacy v. District of Columbia*, 408 A.2d 985, 990 (D.C. 1979) (new trial on some but not all claims).

[48] *Jones v. District of Columbia*, 996 A.2d 834, 839 (D.C. 2010).

even necessary; the court could have entered this relief on its own initiative.[49]

The court did not act as if there had been a motion for judgment as a matter of law. The court consistently viewed the question as summoning this Court's jurisprudence on when a party may expect a requested jury instruction. After trial, the court ruled that the District's requested instruction on contributory negligence should have been refused and that, had the District requested an instruction on "contributory recklessness," the evidence would not have supported it. The Estate did not need to move for judgment; it was litigating the propriety of the contributory-negligence instruction. The court awarded relief — which it could have ordered *sua sponte* — sufficient to cure its instructional error.

A new trial on damages is not some hobgoblin foreign to our jurisprudence. A remittitur, for example, presents a litigant "the option" of taking a reduced amount or sitting for a new trial on damages.[50] There are many other examples where a new trial, on damages alone, is the appropriate remedy, without regard to any Civil Rule 50 motion for judgment.[51] Rule 50 was not the only road for relief.

---

[49] DC CIVIL RULE 59(d); 12 MOORE'S FEDERAL PRACTICE – CIVIL § 59.10[2]; *see also Faggins v. Fischer*, 853 A.2d 132, 140 (D.C. 2004) (*per curiam*) (trial court has the "power *and duty*" to grant a new trial if "justice would miscarry" otherwise; emphasis added).

[50] *E.g.*, *Phillips v. District of Columbia*, 458 A.2d 722, 724 (D.C. 1983).

[51] *See, e.g.*, *Jonathan Woodner Co. v. Breeden*, 681 A.2d 1098, 1101 (D.C. 1996) (new trial on punitive damages alone); *Bernard v. Calkins*, 624 A.2d 1217, 1222

III. There Was No Basis For A Remittitur

"Trial courts have historically given *great* weight to jury verdicts;" granting new trials "only" when the court is "convince[d]" that "unusual circumstances" led the jury to be "improperly influenced by non-germane factors or that its verdict is clearly unreasonable."[52] No "unusual circumstances" affected the verdict here.[53]

A. The Jury Faithfully Discharged Its Duty

The jury was mindful of its responsibility, sent in two thoughtful inquiries before deciding, and deliberated for more than five hours (*see*, *e.g.*, SR 14, at 10 (District counsel tells the jury, "you all were listening attentively and taking copious notes"; "I really appreciate your service"); *id*. (trial judge commends the jury)). Agreeing with the District (SR 13, at 30), the jurors did not "give double recovery" for economic loss.[54] They awarded nothing under the Survival Act,

---

(D.C. 1993) (remand for new trial on damages alone); *Robinson v. Sarisky*, 535 A.2d 908-09 (affirming order for new trial on punitive damages alone); *Barron v. District of Columbia*, 494 A.2d 663, 665 (D.C. 1985) (remand for new trial on damages alone); *Washington Gas Light Co. v. Connolly*, 214 F.2d 254, 256 (D.C. Cir. 1954) (remand for new trial on damages only; "[i]t is well settled that we may thus divide the issues and limit the scope of a new trial").

[52]*Louison v. Crockett*, 546 A.2d 400, 403 (D.C. 1988) (emphasis added)).

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

[54] *See, e.g., Strother v. District of Columbia,* 372 A.2d 1291, 1295 & n. 5 (D.C. 1977) (decedent's "projected future income" is recoverable under laws but "'double recovery for the same elements of damage [is to] be avoided'").

compensated Green's wife for her economic loss under the Wrongful Death Act, and provided relief to his children under that law, individually tailored to their lifetimes, for the loss of their father.

B. The Jury Was Entitled To Accept The Economic Experts' Testimony On Present Value

Both parties presented economic experts, and both experts provided the jury their analyses of the economic loss suffered from Green's death. This loss comprised loss of financial support from Green's income and the loss of his household services. For each element, each expert calculated a figure and then reduced each figure to present value. Both experts explained what they did and how they did it (*see* pp. 27-29 above).

In its closing argument, the District urged the jury to disregard these computations, repudiating even those made by the District's own expert (SR 13, at 23-33). It urged the jury to do its own calculations, and criticized the Estate for not providing what the District said was necessary to do its own arithmetic. But the jurors' prerogative was to accept or reject all or part of the experts' testimony (SR 12, at 69 ("you may completely or partially disregard the [expert's] opinion")); they did not need to honor the District's disavowal of its own expert.

C. The District's View Of The Wrongful Death Act is Wrong And Was Not Asserted Below

1. The Act Provides Relief For Economic And Noneconomic Loss

D.C.'s Wrongful Death Act authorizes recovery for economic, tangible loss: this much the District acknowledges. This loss includes recovery for a decedent's lost income and the value of what can be purchased in the marketplace, like household services. For economic loss, "[e]xpert economic testimony" may be helpful, but it "represents only a guideline and" '[need] not be adopted at its face value.'"[55] Here, for economic loss the jury selected a figure between those proposed by the economic experts, and awarded it all to T'Anita as the surviving head of the household.

But the Wrongful Death Act also provides recovery for noneconomic, intangible loss.[56] The jury placed a value on each child's loss of a dad who will not be there to help them as they embrace life's joys while confronting its challenges,

---

[55] *Doe v. Binker*, 492 A.2d 857, 864 (D.C. 1985); *id.* (economic testimony is "not conclusive evidence").

[56] *See*, *e.g.*, *District of Columbia v. Hawkins*, 782 A.2d 303 ("[i]n addition to allowing recovery for pecuniary losses resulting from the loss of financial support … recovery is allowed for the value of services the decedent would have provided, including *e.g.*, loss of care, education, training, guidance and personal advice"); *Doe v. Binker*, 492 A.2d 863-64 (damages for "'loss of care, education, training, guidance and personal advice' to Mr. Binker's children").

learn right from wrong, strive for academic achievement, deal with bullies and bigots, survive puberty and the awkward pre-teen years, cope with sickness and death, and make life-changing decisions on where to live, where to work, and who if anyone to accept as a life partner. These are not "services" that may be "procur[ed] … in the open market" (District Br. 30). Green's children will need their father, and suffer from his loss, each in his or her own way, over their lifetimes. So for each child the jurors determined a unique amount, varying by age, thus accounting for each child's projected time without their father.

The District coldly, variously, and wrongly suggests that an economist must "assign a monetary value" to this intangible loss (District Br. 68, 71), that "[l]oss of parental guidance is an economic loss" (*id*. 73), that the jury's award must bear some relation to economic loss (*id*. 71-72), or that the Wrongful Death Act "allows for the recovery of economic losses only" (*id*. 74). That is not the law in the District of Columbia; jurors may draw upon their common sense and appreciation for what would be just in all the circumstances.[57] And that is exactly what the

[57] *Doe v. Binker*, 492 A.2d 864 (the "'amount of damages … must be based largely on the good sense and sound judgment of the jury … [and] all the facts and circumstances of the case'"); *see also Campbell v. Fort Lincoln New Town Corp*., 55 A.3d 379, 387-88 (D.C. 2012) ("'[r]ough justice in the ascertainment of damages is often the most that can be achieved'") (citation omitted); *Elliott v. Michael James, Inc.*, 559 F.2d 759, 766 (D.C. Cir. 1977) ("[e]ven though some of our opinions have spoken of Wrongful Death Act damages as representing 'pecuniary' loss to the beneficiary, we are quite aware that a dollar 'amount cannot be computed by any mathematical formula'") (citation omitted); *id.* at 767 (the

District told the jury in its closing argument (SR 13, at 30 ("there is no value that you can put on the loss of a parent … that's a number that you're going to come up with"), 33 ("think about that as a group and come up with your own number")).[58]

2. The Relief Is For the Beneficiaries' Lifetimes

The District's assertion that the children's recovery "is limited to the period of [their] minority" (District Br. 72; *see id.* 65) finds no support in the text of the Act, the DC Standardized Jury Instructions, or caselaw squarely rejecting as a "dead letter" the authority of the 130-year-old case upon which the District relies.[59]

"view that definite dollar values be established . . . went beyond the requirements of the proof upon which the good sense and sound judgment of the jury were to operate").

[58] *See Campbell-Crane & Assocs. v. Stamenkovic*, 44 A.3d 924, 945 (D.C. 2012) ("because some injuries are incapable of exact quantification, '[a] court must be *especially* hesitant to disturb a jury's determination of damages in cases involving intangible and non-economic injuries'"; emphasis added).

[59] D.C. Code § 16-2701; CIVIL JURY INSTRUCTIONS FOR DC § 14.05, Instruction 14-5 ("[y]ou should also set a dollar amount on the reasonable value of any services that the deceased would have provided to each beneficiary over their joint life expectancies"); *Hines v. MedStar Georgetown Univ. Med. Ctr.*, 753 F. Supp. 2d 89, 95-99 (D.C. 2010), *declining to follow Baltimore & P.R. Co. v. Golway*, 6 App. D.C. 143, 176-77 (D.C. Cir. 1895), and *distinguishing District of Columbia v. Jackson*, 810 A.2d 388, 398 (D.C. 2002) (also cited by the District (Br. 65) ("the case merely stands for the unremarkable proposition that excessive damages may be reduced by a remittitur")). *See also Runyon v. District of Columbia*, 463 F.2d 1322 (the Act allows recovery for lost financial support during the deceased's work life expectancy or the beneficiary's life expectancy, whichever is shorter).

3. The District Accepted This Scope Of Relief Below

The Wrongful Death Act relief discussed in paragraphs 1 and 2 above is mirrored in the D.C. pattern jury instructions.[60] At the pretrial conference, the District did not object to recovery for each child's noneconomic loss, regardless of age (JA 793-95), and indeed proposed its own "Non-Standard Jury Instruction" including this relief (JA 804; "[i]n making your award, you must consider the loss of care, education, training, guidance and parental advice that DeAngelo Green would have been expected [*sic*] to his beneficiaries"). During the trial, the District did not urge a revision in the instruction to eliminate recovery for this loss (JA 1070-78); in fact, it included this measure of recovery in its own written comments (JA 1121) and did not object to this instruction as given (*see* SR 5, at 87-89, 105-09; SR 6, at 80-83; SR 9, at 7-8; SR 10, at 64-75; SR 11, at 4-7; SR 12, at 63-83). In its post-trial motions, the District never made the contention it makes here (*see* District Motion (pp. 10-15) and Reply (pp. 4-5), filed May 1 and May 24, 2024).

D. The Jury Awarded Damages Grounded In Common Sense, Evidence, And The Law

1. The Estate presented no maudlin displays; the jury saw two family photographs and heard from T'Anita, two other family members, and an economist. Twice the Estate emphasized the case was not about sympathy (SR 13,

[60] *See* CIVIL JURY INSTRUCTIONS FOR DC § 14.05, Instruction 14-5.

at 4, 10). Its closing argument asked the jurors to provide compensatory relief they deemed fair. There was no inflamed rhetoric and the District interposed no pertinent objection or motion for mistrial.[61] *See* SR 13, at 4-15, 35-43.

2. At the start of trial, the court told the jury that lawyers' opening statements "are not evidence," and that the jury must base its decision "on the evidence" (SR 9, at 64-66). The court's closing instructions emphasized that lawyers' statements "are not evidence"; and that damages were not to be based on sympathy or sorrow (SR 12, at 66, 74, 77-78, 80). "[T]his court will not 'upset the verdict by assuming the jury'" failed to follow these instructions.[62]

3. "[T]he primary purpose of compensatory damages in personal injury cases is to make the plaintiff whole."[63] Honoring the court's instructions, weighing

---

[61] *See, e.g., District of Columbia v. Bethel*, 567 A.2d 1336-38 (to reverse for improper final argument, "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") (internal quotation marks and citations omitted); *see also Doe v. Medlantic Health Care Group, Inc.*, 814 A.2d 939, 953 (D.C. 2003) (no new trial where, among other things, counsel failed to object or request a mistrial, and "proper instructions were given as to the jury's role as the sole arbiter of the facts").

[62] *Harris v. United States,* 602 A.2d 165; *accord*, *Parker v. Randolph*, 442 U.S. 73; *Blackwell v. Dass*, 6 A.3d 1274, 1278 (D.C. 2010).

[63] *Croley v. Republican Nat'l Comm.*, 759 A.2d 682, 689 (D.C. 2000) (internal quotation marks and citations omitted).

the evidence, and drawing upon their collective wisdom, experience, and common sense, the jurors did exactly what the law asks of them. They struck the right "balance between ensuring that important personal rights are not lightly disregarded, and avoiding extravagant awards that bear little or no relation to the actual injury involved."[64] The District refuses even to acknowledge that the jurors determined unique amounts, child by child, and did not just award the aggregate sum the District emphasizes. The jury's individual awards are not "beyond all reason," "so great as to shock the conscience," or "so inordinately large as *obviously* to exceed the maximum limit of a reasonable range within which the jury may properly operate."[65] While there are no "perfect trials,"[66] the purity of this record stands in stark contrast with those where trial judges have granted

---

[64] *Phillips v. District of Columbia*, 458 A.2d 726.

[65] *Daka Inc. v. Breiner*, 711 A.2d 86, 100 (D.C. 1998) (emphasis added) (internal quotation marks and citations omitted); *accord*, *e.g.*, *District of Columbia v. Bamidele*, 103 A.3d 516, 521 (D.C. 2014); *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 1234-36, 1242-43) (McKenna, J., denying remittitur; three children each awarded $5 Million for loss of parental care, education, training, guidance and personal advice), *appeal dismissed*, No. 22-CV-0532 (D.C., Oct. 27, 2023).

[66] *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984) (a litigant "'is entitled to a fair trial, but not a perfect one,' for there are no perfect trials'"), *quoted and applied in Blackwell v. Dass*, 6 A.3d 1281 ("The trial court's actions in this case were rational and reasonable, resulting in a trial that was certainly fair.").

remittiturs.[67]

4. This Court defers to a trial judge's decision to reject a requested remittitur. We know of no reported decision in which this Court reversed a trial court's decision denying a remittitur, save one where this Court remanded to require the trial judge to provide the rationale for his decision.[68] Here the trial court explained its reasoning (JA 1259-60).

5. Illustrating the deference to which verdicts are entitled, 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."[69] (Emphasis added.)

---

[67] *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) (jury was "improperly motivated").

[68] *Louison*, 546 A.2d 401.

[69] *WMATA v. Jeanty*, 718 A.2d 172, 180 n.14 (D.C. 1998); *see also Campbell-Crane & Assocs.,* 44 A.3d 945-47 ("[i]t is not our role to credit or weigh the evidence of injury"); *NCRIC, Inc.,* 957 A.2d 902 ("[w]e are obliged to respect the

That teaching applies no less in this case.

IV. No Evidentiary Ruling Taints This Relief

A. The Court Fairly Managed The Allegation Of PCP Impairment

From PCP allegedly in Green's blood sample, and the account of one lay eyewitness, the District argues that Green was impaired by PCP. Rejecting this proffer was soundly based and presents no reversible error.

1. The Report Of PCP Could Not Be Verified

Because the District destroyed the blood sample, the Estate never was able to confirm its authenticity or accuracy (*e.g.*, JA 361-62, Zarwell Dep. 88-92). The Estate disputed its authenticity (*see* SR 16, pretrial conf., at 65 ("[w]e have consistently denied that the specimen was his")). And the concentration of PCP was suspect: the District's Chief Toxicologist testified, "[P]ostmortem blood concentration … can sometimes be elevated, compared to nonpostmortem concentration" (JA 228, Zarwell Dep. 119).

2. The Presence Of PCP Is Not Impairment

Even if authentic and accurate, the sample alone could not serve as a reliable basis for finding Green impaired. The District equates PCP with alcohol, but

---

jury's prerogatives"); *District of Columbia v. Harris*, 770 A.2d 82, 89 (2001) ("[i]t is the jury's province, and not the court's, to weigh the evidence and to determine the credibility of witnesses").

current scientific authority rejects that assertion. The District's proffered expert, Dr. Copeland, was "not aware of any" literature reporting blood level alone to be sufficient (JA 83-84, Copeland Dep. 73, 77-79); the sole "authoritative" study he identified (the "Kunsman" study) did not "establish a correlation between PCP blood concentration and impairment" (JA 84-85, 104, Copeland Dep. 77-79, 83, 158-59). The Kunsman study labelled this finding its "most important point," and concluded "it is questionable whether such a correlation can be established" (JA 193). "PCP is one of those drugs where the blood concentration really does not correlate with the behavior very well," Copeland testified (JA 85, Copeland Dep. 84; *see also* JA 79-80, Copeland Dep. 58-61; JA 223-26, 368-70, Zarwell Dep. 62-65, 119, 140-41 (concentration "doesn't correlate with impairment")). And the duration of PCP's influence "varies [from] individual to individual" (JA 93, 97-98, Copeland Dep. 114, 130-34); so even if Green had taken PCP, Copeland had "no way of determining" what he took and how it affected him (JA 97-98, 105, 111, Copeland Dep. 132, 134, 161-62, 187-88; *see also* JA 370, Zarwell Dep. 141). The District's Chief Toxicologist testified that he, too, could not identify when Green may have ingested PCP, how much he ingested, or whether he was impaired when he died (JA 223-26, 228-30, Zarwell Dep. 62-65, 119, 123, 140-41).

3. The District Proffered No Qualified Observers

According to the scientific evidence, to support an opinion of PCP

impairment, not only must there be PCP in the blood, but there also must be first-hand "clinical observation of behavior at the time" (JA 93, Copeland Dep. 115; *see also* JA 80, Copeland Dep. 62). And only a trained "Drug Recognition Expert," a "DRE," looking for specific "clues," can confirm PCP impairment (JA 80, 85-86, 93, Copeland Dep. 62, 84-85, 115; JA 191-92, Kunsman study).

No such observer and no such clues were at play here. Copeland did not "have access to [Green's] behavior status"; "I don't have any behavior reference" (JA 100, 104, Copeland Dep. 144, 160). The lay witness, McKnight, driving his postal truck behind Green, reported that Green had been driving "[r]egular[ly]," "normal[ly]" (JA 351, McKnight Dep. 28-31). When stopped at the traffic light, there were two cars in front of Green, and McKnight said Green had left either a "normal" or a bus length's space between his car and the car in front of him (*see* JA 351, 393, McKnight Dep. 29-31, 78). McKnight alerted Green to the changed traffic signal, because while stopped Green had reached into the back as if to retrieve something. McKnight regarded it as "[n]othing out of the ordinary" (JA 562, McKnight Dep. 32). Before McKnight had sounded his horn, McKnight had not heard any siren; he heard no siren until after Green already had entered the intersection (JA 352, McKnight Dep. 36-39).

4. Copeland's Opinions Were Not Reliable

The District made no showing that Copeland's opinions had been, or even

were capable of being, tested, subjected to peer review and publication, analyzed for reliability, generally accepted in the scientific community, or consistent with the standards and controls governing Copeland's field (*see* JA 127-28, Copeland Dep. 252-53; JA 309-10, Order 8-9). To the extent he has ever analyzed drug concentrations correlating with impairment, it has involved other substances — not PCP — and "all of these were done in animal studies." Copeland has never before opined or written a report on alleged PCP impairment. He admitted his report here was, to a large extent, a "cut and paste" job of unattributed sources, a paper he would grade no higher than "D" and whose author's credibility "would" be "doubt[ed]" (*see* JA 88-89, 112-25, Copeland Dep. 96-100, 191-244).[70] He has never published any articles on PCP or on "anything to do with the issues in this case," has never taught anything specifically about PCP, and has never conducted a study or given any speeches or presentations on it. In his class, he only "gives it a good ten to 15 minutes." He is not trained as a DRE, is unfamiliar with their training and the factors they use to determine PCP impairment, and could not identify any of the observable DRE "clues" or signs of PCP in Green. Although a member of the Society of Toxicology, he has not "attended particularly any of the

[70] *See, e.g.*, *Nat'l Ass'n of Postmasters of the United States v. Washington*, 894 A.2d 471, 474 (D.C. 2006) (this Court may affirm on any ground (*i.e.*, plagiarism) argued but not decided below).

sessions on PCP." *See* JA 78, 86-92, 101-03, 106-07, 112-25, Copeland Dep. 56, 85-87, 92-94, 96-100, 103-04, 106-09, 110-11, 146-55, 169, 166-68, 191-244. Copeland's questionable competence can sustain the order precluding him.[71]

5. The Court Avoided A Speculative And Inflamed Verdict

a. Copeland suggested that Green "did not seem concerned about" the fire truck; "[h]e was feeling more concerned about something that was in the back seat"; "[i]f I need something in the back … I'll pull over …." (*See* JA 69-72, 104-05, 126-27, Copeland Dep. 17-31, 160-61, 248-51.) But while a driver's brief inattention while stopped at a red light may be an irritant, it is not proof of drug-induced impairment. For Green, it was more probably a distraction prompted by retrieving something that had slipped through a front seat to the rear floor. Green's apparent delay in responding to the green light, or not seeing or hearing the speeding fire truck until it was in the intersection, may not serve as a scientific basis for an opinion he was impaired. Green's response mirrored that of McKnight, about whom the District has made no contention of impairment. Geography and the fire truck's speed likely accounted for inability to observe the fire truck.

---

[71] *See, e.g.*, *Haidak v. Corso*, 841 A.2d 316, 327 (D.C. 2004) ("[e]xpert testimony may be excluded when the expert is unable to show a reliable basis for their theory"); *see also Motorola, Inc. v. Murray*, 147 A.3d 755, *quoting General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("'[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered'").

Copeland's testimony comprised opinions "based only on [his] personal experience and subjective views" (JA 307, Order 6).[72]

b. The trial court recognized the District's effort "relentlessly" to insinuate PCP into this case (SR 17, Trial Readiness Hearing, at 4), even to color Green's contributions as husband and father, a proffer the trial court properly rebuffed in rulings the District does not appeal.[73] The specter of PCP is sprinkled throughout the District's brief: For example, the District cites snippets from a pretrial deposition of Green's brother (District Br. 12-13), but ignores the context: two isolated incidents a year apart and seven years or more before Green's death (JA 402-05). The District presented no witness who had observed Green's speech or physical movements on the morning he died.[74] Repeated references to the toxicology report, even if it is a business record, do not make its numbers any less

---

[72] *Cf. Hawes v. Chua*, 769 A.2d 806 (on standard of care, "a statement only of what the expert 'would do under similar circumstances . . .' is inadequate"); *accord*, *e.g.*, *Nwaneri v. Sandidge*, 931 A.2d 466, 470 (D.C. 2007); *Strickland v. Pinder*, 899 A.2d 770, 773 (D.C. 2006).

[73] *See generally In re Am. V.*, 833 A.2d 493, 499 (D.C. 2003) ("mere existence of a drug problem" insufficient to show parental neglect); *In re M.D.*, 758 A.2d 27, 32 n. 9 (D.C. 2000) (same).

[74] *Compare Harris v. District of Columbia*, 601 A.2d 21, 28 (D.C. 1991) (positive test results for PCP *and* testimony from three experienced police officers reporting contemporaneous observations of the driver's appearance, speech, and other behavior after the driver had "crossed the median line of a two-way street and went up on the opposite curb").

unfairly prejudicial — the autopsy report did not ascribe PCP as relevant to Green's death (*see* SR 3, at 29-30 and JA 61, Deputy Medical Examiner Giese Dep. 51). Titillating references to PCP offer only inflammatory, unfairly prejudicial matter likely to invite speculation and skew deliberations.[75] District counsel once had it right: "We're not arguing that he was high that day," agreeing with the court that "[t]here's no evidence of that" (SR 16, pretrial conf., at 61).

c. "[E]xpert testimony ordinarily is required when the key question is whether and how PCP continues to affect a particular individual hours after ingestion"; "without an expert … the probative value of the PCP evidence [is] low" and the "prejudicial effect" high.[76] Nonetheless, the jury knew about PCP and Green (*see, e.g.*, SR 10, at 15-16 (T'Anita) (District's cross-examination), 31 (District's reference to Green's "drug conviction" seven years before his death), 41 (Green's "bad decisions" "would never" diminish "from him being a great father"); SR 10, at 56-57 (Dontrell) (District's cross-examination). The jury heard this and awarded damages to Green's heirs anyway.

d. The court studied the District's proffers and weighed admissibility

---

[75] *See*, *e.g., Jackson v. United States*, 210 A.3d 800, 807-08 (D.C. 2019) (jury's deliberations "may be colored by stories in the news describing individuals on PCP as violent and impulsive"); *Travers v. District of Columbia*, 672 A.2d 566, 568 (D.C. 1996) (purpose of expert testimony is to avoid decision by speculation).

[76] *Jackson*, 210 A.3d 806-07.

through the prisms of scientific reliability, probative value, fair versus unfair prejudice, and rules to avoid decisions based on speculation, surmise, and suspicion. Following the teaching of *Jackson* and *Coates* cannot be reversible error. [77]

B. The Jury Fairly Considered "Safe Driving Practices"

The District had two written reports from Miller, his biographical and testimonial history, and its own deposition of him (*see, e.g.*, JA 29-31, 36-38, 525-53, 599-612). His qualifications were the focus of pretrial litigation (*see, e.g.*, SR 15, motions hearing, at 17-40). There was no surprise trial testimony.

The court rejected the District's "lack of notice" claim. It also found knowledge of "safe driving practices" to be within Miller's accident-reconstruction qualifications, to which the District had not objected. Discovering an accident's cause must include identifying the unsafe-driving pieces of the puzzle. The court's

[77] *See, e.g.*, *Coates*, 558 A.2d 1151-52, 1154-55 (trial judge "exercised his discretion reasonably" to preclude testimony from a "professor of pharmacology" who had only "limited experience in observing PCP users" and "acknowledged … that the effect of PCP on a given person is 'very, very unpredictable, and the response of individuals is variable'" and dependent on several factors); *compare Robinson v. United States*, 50 A.3d 508, 524-28 (D.C. 2012), *cert. denied*, 569 U.S. 986 (2013) (error, albeit harmless, to preclude an experienced expert's testimony on PCP-impairment on a witness, when there was first-hand knowledge about the PCP the witness had smoked, when she had smoked it, her past experience with PCP, "her self-reporting about how long it affected her," and her specific behavior at the time in question).

ruling was not "manifestly erroneous."[78]

In any event, the District failed to perfect a record revealing whether, if there was error, it was prejudicial. The verdict could have been based on Miller's testimony on "safe driving practices," "accident reconstruction," or both. "[T]he 'mere theoretical possibility that the jury based its decision' on one theory … rather than the other … is not basis enough to call its verdict into question."[79] The District did not request a verdict requiring the jury to identify which theory of liability provided the basis for its decision, so it is impossible now to know the basis, and therefore to engage in meaningful appellate review. As in *Burke v. Scaggs,* the District is estopped from the contention in this Court.[80]

The jury learned that Tate deliberately did not check his speedometer, was speeding well beyond the limit prescribed for him and likely beyond the capability of his sirens to warn Green, did not slow for the intersection, ran a red light, failed to see other vehicles in the intersection, and was punished by the District Fire Department for his conduct. It is not beyond the ken of lay people to recognize

---

[78] *See, e.g.*, *Jung v. George Washington University*, 875 A.2d 104-05.

[79] *George Washington Univ. v. Lawson*, 745 A.2d 323, 329 (D.C. 2000).

[80] 867 A.2d 221-22; *see also Blackwell v. Dass*, 6 A.3d 1279 n.7; *Robinson v. Washington Internal Medicine Assocs., P.C.,* 647 A.2d 1140, 1144-45 (D.C. 1994).

these "unsafe driving practices." An expert's opinion was not even necessary.[81]

Conclusion

The judgment should be affirmed.

Respectfully submitted,

/s/ Alfred F. Belcuore

ALFRED F. BELCUORE *
DC Bar No. 181560

Law Offices of Alfred F. Belcuore
336 Constitution Ave. NE
Washington, DC 20002
alfred.belcuore@belcuorelaw.com
301-367-2992

Attorneys for Appellee

OF COUNSEL:

WILLIAM P. LIGHTFOOT
DC Bar No. 313593

Lightfoot Law, PLLC
Franklin Square
1300 I Street, NW, Suite 400 E
Washington, DC 20005
blightfoot@lightfootlawdc.com
202-918-1823

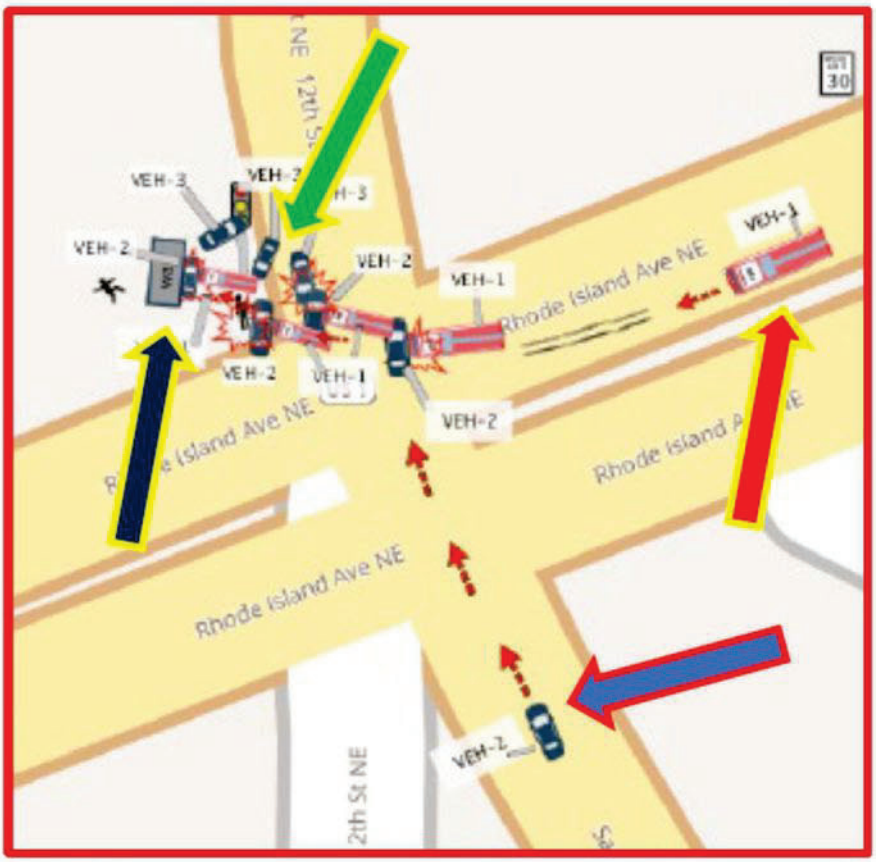
ALLYSON KITCHEL
DC Bar No. 496687

Kitchel Law, PLLC
700 Pennsylvania Ave SE, Second Floor
Washington, DC 20003
allyson@kitchellaw.com
202-949-7109

July 2025

[81] *See, e.g.*, *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988) (no standard-of-care expert needed "where the alleged negligent act is 'within the realm of common knowledge and everyday experience'").

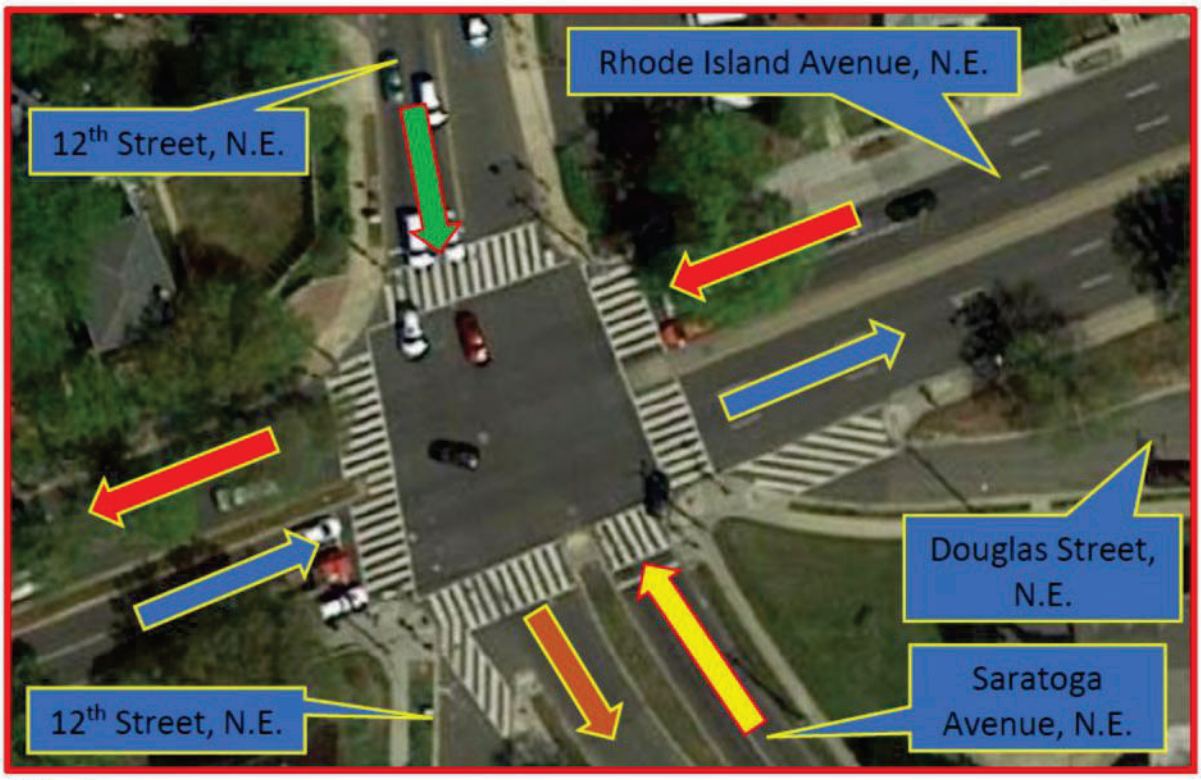
ADDENDUM



Picture 1

PLAINTIFF'S EXHIBIT

1a



Picture 2

PLAINTIFF'S EXHIBIT

1b

Certificate Of Service

This will certify that, on July 30, 2025, I served the foregoing Brief for Appellee upon Stacy L. Anderson, Esquire, and all other counsel of record, through the Court's electronic service.

/s/ Alfred F. Belcuore

_____

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