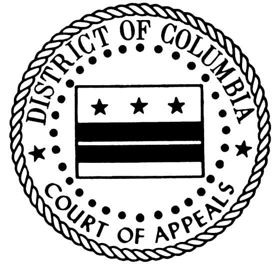

Clerk of the Court
Received 01/26/2023 12:48 PM
Filed 01/26/2023 12:48 PM

No. 22-CV-532

District of Columbia Court of Appeals

WASHINGTON HOSPITAL CENTER CORPORATION D/B/A WASHINGTON WOMEN'S WELLNESS CENTER AT WASHINGTON HOSPITAL CENTER,

Appellant,

v.

SHANAYE BATEY, ET AL.

Appellees.

On Appeal from the Superior Court of the District of Columbia

---

BRIEF FOR APPELLEES

---

*Marc Fiedler
mfiedler@koonz.com
KOONZ MCKENNEY JOHNSON & DEPAOLIS LLP
2001 Pennsylvania Avenue, N.W.
Suite 530
Washington, D.C. 20006
(202) 659-5500

Alfred F. Belcuore
alfred.belcuore@belcuorelaw.com
LAW OFFICES OF ALFRED F. BELCUORE
336 Constitution Avenue, N.E.
Washington, D.C. 20002
(301) 367-2992

Attorneys for Appellees

Of Counsel

Catherine D. Bertram
katie@blg-dc.com
BERTRAM LAW GROUP, PLLC
20 F Street, N.W., 7th Floor
Washington, D.C. 20001
(202) 803-5800

Allan M. Siegel
siegel@dc-law.net
CHAIKIN, SHERMAN, CAMMARATA & SIEGEL, P.C.
1232 17th Street, N.W.
Washington, D.C. 20036
(202) 659-8600

Parties and Counsel

The following listed parties and counsel appeared in the trial court and are appearing in this Court:

Plaintiffs-Appellees:	Shanaye Batey, as Personal Representative of the Estate of Tiffaney Dunbar and T.A.D., J.D., and T.J.D., her minor children
Defendant-Appellant:	Washington Hospital Center Corporation, d/b/a Washington Women's Wellness Center at Washington Hospital Center
Counsel for Plaintiffs-Appellees:	Marc Fiedler Koonz McKenney Johnson & DePaolis LLP
	Alfred F. Belcuore Law Offices of Alfred F. Belcuore
	Catherine D. Bertram Bertram Law Group, PLLC
	Allan M. Siegel Chaikin, Sherman, Cammarata & Siegel, P.C.
Counsel for Defendant-Appellant:	Derek M. Stikeleather Janet A. Forero Goodell, DeVries, Leech & Dann, LLP
	Daniel C. Costello Timothy D. Fisher Wharton Levin Ehrmantraut & Klein, P.A.

No intervenors or amici curiae appeared below and to date none have appeared in this Court.

TABLE OF CONTENTS

	Page
Parties and Counsel…………………………………………………	i
Table of Contents…………………………………………………	iii
Table of Authorities………………………………………………	vi
Jurisdiction………………………………………………………..	1
Statement of the Issues …………………………………………...	1
Counterstatement of the Case……………………………………..	2
A. Nature of the case..…………………………………….…...	2
B. Proceedings and disposition below..………………………	3
1. Trial and judgment …………………………………….	3
2. The trial court's rulings on contributory negligence ……...	4
a. The ruling in limine ……………………………….	4
b. The ruling at trial ..………………………………....	5
c. The ruling after trial …………………………….....	6
3. The trial court's rulings on informed consent…………….	6
4. The verdict form..……………………………………….	7
5. The trial court's rulings on the *Colston* argument ……….	8

Page

C. Facts…………………………………………………………….. 8

1. Tiffaney Dunbar………………………………………… 8

2. Ms. Dunbar's treatment at the Hospital …………………. 9

3. Liability and damages …………………………………… 12

a. Medical negligence……………………………….... 12

b. Failure to elicit informed consent …..…………….. 13

c. Damages………………………………………….... 13

Summary of Argument…………………………………………..... 14

Standard of Review……………………………………………….… 15

Argument…..……………………………………………………… 16

I. The trial court's rulings as to the Hospital's contributory-negligence defense were neither erroneous nor prejudicial……... 16

A. The Hospital may not contest the rulings on contributory negligence……………………….… 16

B. The Hospital failed to establish the elements of contributory negligence……………………… 18

1. The elements……………………………………… . 18

2. The evidence……………………………………… 20

C. The Hospital was not entitled to an instruction on contributory negligence……………………………….. 24

D. The Hospital's remaining contentions on contributory negligence lack merit..................…………… 25

Page

II. The jury fairly considered the informed-consent claim………….. 32

A. This Court need not reach the issue of the Hospital's informed-consent liability…………………. 32

B. The Hospital cannot now challenge the sufficiency of the evidence ………..…………………….. 33

C. The Hospital misapprehends the informed-consent doctrine………………………………... 34

III. The jury fairly compensated each child for his or her loss……… 39

A. Each child suffered economic and noneconomic loss......... 40

B. Each child's noneconomic loss was soundly grounded in evidence……………………………. 42

C. The jury fairly determined each child's relief.…………… 43

D. The relief awarded each child is well within reason……… 46

Conclusion……………………………………………………… 50

Certificate of Service

Redaction Certificate Disclosure Form

TABLE OF AUTHORITIES

Page

Cases

* *Asal v. Mina*, 247 A.3d 260 (D.C. 2021) ……………………….. 16, 28, 39

Barbosa v. Osbourne,
183 A.3d 785 (Md. Ct. Spec. App. 2018) ……………………… 29

Blackwell v. Dass, 6 A.3d 1274 (D.C. 2010) …………….............. 42

Bell v. Jones, 523 A.2d 982 (D.C. 1986) ………………………... 31

Bloom v. Beam, 99 A.3d 263, 266 (D.C. 2014)…………………. 33

Bond v. Ivanjack, 740 A.2d 968 (D.C. 1999) …………………… 39-40, 46

Brown v. Nat'l Acad. of Scis.,
844 A.2d 1113 (D.C. 2004)……………………………………. 28

Burke v. Scaggs, 867 A.2d 213 (D.C. 2005) …………………… 17

Burton v. United States,
668 F. Supp. 2d 86 (D.C. 2009) …………………….............. 20, 26

Campbell v. Fort Lincoln New Town Corp.,
55 A.3d 379 (D.C. 2012)………………………………………. 42

* *Campbell-Crane & Assocs., Inc. v. Stamenkovic*,
44 A.3d 924 (D.C. 2012)………………………………………. *passim*

* *Canterbury v. Spence*,
464 F.2d 772 (D.C. Cir. 1972)…………………………………. *passim*

Capitol Hill Hosp. v. Jones,
532 A.2d 89 (D.C. 1987)………………………………………. 48

Page

Cases

Cauman v. George Washington University,
630 A.2d 1104 (D.C. 1993) ………………………………………. 38, 39

Ceco Corp. v. Coleman, 441 A.2d 940 (D.C. 1982) ……………. 24

Chudson v. Ratra, 548 A.2d 172 (Md. Ct. Spec. App. 1988) …… 29, 34

Cleary v. Group Health Ass'n,
691 A.2d 148 (D.C. 1997) ………………………………………… 39

Cobb v. Standard Drug Co.,
453 A.2d 110 (D.C. 1982) ……………………………………... 17

Cole v. United States, 478 A.2d 277 (D.C. 1984) ………………. 17

Convit v. Wilson, 980 A.2d 1104 (D.C. 2009)…………………..... 28, 31

* *Crain v. Allison*, 443 A.2d 558 (D.C. 1982) ……………………... *passim*

Croley v. Republican Nat'l Comm., 759 A.2d 682 (D.C. 2000) …. 48

Daka Inc. v. Breiner, 711 A.2d 86 (D.C. 1998) ………………….. 48

Dennis v. Jones, 928 A.2d 672 (D.C. 2007) …………………….. 30, 35

District of Columbia v. Bamidele,
103 A.3d 516 (D.C. 2014)……………………………………… 48

District of Columbia v. Banks,
646 A.2d 972 (D.C. 1994) ………………………………………… 33

District of Columbia v. Bethel,
567 A.2d 1331 (D.C. 1987) ………………………………………. 44

* *District of Columbia v. Colston,*
468 A.2d 954 (D.C. 1983) ………………………………………… 44

Page

Cases

District of Columbia v. Hawkins,
782 A.2d 293 (D.C. 2001) ………………………………………… 47

* *District of Columbia v. Mitchell*,
533 A.2d 629 (D.C. 1987) ……………………………………........... 18, 24, 26

District of Columbia v. Peters,
527 A.2d 1269 (D.C. 1987) …………………………………… 24-25

* *District of Columbia v. Sterling*,
578 A.2d 1163 (D.C. 1990) …………………………………… 18, 19, 25, 26

District of Columbia v. Wical Ltd. P'ship,
630 A.2d 174 (D.C. 1993) ……………………………………... 33

* *Doe v. Binker*, 492 A.2d 857 (D.C. 1985) ……………………….. 42, 47

Doe v. Medlantic Health Care Group, Inc.,
814 A.2d 939 (2003) …………………………………………… 44-45

Dunn v. Cath. Med. Ctr. of Brooklyn & Queens, Inc.,
389 N.Y.S.2d 123 (N.Y. App. Div. 1976) ……………………… 31

* *Durphy v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*,
698 A.2d 459 (D.C. 1997) ……………………………….......... *passim*

* *Elliott v. Michael James, Inc.*,
559 F.2d 759 (D.C. Cir. 1977) ………………………………… 46-47

Finkelstein v. District of Columbia,
593 A.2d 591 (D.C. 1991) (en banc) ………………………….. 15, 46, 48

Fry v. Diamond Constr., Inc., 659 A.2d 241 (D.C. 1995) ……… 34

Gebremdhin v. Avis Rent-A-Car Sys., Inc.,
689 A.2d 1202 (D.C. 1997) ………………………………….... 24, 25

Page

Cases

George Washington Univ. v. Waas,
648 A.2d 178 (D.C. 1994) …………………………………….. *passim*

Gordon v. Neviaser, 478 A.2d 292 (D.C. 1984) ………………… 38, 39

Gordon v. Rice, 261 A.3d 224 (D.C. 2019) …………….......... 40

Hall v. Carter, 825 A.2d 954 (D.C. 2003) ………………………. 30

Hardi v. Mezzanotte, 818 A.2d 974 (D.C. 2003) ………………. 23

Hawthorne v. Canavan, 756 A.2d 397 (D.C. 2000) ……………. 31

Hechinger Co. v. Johnson, 761 A.2d 15 (D.C. 2000) …………… 44

Hopkins v. Silber, 785 A.2d 806 (Md. Ct. Spec. App. 2001) …… 30

Howard Univ. v. Roberts-Williams,
37 A.3d 896 (D.C. 2012) ………………………………………. 44, 45

Hughes v. Pender, 391 A.2d 259 (D.C. 1978) …………………... 48

* *Iron Vine Sec., LLC v. Cygnacom Solutions, Inc.*,
274 A.3d 328 (D.C. 2022)………………………………………. 33

* *Jarrett v. Woodward Bros.,* 751 A.2d 972 (D.C. 2000) …………. 34

Jones v. Howard Univ., 589 A.2d 419 (D.C. 1991) …………….. 39

Kelton v. District of Columbia,
413 A.2d 919 (D.C. 1980)………………………………………. 39

Langevine v. District of Columbia,
106 F.3d 1018 (D.C. Cir. 1997) ………………………………… 40

Page

Cases

Lauderdale v. United States,
666 F. Supp. 1511 (M.D. Ala. 1987) …………………………… 20

Liu v. Allen, 894 A.2d 453 (D.C. 2006) …………………............. 15, 16

Louison v. Crockett, 546 A.2d 400 (D.C. 1988) …………………. 40

Lynn v. District of Columbia,
734 A.2d 168 (D.C. 1999) ……………………………............ 18

Majeska v. District of Columbia,
812 A.2d 948 (D.C. 2002) ……………………………………… 24

May Dep't Stores Co. v. Devercelli,
314 A.2d 767 (D.C. 1973) ……………………………………… 48

Menish v. Polinger Co., 356 A.2d 233 (Md. 1976) ……………… 29, 34

Miller-McGee v. Wash. Hosp. Ctr.,
920 A.2d 430 (D.C. 2007) ……………………………………… 34

Morrison v. MacNamara,
407 A.2d 555 (D.C. 1979) …………………………………….. 20, 26

Moss v. Stockard, 580 A.2d 1011 (D.C. 1990) ………………….. 46

Nat'l R.R. Passenger Corp. v. McDavitt,
804 A.2d 275 (D.C. 2002) ……………………………………… 32-33

NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.,
957 A.2d 890 (D.C. 2008) ……………………………………… 49

Nelson v. McCreary, 694 897 (D.C. 1997) ……………………… 25

* *Newell v. District of Columbia*,
741 A.2d 28 (D.C. 1999) ………………………………………. 17, 18

Page

Cases

* *Nimetz v. Cappadona*, 596 A.2d 603 (D.C. 1991) ………………. 17

* *Oxendine v. Merrell Dow Pharms., Inc.*,
506 A.2d 1100 (D.C. 1986) ……………………………............. 16

Payne v. Soft Sheen Prods., Inc.,
486 A.2d 712 (D.C. 1985) ……………………………………….. 34

Phillips v. District of Columbia,
458 A.2d 722 (D.C. 1983) ………………………………………… 47

Psychiatric Inst. of Washington v. Allen,
509 A.2d 619 (D.C. 1986) …………………………………………. 42

Robinson v. Washington Internal Med. Assocs., P.C.,
647 A.2d 1140 (D.C. 1994) ……………………………………….. 17

Rotan v. Egan, 537 A.2d 563 (D.C. 1988) ……………………... 20

* *Safeway Stores, Inc. v. Feeney*,
163 A.2d 624 (D.C. 1960) ………………………………......... 18, 19, 26, 28

Schliesman v. Fisher, 158 Cal. Rptr. 527 (Cal. Ct. App. 1979) … 30-31

Schoonover v. Chavous, 974 A.2d 876 (D.C. 2009) …………….. 28, 31

Scoggins v. Jude, 419 A.2d 999 (D.C. 1980) …………………… *passim*

Scott v. Crestar Fin. Corp., 928 A.2d 680 (D.C. 2007) ……........ 46

Semler v. Psychiatric Inst. of Washington,
575 F.2d 922 (D.C. Cir. 1978) …………………………………. 47

* *Stager v. Schneider*, 494 A.2d 1307 (D.C. 1985) ………………. *passim*

Page

Cases

Taylor v. Washington Terminal Co.,
409 F.2d 145 (D.C. Cir. 1969) …………………………………… 48

Thomas v. Panco Mgmt. of Maryland, LLC,
31 A.3d 583 (Md. 2011) …………………………………………… 29

Turner v. United States, 26 A.3d 738 (D.C. 2011) ……………… 25

United Mine Workers v. Moore,
717 A.2d 332 (D.C. 1998) ……………………………………… 15

Washington Inv. Partners of Del., LLC v. Sec. House, *K.S.C.C.*,
28 A.3d 566 (D.C. 2011) …………………………………………. 37

* *Washington Metropolitan Area Transit Authority v. Jeanty*,
718 A.2d 172 (D.C. 1998) ………………………………………. 48-49

Weil v. Seltzer, 873 F.2d 1453 (D.C. Cir. 1989) ………………….. 26, 31

West v. United States, 866 A.2d 74 (D.C. 2005) ………………….. 28

* *Wilson Sporting Goods Co. v. Hickox*,
59 A.3d 1267 (D.C. 2013)………………………………………… 32

Statutes and Rules

D.C. CODE

§ 12-101…………………………………………………….. 3

§ 16-2701...………………………………………………. 3

§ 16-2702………………………………………………… 3

§ 16-2703…………………………………………………. 3

Page

Statutes and Rules

D.C. SUPERIOR COURT RULES

CIVIL RULE 51 41

Miscellaneous

Diane Shelby, Note, *Contributory Negligence in Medical Malpractice*, 21 CLEV. ST. L. REV. 58 (1972) 20

RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1965)

§ 289 .... 19, 26, 28

§ 464 .... 18, 19, 26, 28

§ 466 .... 19, 26, 28

W. PROSSER & W. KEETON, THE LAW OF TORTS (5th ed. 1984)

§ 65 .... 19, 26

Jurisdiction

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

Statement of the Issues

1. A party must request a special verdict to claim error relating to fewer than all of the theories of liability or defenses on which a verdict could permissibly be based. Defendant did not request a special verdict distinguishing Plaintiffs' two theories of negligence, only one of which was potentially susceptible to a contributory-negligence defense. Did Defendant forfeit its complaint that the trial court's rulings on contributory negligence were reversible error?

2. A contributory-negligence defense requires that the plaintiff knew or should have known of the danger created by the defendant's negligence and should have foreseen her injury. Plaintiffs' decedent did not know or have reason to know that she was at risk of a ruptured fallopian tube and could not have reasonably foreseen that, by not getting a repeat blood test, she could suddenly die. Did the trial court properly deny a contributory-negligence defense?

3. A defendant challenging the sufficiency of the evidence on a claim must make that contention in a motion for judgment before the claim is submitted to the jury. Defendant did not move for judgment on informed consent before that claim

was submitted to the jury. May Defendant now contend that the evidence was not sufficient to support the jury's consideration of informed consent?

4. An informed-consent claim lies where a healthcare provider fails to disclose the nature of the patient's condition, the nature of the proposed treatment, and the nature and degree of risks and benefits inherent in undergoing or in abstaining from the proposed treatment. Defendant did not disclose to Plaintiffs' decedent that she likely had a condition that could silently and suddenly kill her. Did the trial court properly permit the jury to consider Plaintiffs' informed-consent claim?

5. This Court accords great deference to trial-court decisions denying a motion for new trial based on excessiveness of the verdict. The trial court here found that the jury's award to three minor children for the loss of their mother neither resulted from improper factors nor was unreasonable but rather represented a permissible exercise of the jury's prerogative to award fair and reasonable compensatory damages. Does the trial court's decision deserve this Court's deference?

Counterstatement of the Case

A. Nature of the case

This action seeks damages arising from the death of Tiffaney Dunbar following medical treatment she received at the Washington Hospital Center Corporation's Women's Wellness Clinic at the Washington Hospital Center ("the Hospital"). Ms.

Dunbar's personal representative, Appellee Shanaye Batey, brought claims on behalf of Ms. Dunbar's estate under the District of Columbia Survival Act,[1] and separate claims, on behalf of each of Ms. Dunbar's three minor children, under the District of Columbia's Wrongful Death Act.[2] The Hospital, Appellant here, was the sole defendant below.

The gravamen of Plaintiffs' complaint is that the Hospital's employee, Nurse Practitioner Sarah Belna, (a) in two distinct ways breached the standard of care in her treatment of Ms. Dunbar and by so doing failed to diagnose or treat her ectopic pregnancy (a fertilized egg growing inside a fallopian tube instead of the uterus) and (b) failed to obtain Ms. Dunbar's informed consent sufficient to permit her knowledgably to accept, delay, or decline follow-up treatment. As a result, Ms. Dunbar suffered a burst fallopian tube and died from catastrophic blood loss. The Hospital denies responsibility.

B. Proceedings and disposition below

1. Trial and judgment

Following six days of trial proceedings (McKenna, J., presiding), and approximately five hours of deliberations, the jury agreed that the Hospital,

[1] D.C. CODE § 12-101.

[2] *Id*. §§ 16-2701 to -2703.

through its employee NP Belna, breached the standard of care in its treatment of Ms. Dunbar, that it failed to obtain her informed consent regarding follow-up treatment, and that each of these was a cause of her death. (Joint Appendix ("A.") 820-23, 825-26.) The jury awarded damages for economic loss ($915,000 for Ms. Dunbar's lost wages and $692,000 for loss of her household services) and noneconomic loss ($500,000 for Ms. Dunbar's pain and suffering and $5 million to each of her three young children for the loss of their mother's guidance, care, support, and education). (A. 821-23, 827.)

The Hospital filed a posttrial motion for judgment as a matter of law, which it withdrew after Plaintiffs filed their opposition, and posttrial motions for a new trial or a remittitur, which the trial court (McKenna, J.) denied after full briefing. (A. 832-42.) The court entered judgment on the jury's verdict, plus interest and costs (A. 828-31), and the Hospital timely appealed.

2. The trial court's rulings on contributory negligence

In the court below, the Hospital interposed an affirmative defense of contributory negligence, and three times — before, during, and after trial — the parties litigated whether the evidence was sufficient to support it.

a. The ruling in limine. Before trial, the parties briefed the issue on a record that included the pertinent medical records and deposition testimony of NP Belna (*See* Pl.'s Mot. *in Lim.* to Exclude Evid. that Decedent did not Submit to a Repeat

Lab Test; the related docket entries on Feb. 3, 16, 22, 23, 24, 28, and Mar. 17, 2022 (A. 6-8); and the transcript of the hearing (A. 96, 98-112).) The court "reserve[d] on the issue of whether the Defendant can ultimately argue contributory negligence to the jury" but ruled that the Hospital could not "do[] so in their opening[] [statement]." (A. 99; *see also* A. 109-10.) "[A]t this juncture, the evidence . . . is insufficient to conclude that a reasonable finder of fact could find that Ms. Dunbar's failure to report for the second blood test was unreasonable, given what she knew and had been told at the time." (A. 100.) "Ms. Dunbar cannot be found to have been contributorily negligent in not reporting for the second blood test because [NP Belna] had not impressed upon her the importance of doing so." (A. 105; *see also* A. 106, 107-08.) The court ruled that, at trial, the Hospital could renew its request to argue contributory negligence and request an appropriate jury instruction. (A. 108-09.)

b. The ruling at trial. The Hospital renewed its request at trial and there was extensive colloquy on whether the evidence actually received was sufficient to support a contributory-negligence instruction. (*See* A. 664-78, 717-34.) In that pre-verdict posture, the court determined that, "viewing the evidence in the light most favorable to the defense a reasonable juror could find that [NP Belna] told Ms. Dunbar that she had an abnormal sonogram." (A. 668.) But, the court ruled, that was not enough to support a contributory-negligence instruction because "at no

time" did NP Belna give Ms. Dunbar "reason to believe that returning back to the clinic in 48 or even 96 hours was imperative because of the potential risk it pose[d] to her health." (A. 668-69.) "What . . . still needs to be shown . . . is that the patient had been informed of the need for and the importance of the follow-up testing . . . . [T]hat link has still not been established here." (A. 670-71; *see also* A. 671, 672-73, 721, 722-23, 733.) The court "incorporate[d] the findings [it] made" at the March 17 hearing and "continue[d] to preclude the defense now from arguing contributory negligence to the jury." (A. 672-73.)

c. The ruling after trial. The Hospital challenged this ruling in it posttrial motion. After receiving full briefing and having "carefully considered" the issue, the court "incorporate[d] by reference" its prior rulings and once again rejected the Hospital's argument. (A. 833, 835-36.)

3. The trial court's rulings on informed consent

The Hospital neither challenged Plaintiffs' informed-consent claim before trial nor moved for judgment at trial on this issue. (*See* A. 393-97, 657-59.) At trial, the court overruled the Hospital's objection to a jury instruction on informed consent and the jury's separate consideration of it. (A. 501-03, 683-87, 716.) After trial, the Hospital renewed its objection, which the court rejected: "By the conclusion of the trial, the appropriate time for the Defendant to have raised a legal challenge to the validity or sufficiency of such a claim . . . had passed and the evidence elicited at

trial was more than sufficient to submit this claim to the jury." (A. 837.) The court also affirmed its decision to present the jury separate interrogatories on this issue to assure "clarity in the verdict form." (A.837.)

4. The verdict form

There was extensive discussion about the verdict form. (*See* A. 734-44, 745-46, 769-76, 779, 816.) This colloquy included emphasis on the need for parties to request separate interrogatories on verdict forms to preserve appellate review. (*See* A. 741-43, 745-46, 769-72.)

Notwithstanding this discussion, and the evidence of two distinct theories of negligence, the Hospital never requested separate interrogatories on the verdict form to distinguish the negligence claim to which contributory negligence might be applicable from the negligence claim to which the defense could not be applied. (*See, e.g.,* A. 84-85 (Def.'s Proposed Verdict Sheet)). As a result, the court presented the jury with questions distinguishing only the general negligence claim from the informed-consent claim. (A. 825-26.)

The Hospital did not object to the verdict form's presentation of damages (A. 827). (*See* A. 768, 779, 816; *see also* A. 85 (Def.'s Proposed Verdict Sheet).)

5. The trial court's rulings on the Colston argument

At trial, Plaintiffs presented a memorandum on the propriety of the so-called "*Colston* argument." (*See* A. 9 (noting filing of Bench Br. on Permissibility of *Colston* Arg.).) The Hospital filed no written response, but preserved its objection. (A. 341-43, 691-95, 780-81.) Relying upon controlling authority, the trial court permitted the argument (A. 693-95) and reaffirmed that ruling after trial (A. 840-41).

C. Facts

1. Tiffaney Dunbar

At her death, Ms. Dunbar was a 33-year-old woman who, but for her undiagnosed ectopic pregnancy, was in excellent health, was athletic, and neither smoked nor drank. (A. 215-16, 302, 305, 314, 316, 320, 615, 616.) She was a single mom raising three young children, T.A.D., J.D., and T.J.D., then aged ten years, four years, and ten months, respectively. (A. 301, 303-04, 314.) A high-school graduate, Ms. Dunbar worked as a security guard for Howard University, and her goal was to continue in that career, full-time, as her mother, father, and grandmother had before her. (A. 301-02, 320, 353-55, 383, 844.) She was a caring mother, with dreams for her children attending "private school" and "learn[ing] a

foreign language." (A. 303, 318.)

2. Ms. Dunbar's treatment at the Hospital

a. On February 7, 2018, Ms. Dunbar went to the Hospital's Women's Wellness Clinic for her annual visit. (A. 289, 857.) She was examined by NP Belna, who had no memory of her interactions with her: "I do not have an independent recollection of the day and my visit with Ms. Dunbar. All I can go on is my notes and what those documented and my standard practice across all patients." (A. 405; *see also* A. 274, 280, 465.)

b. According to the medical records, on February 7 NP Belna administered a rapid pregnancy test suggesting Ms. Dunbar "[l]ikely" was in her first trimester. (A. 411, 428, 451.) She also performed a bedside transvaginal ultrasound to examine Ms. Dunbar's uterus in order to confirm the pregnancy, but she did not extend the ultrasound examination into the fallopian tubes. (A. 410-11, 425-27, 429, 445, 446, 457.)

c. The ultrasound was "questionable" for evidence of a fertilized egg in the uterus (A. 410-11, 446-47, 449, 455), a finding that NP Belna characterized at trial as "abnormal" (A. 411, 457). What NP Belna observed in Ms. Dunbar's uterus on February 7 "can be associated with an ectopic pregnancy," among other things. (A. 449.) But NP Belna did not examine the fallopian tubes to check for the presence there of a fertilized egg. (A. 445.)

d. On February 7, NP Belna also took a blood sample from Ms. Dunbar and sent it to a laboratory for additional testing. (A. 420-21.)

e. If she followed "standard of care," NP Belna testified, on February 7 she "would have told [Ms. Dunbar] that she had a positive pregnancy test, the possibilities of what the pregnancy could mean, and the precautions that were indicated here [—] the bleeding precautions, pain precautions, SAB [spontaneous abortion] precautions." (A. 280; *see also* A. 423.) Ms. Dunbar "was asked to start a prenatal vitamin daily, and she was told by me, per the documentation, that I would call her back once the [blood test] results were available." (A. 423, 862.)

f. Ms. Dunbar was to return on February 9 for a repeat blood test. (A. 422-23.) In fact, NP Belna's assistant, who recalled the visit, testified that on February 7 she heard NP Belna tell Ms. Dunbar only "to come back . . . to get blood work done again for her follow-up appointment." (A. 289-90.)

g. On the very next day, February 8, NP Belna received the lab results. (A. 430.) The "lab's determination" was that the pregnancy was at six to seven weeks. (A. 282; *see also* A. 460.) "If this were a normal pregnancy," NP Belna testified, "you would expect to be able to see a gestational sac" in the uterus, which was not observed here. (A. 282.) She testified that the lab results "could have meant many things for me . . . from a miscarriage, [to] a normal intrauterine pregnancy, *an ectopic pregnancy* or a retained products of conception." (A. 430 (emphasis

added); *see also* A. 453-54.) "It could have been any of . . . these." (A. 455.) "Any" of these conditions could have been "silent and fatal" "in the next 48 hours." (A. 456; *see also* A. 464-65.)

h. Ms. Dunbar did not return for the repeat blood test on February 9. NP Belna contacted her on February 13, but "can't remember the specifics of the conversation" and only "recall[s] what was documented." (A. 289; *see also* A. 274.) "Any conversations I had with Ms. Dunbar would be documented in the record"; her "custom and habit [was] to document all important things [she] said to a patient during a telephone call." (A. 275). NP Belna's entire note of that telephone call records: "Pt. did not have repeat [blood drawn for repeat test] last Friday. Will come tomorrow for redraw. Next appointment made for 2/21 at 1130. Pt has no complaints today." (A. 867.) The note contains no mention of her telling Ms. Dunbar anything about an ectopic pregnancy, the risks of not receiving treatment for it, or the risks of delaying further testing.

i. At trial, the most NP Belna could testify was that, if she had followed her usual practice, she would have told Ms. Dunbar the bedside ultrasound was "abnormal," but she would not have made a record of telling her that. (A. 418-20.) NP Belna could not point to anything suggesting that she told Ms. Dunbar — ever — that she needed to return, even though she was asymptomatic, because of a life-threatening risk or a condition that could be harmful to her. NP Belna said that,

with what she knew, she would "certainly not terrify a patient"; "I wouldn't tell a patient in this scenario, or any scenario, without the sufficient data points and scare them that they were going to die." (A. 466; *see also* A. 473, 474.)

j. After visiting NP Belna on February 7, Ms. Dunbar happily reported she was pregnant again and that the "nurse" had said she was "fine" and "okay." (A. 307-11.) Ms. Dunbar did not return to the clinic; she travelled to California and died there on February 17, suffering internal bleeding from a "ruptured ectopic pregnancy." (A. 846; *see also* A. 213-14.)

3. Liability and damages

a. Medical negligence. Evidence showed that NP Belna had breached the standard of care in two independent ways. First, on February 7, NP Belna neglected to perform a complete ultrasound examination, which would have included viewing Ms. Dunbar's fallopian tubes to check for an ectopic pregnancy, an examination that the standard of care required in the circumstances. (A. 175, 189-90, 191-92, 211-12.) Had she done so, Ms. Dunbar's ectopic pregnancy would have been diagnosed and she likely would have received successful treatment for it then and there. (A. 190, 216-17, 218; *see also* A. 462-63, 464.)

Second, at least by February 8, when NP Belna received the results of the second blood test, she should have realized that Ms. Dunbar was experiencing an ectopic pregnancy; it was "a huge red flag," according to one expert. (A. 198.) The

standard of care required her to contact Ms. Dunbar and emphasize how important it was to return immediately to treat the ectopic pregnancy. (A. 190, 197-98, 199-201, 204-05, 206-09.) NP Belna failed to do so.

The jury was entitled to credit testimony that NP Belna's conduct violated not only the standard of care but also the Hospital's own guidelines for the diagnosis and treatment of ectopic pregnancy. (A. 209-10, 851-56.)

b. Failure to elicit informed consent. The jury credited evidence that Ms. Dunbar was never told to return to the clinic for any reason other than to obtain a second blood test. Reasonable jurors need not have credited NP Belna's speculation that, if she had followed her "usual practice," she would have told Ms. Dunbar that the ultrasound results were "abnormal." And in any event, saying the result was "abnormal" would not be the same as disclosing that Ms. Dunbar was at risk for serious complications, even death, and needing urgent care. NP Belna disavowed telling Ms. Dunbar anything that would "scare" her, and the jury could well conclude that Ms. Dunbar did not believe there was an urgent need to return for another blood test to confirm what she already knew — that she was pregnant.

c. Damages. The jury credited evidence that the Hospital's failure to ultrasound Ms. Dunbar's fallopian tubes, or its failure to impress upon her the need to return for treatment, or its failure to give her information enabling an informed decision on treatment — or all of this conduct — caused her death. (A. 199-200, 239-40,

246.) Plaintiffs presented economic testimony establishing Ms. Dunbar's lost wages and the value of her household services (*see, e.g.*, A. 361-71, 382-83), and medical testimony attesting to the pain she suffered before her death (A. 214-15, 247-48). Plaintiffs introduced the children through three very brief videos and four photographs, and presented testimony about the care that Ms. Dunbar, as a single parent, provided her children. (*See*, *e.g*., A. 324-33, 847-50.) Based upon the pertinent life tables, $5 million was the jury's value for each child's loss of maternal guidance and other intangible support for nearly 50 years.

Summary of Argument

1. The Hospital did not meet procedural requirements permitting appellate review of its contentions on contributory negligence and informed consent. It failed to request a verdict form enabling identification of any prejudice allegedly arising from the rulings on contributory negligence, it failed to move for judgment as a matter of law on informed consent, and it cannot show that this Court must even reach the issue of informed consent since the verdict is fully supported by the jury's finding of negligence, which the Hospital does not contest.

2. In any event, the trial court's rulings were correct or well within its discretion. The evidence did not earn the jury's consideration of alleged contributory negligence: patients are under no duty to recognize the urgency of

medical conditions of which they have not been informed. By contrast, the Hospital's failure to disclose to Ms. Dunbar the risks of declining further treatment met the elements of an informed-consent claim.

3. The Hospital accepted the verdict form's display of what damages the jurors could award; the Hospital may not now complain about something to which it agreed at trial. The jury's determination of relief was supported in the record, fairly compensates each child for the noneconomic loss of their mother's nurture, and is demonstrably not the product of emotion or error.

Standard of Review

This Court reviews a trial court's ruling on a motion for a new trial[3] or for remittitur[4] "only for abuse of discretion." "The scope of appellate review is 'especially narrow' when the trial court denied the motion, as in that case 'the trial court's unique opportunity to consider the evidence in the context of a living trial coalesces with the deference properly given to the jury's determination of such

---

[3] *Liu v. Allen*, 894 A.2d 453, 459 n.10 (D.C. 2006) (quoting *United Mine Workers v. Moore*, 717 A.2d 332, 337 (D.C. 1998)).

[4] *Campbell-Crane & Assocs., Inc. v. Stamenkovic*, 44 A.3d 924, 945 (D.C. 2012) (quoting *Finkelstein v. District of Columbia*, 593 A.2d 591, 599 (D.C. 1991) (en banc)).

matters of fact as the weight of the evidence.'"[5]

Argument

I. The trial court's rulings as to the Hospital's contributory-negligence defense were neither erroneous nor prejudicial.

A. The Hospital may not contest the rulings on contributory negligence.

Plaintiffs presented two theories of negligence: NP Belna's failure to examine the fallopian tubes on February 7, and her failure to impress upon Ms. Dunbar the urgent need to return for further treatment. Alleged contributory negligence, based on Ms. Dunbar's decision not to keep her appointment for the return visit, could be a defense only against the latter theory. The Hospital never requested that the jury distinguish between these two theories; it did not suggest a verdict form to separate them; and so now it is impossible to know whether the jury based its verdict on the theory to which contributory negligence might be a defense, the other theory, or both. The Hospital cannot show prejudice.

"[C]ounsel in a civil case [is] required to request a special verdict form to preserve a claim of error relating to fewer than all of the theories of liability (or

[5] *Liu*, 894 A.2d 459 n.10 (quoting *Oxendine v. Merrell Dow Pharms., Inc.*, 506 A.2d 1100, 1110-11 (D.C. 1986)) (new trial); *Asal v. Mina*, 247 A.3d 260, 277 (D.C. 2021) (quoting *Campbell-Crane & Assocs.*, 44 A.3d at 945) (remittitur).

defenses thereto) on which the jury permissibly could have based its verdict."[6] This rule flows from the principle that "a party challenging an adverse judgment bears the heavy burden of persuading this court that the trial judge committed error,"[7] and so the appellant must "'present[] this court with a record sufficient to show that error occurred at trial.'"[8] The rule, too, reflects "concern for judicial efficiency and respect for jury verdicts."[9] By failing to request a special verdict, the Hospital forfeited its complaint that the court's rulings on contributory negligence were reversible error. This Court need not reach the merits of the contributory-

---

[6] *Newell v. District of Columbia*, 741 A.2d 28, 33 (D.C. 1999); *see also Nimetz v. Cappadona*, 596 A.2d 603, 608 (D.C. 1991) (a civil defendant failing to request a special verdict form "will be barred on appeal from complaining that the jury may have relied on a factual theory unsupported by the evidence when there was sufficient evidence to support another theory properly before the jury"); *Burke v. Scaggs*, 867 A.2d 213, 221 (D.C. 2005) (same); *cf. Robinson v. Wash. Internal Med. Assocs., P.C.*, 647 A.2d 1140, 1144-45 (D.C. 1994) ("a plaintiff who objects to the giving of affirmative defense instructions, but who does not request either a special verdict or a general verdict with interrogatories, is estopped from raising any claim of error with respect to the affirmative defense on appeal").

[7] *Robinson*, 647 A.2d at 1144; *see also Cobb v. Standard Drug Co.*, 453 A.2d 110, 111 (D.C. 1982) ("[a] judgment of any trial court is presumed to be valid") (citations omitted).

[8] *Newell*, 741 A.2d at 33 (quoting *Cole v. United States,* 478 A.2d 277, 283 (D.C. 1984)); *accord*, *Cobb,* 453 A.2d at 111.

[9] *Burke*, 867 A.2d at 222; *see also Nimetz*, 596 A.2d at 608 ("Our courts are overburdened, and a plaintiff should not have to endure a second trial when the rules of procedure provide a remedy.")

negligence issue.[10]

B. The Hospital failed to establish the elements of contributory negligence.

1. The elements. The Hospital needed evidence permitting reasonable jurors to conclude, by a preponderance of the evidence, (a) that Ms. Dunbar had been negligent, and (b) that this negligence proximately caused her death.[11]

a. A plaintiff is negligent by engaging in "'unreasonable conduct,'"[12] that is, by "fail[ing] to act with the prudence demanded of an ordinary reasonable person under like circumstances."[13] A plaintiff's conduct is "unreasonable" if, with actual or constructive knowledge of the danger created by a defendant's negligence, the plaintiff fails to exercise reasonable care commensurate with that danger.[14]

---

[10] *See Newell*, 741 A.2d at 34 (declining to reach an issue that appellant did not preserve by failing to request a special verdict).

[11] *See Lynn v. District of Columbia*, 734 A.2d 168, 172 (D.C. 1999) (citation omitted); *District of Columbia v. Sterling*, 578 A.2d 1163, 1165 (D.C. 1990) (citations omitted).

[12] *Durphy v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 698 A.2d 459, 465 (D.C. 1997) (quoting *District of Columbia v. Mitchell*, 533 A.2d 629, 639 (D.C. 1987)).

[13] *Stager v. Schneider*, 494 A.2d 1307, 1311 (D.C. 1985) (citing, inter alia, RESTATEMENT (SECOND) OF TORTS § 464 (AM. LAW INST. 1965)).

[14] *Safeway Stores, Inc. v. Feeney*, 163 A.2d 624, 627 (D.C. 1960); *see also Scoggins v. Jude*, 419 A.2d 999, 1004 (D.C. 1980) (contributory negligence comprises "an intentional and unreasonable exposure of [the plaintiff] to danger created by the defendant's negligence, of which danger the plaintiff knows or has

b. "Proximate cause" exists if the plaintiff's negligence was "a substantial factor in causing his or her injury, and . . . the injury or damage was either a direct result or a reasonably probable consequence of the negligent act or omission."[15] Proximate cause requires proof that the injury was a "foreseeable consequence" of the plaintiff's conduct.[16]

c. The law emphasizes, too, that in cases of medical negligence, the healthcare provider's "superior knowledge and expertise" and the patient's "generally limited knowledge" about "the dangers associated with the illness and treatment may

---

reason to know" (quoting RESTATEMENT (SECOND) OF TORTS § 466(a) (AM. LAW INST. 1965))); *Stager*, 494 A.2d at 1311 ("the doctrine of contributory negligence . . . operates as a defense when a party knows or by the exercise of ordinary care should have known a particular fact or circumstance") (citation and emphasis omitted). *See generally* RESTATEMENT (SECOND) OF TORTS § 289 cmt. b (AM. LAW INST. 1965) ("[i]n order that an act may be negligent it is necessary that the actor should realize that it involves a risk of causing harm"); *id*. § 464 cmt. c ("[t]he rule stated in § 289 is important in determining whether the plaintiff should recognize the existence of a risk to which it would be contributory negligence to expose himself").

[15] *Durphy*, 698 A.2d at 465 (citing *George Washington Univ. v. Waas*, 648 A.2d 178, 180 (D.C. 1994)); *see also Sterling*, 578 A.2d at 1165 ("the rules as to causation are the same for contributory negligence as for negligence" (quoting W. PROSSER & W. KEETON, THE LAW OF TORTS § 65, at 456 (5th ed. 1984))).

[16] *Sterling*, 578 A.2d at 1166; *see also Feeney*, 163 A.2d at 627 (explaining that contributory negligence is not established "where the injury which results could not have been foreseen by a reasonably prudent person").

negate the critical elements of the defense . . . , specifically the knowledge and appreciation of the risks and dangers associated with certain medical treatments."[17]

2. The evidence. The court below properly applied these principles as it canvassed the record. Having seen no evidence of a fertilized egg in Ms. Dunbar's uterus, NP Belna — an experienced healthcare professional — knew or should have known that her patient was at substantial risk of an ectopic pregnancy, which without warning can cause death unless treated emergently. By contrast, Ms.

---

[17] *Durphy*, 698 A.2d at 465 (citing *Morrison v. MacNamara,* 407 A.2d 555, 567, 568 n.11 (D.C. 1979)); *Rotan v. Egan*, 537 A.2d 563, 567–68 (D.C. 1988) (same); *see also Stager*, 494 A.2d at 1312 (plaintiff patient not contributorily negligent for failing to call radiologist to obtain x-ray results; patient's duty to cooperate cannot be used "to invert the duty by transferring it from the health professional to the patient"); *Durphy*, 698 A.2d at 468 (no contributory negligence "given the substantial evidence that any negligence on [the patient's] part did not proximately cause" his injury); *Burton v. United States*, 668 F. Supp. 2d 86, 108 (D.D.C. 2009) (plaintiff patient not contributorily negligent for failing to seek medical attention when he suffered symptoms of deep venous thrombosis; "particularly considering physicians' superior knowledge and expertise, D.C. caselaw does not place patients under a duty to recognize the urgency of symptoms of which they have not been informed"); *accord*, *Lauderdale v. United States*, 666 F. Supp. 1511, 1515-16 (M.D. Ala. 1987) (applying Alabama law; patient's failure to return to clinic was not contributory negligence "in light of the insufficient warning given [to the plaintiff] of the urgency of his need to return*"). See generally* Diane Shelby, Note, *Contributory Negligence in Medical Malpractice*, 21 CLEV. ST. L. REV. 58, 59 (1972) ("a defense of contributory negligence is particularly difficult to maintain because of . . . the fact that the patient is assumed to put himself completely under the charge of the doctor or hospital and is in no position to harm himself"), *cited with approval in Morrison*, 407 A.2d at 568 n.11.

Dunbar, a high-school-educated security guard with no obstetrical expertise, neither knew nor had reason to know of these grave risks.

If NP Belna in fact told Ms. Dunbar that "her pregnancy test was positive but . . . her transvaginal ultrasound was abnormal and . . . she needed to return for further testing in two days" (Br. of Appellant 2), that communication would not mean that Ms. Dunbar understood or reasonably should have understood either the implications of those findings or the imperative need to return promptly to the clinic. NP Belna knew that Ms. Dunbar had a condition that could be fatal within 48 hours; yet, because she did not want to "scare" or "terrify" Ms. Dunbar, NP Belna never informed her about the dangers inhering in her hidden but hazardous condition.

Compounding the implications of this silence, what NP Belna said and did fostered a reasonable patient's belief that she was not in imminent danger. With actual or constructive knowledge that Ms. Dunbar had an ectopic pregnancy that could cause a rupture at any moment, NP Belna did not provide immediate treatment; she "sent her out of the office" (A. 465.)

At trial, NP Belna said her undisclosed treatment plan apparently was for Ms. Dunbar to return for another ultrasound to determine if the gestational sac was in the uterus. (A 280, 421-22, 425-26, 463-64.) But that is not what she told Ms. Dunbar. Instead, she told her to come back in a few days for a repeat blood test.

(A. 283, 284, 289-90.) And NP Belna's routine precautions, if indeed she gave them to Ms. Dunbar, were to go to an emergency room if she experienced excessive bleeding or pain. (A 280, 466.)

In light of NP Belna's words and deeds, a reasonable patient in Ms. Dunbar's circumstances likely would believe that she was in no imminent danger, that the further blood testing would merely confirm the pregnancy or help establish the gestational age, and that she would have some tangible warning in the form of bleeding or pain before anything potentially bad could happen. Nothing that NP Belna said or did would have put a reasonable patient in Ms. Dunbar's circumstances on actual or constructive notice either of the ticking time bomb lurking in her fallopian tube or of the potentially catastrophic consequences of not returning for what she was led to believe was only a repeat blood test. Ms. Dunbar did not know the risks of her perilous but imperceptible condition because NP Belna never informed her of them.

Because of her superior knowledge and expertise, NP Belna owed a duty to Ms. Dunbar to disclose the risks and dangers associated with the finding of an abnormal sonogram, the likely diagnosis of an ectopic pregnancy, and the treatment plan she had devised.[18] And Ms. Dunbar was entitled to assume that NP

---

[18] *See Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982) ("at a minimum, a physician must disclose the nature of the condition, the nature of the proposed treatment, any alternate treatment procedures, and the nature and degree of risks

Belna would fulfill that duty.[19] Just as the patient in *Stager* was not contributorily negligent for relying on a radiologist to inform her of the implications of an x-ray he had interpreted,[20] so, too, Ms. Dunbar was not contributorily negligent for relying on NP Belna to inform her of the implications of the sonogram she had interpreted. Failing to inform Ms. Dunbar that the abnormal sonogram signaled the risk of a life-threatening emergency deprived Ms. Dunbar of facts she needed in order to decide whether and when to return for a follow-up appointment. Lacking these crucial facts, a reasonable person in Ms. Dunbar's position would not have perceived a pressing need to return to the clinic promptly.

The Hospital failed to meet the elements of its affirmative defense. No evidence was presented on which the jury could find that Ms. Dunbar either knew or reasonably should have known she was in danger or that a reasonably prudent

---

and benefits inherent in undergoing and in abstaining from the proposed treatment") (footnote omitted).

[19] *See Stager*, 494 A.2d at 1311 ("a plaintiff is not bound to anticipate negligent conduct on the part of others [but] [r]ather[] [s]he may assume that others will fulfill their duties") (citation omitted); *accord*, *Asal*, 247 A.3d at 271; *see also Hardi v. Mezzanotte*, 818 A.2d 974, 980 (D.C. 2003) ("[p]atients who seek medical care . . . . must rely on the physician's expertise to determine the cause of the problem and provide treatment"); *Crain*, 443 A.2d at 561 ("Because most people are ignorant in the medical sciences, they rely heavily on the knowledge and advice of their physicians.") (citation omitted).

[20] *See Stager*, 494 A.2d at 1312.

person under these circumstances would have foreseen that death would result from delaying her return to the clinic.

C. The Hospital was not entitled to an instruction on contributory negligence.

"It is elementary that an instruction should not be given if there is no evidence to support it."[21] Here, the Hospital can establish neither of two critical elements of a contributory-negligence defense: that Ms. Dunbar's conduct was unreasonable under the circumstances and that her death was a reasonably foreseeable consequence of her conduct. Without evidence of Ms. Dunbar's actual or constructive knowledge of her condition and the risks it posed, a contributory-negligence instruction would have invited juror speculation and conjecture.[22]

The trial court's decision not to instruct the jury on contributory negligence[23]

---

[21] *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) ("Jury instructions must have an evidentiary predicate.") (citation omitted).

[22] *See Gebremdhin*, 689 A.2d at 1204 ("While the jury may draw reasonable inferences from the evidence presented, it may not base its verdict on guess or speculation.") (citations omitted); *Majeska v. District of Columbia*, 812 A.2d 948, 950 (D.C. 2002) ("[s]peculation is not the province of a jury") (citation omitted).

[23] *See Mitchell*, 533 A.2d at 639 ("[t]he standard for determining whether an instruction on [a contributory-negligence] defense is required is whether a juror reasonably could conclude that the plaintiff was contributorily negligent"); *District of Columbia v. Peters*, 527 A.2d 1269, 1274 n.4 (D.C. 1987) ("Generally, a contributory negligence instruction is appropriate if there is some evidence upon which a jury could find that the plaintiff, by encountering the risk created by

and to preclude argument on it[24] was not error. Allowing the Hospital to present the defense would have "serve[d] only to confuse the jury and to threaten a fair trial."[25]

D. The Hospital's remaining contentions on contributory negligence lack merit.

1. The Hospital's naked assertion that a patient has an "unconditional" duty "to cooperate and follow her professional healthcare providers' instructions" (Br. of Appellant 18) misstates the law. To prove a patient's contributory negligence, the law requires more than an *ipse dixit* pronouncement that the patient's duty is absolute; it requires examining both whether the patient acted reasonably, taking into account the danger created by the defendant's negligence and the patient's

---

defendant's breach of duty, departed from an objective standard of reasonable care.") (internal quotation marks and citation omitted); *cf. Nelson v. McCreary,* 694 A.2d 897, 904-06 (D.C. 1997) (in a medical-malpractice action alleging negligent treatment of complications arising after a colostomy, an instruction on contributory negligence was not warranted where patient requested that the colostomy remain on his left side after the doctor advised him that the colostomy should be changed to the right side and warned him of an increased likelihood of hernia if this was not done).

[24] *Turner v. United States*, 26 A.3d 738, 743 (D.C. 2011) ("It is improper for an attorney to make an argument to the jury based on facts not in evidence or not reasonably inferable from the evidence.") (citations omitted).

[25] *Sterling*, 578 A.2d at 1166 *see also Gebremdhin*, 689 A.2d at 1204 ("the court's instruction was not warranted from the evidence and invited the jury to speculate improperly").

actual or constructive knowledge of that danger, and whether the patient's injury was the reasonably foreseeable consequence of her own conduct.[26]

Moreover, a patient's duty is subordinate to the healthcare provider's duty: Because of the disparity in medical knowledge and experience, a healthcare provider "generally owes to the patient a greater duty than the patient owes to himself or herself."[27] The Hospital concedes that "the patient's duty to follow instructions does not extend to a duty to self-diagnose complex medical conditions or anticipate remote complications that no lay person would be expected to understand on their own." (Br. of Appellant 14.) But because NP Belna neglected to disclose the nature and risks of Ms. Dunbar's condition, for her to learn its severity and its potentially deadly consequences she would have had to "self-diagnose" her "complex medical condition[]" and "anticipate" its urgent implications for her health and safety. Since "no lay person would be expected to understand [that] on their own," no rational jury could find that her conduct was unreasonable.

---

[26] *See* authorities cited *supra* notes 12-16.

[27] *Durphy*, 698 A.2d at 465 ((citing *Morrison,* 407 A.2d at 568); *see also Weil v. Seltzer*, 873 F.2d 1453, 1458 (D.C. Cir. 1989) ("in the District of Columbia the doctor has a legal duty to inform the patient of the risks") (citation omitted); *Burton*, 668 F. Supp. 2d at 108 ("D.C. caselaw does not place patients under a duty to recognize the urgency of symptoms of which they have not been informed.").

The Hospital's premise that a patient's duty is "unconditional" contradicts the "fundamental" concept honoring patient autonomy.[28] Even NP Belna said patients "expect" to be informed so they may join in "shared decision-making" on treatment (A. 473). Requiring patients blindly to heed healthcare providers' instructions under all circumstances would yield untoward results, such as when a providers' instructions are unlawful or erroneous; when the instructions conflict with those obtained from another provider, especially one with greater expertise; when compliance with the instructions would be difficult or impossible because, for example, the prescribed treatment is scarce, not covered by the patient's insurance, or too expensive; or when, as in this case, the healthcare provider breached its duty to disclose "the nature of the condition . . . and the nature and degree of risks . . . inherent . . . in abstaining from the proposed treatment."[29]

2. The Hospital wrongfully charges that the trial court's ruling "erroneously made it *per se* reasonable for Ms. Dunbar to not follow clear medical instructions." (Br. of Appellant 24.) The court ruled only that, on this record, Ms. Dunbar's lack of knowledge meant the evidence was insufficient to support the instruction. Nor

---

[28] *See Crain*, 443 A.2d at 561 (recognizing "the right of every competent adult human being to determine what shall be done with his own body") (citations omitted); *accord, Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972).

[29] *Crain*, 443 A.2d at 562 (citations omitted).

did the court "add[] a new pre-condition to" a patient's duty — "subjective knowledge of the risks of non-compliance." (Br. of Appellant 17.) Rather, the court applied settled law requiring the defendant to prove that the plaintiff knew or should have known of the danger created by the defendant's negligence.[30] "[T]he standard is an *objective* one."[31]

3. The Hospital's reliance on Maryland caselaw does not aid its cause. First, Maryland decisions — especially from an intermediate-level appellate court — are not controlling authority here.[32] Second, like most jurisdictions D.C. has not adopted Maryland's rule that a patient who fails to return to a healthcare provider

---

[30] *See* authorities cited *supra* note 14.

[31] *Stager*, 494 A.2d at 1311; *see also Asal*, 247 A.3d at 271 ("Contributory negligence evaluates the objective reasonableness of the plaintiff's conduct, determining whether the plaintiff's behavior in encountering the risk [created by the defendant's breach of duty] departed from the standard of care that is to be expected of the reasonable person in the plaintiff's position.") (internal quotation marks and citation omitted); *Brown v. Nat'l Acad. of Scis.*, 844 A.2d 1113, 1119 (D.C. 2004) ("a plaintiff's actual or constructive knowledge of relevant facts must be assessed under a[n] objective 'reasonable person' standard") (citation omitted).

[32] *See Convit v. Wilson*, 980 A.2d 1104, 1117-22 (D.C. 2009) (declining to follow decision of the Maryland Court of Special Appeals on common law); *Schoonover v. Chavous*, 974 A.2d 876, 882, 882 n.5 (D.C. 2009) (declining to follow two decisions of the Maryland Court of Special Appeals on common law, noting that they are "not binding" upon a D.C. court, which is "not obliged" to "turn to the common law of Maryland for guidance"); *West v. United States*, 866 A.2d 74, 79 (D.C. 2005) ("Maryland law is not binding precedent on this court.") (citation omitted).

for further treatment as instructed is guilty of contributory negligence.[33] Third, even in Maryland, a patient's nonattendance at a follow-up healthcare appointment does not necessarily constitute contributory negligence. The Maryland cases on which the Hospital chiefly relies, *Chudson v. Ratra*[34] and its progeny,[35] expressly accept that contributory negligence applies only to a plaintiff "who knows and appreciates, or in the exercise of ordinary care should know and appreciate, the existence of danger from which injury might reasonably be anticipated." As this Court has explained, under *Chudson* "contributory negligence is viewed as an aspect of the plaintiff's response to *a known danger from which injury might reasonably be anticipated.*"[36] That condition is absent here, and so even under Maryland law a contributory-negligence instruction was not required.

4. None of the D.C. cases the Hospital cites require a contributory-negligence

---

[33] *See Durphy*, 698 A.2d at 467 (discussing but not adopting Maryland rule and noting that it is contrary to the majority rule); *Waas*, 648 A.2d at 179-83 (same).

[34] 548 A.2d 172, 182 (Md. Ct. Spec. App. 1988) (quoting *Menish v. Polinger Co.*, 356 A.2d 233, 237 (Md. 1976)).

[35] *E.g.*, *Barbosa v. Osbourne*, 183 A.3d 785, 790–91 (Md. Ct. Spec. App. 2018) ("contributory negligence . . . may not be invoked unless there is some evidence 'that the injured party acted, or failed to act, with knowledge and appreciation, either actual or imputed, of the danger of injury which his conduct involves'" (quoting *Thomas v. Panco Mgmt. of Maryland, LLC*, 31 A.3d 583, 602 (Md. 2011) (internal citations and quotation marks omitted))).

[36] *Waas*, 648 A.2d at 181 (emphasis added).

instruction when a patient fails to follow her healthcare provider's instructions notwithstanding the patient's lack of actual or constructive knowledge of her medical condition, the full extent of her healthcare provider's treatment plan, and the potential risks of not following the instructions.[37] The same is true of the cases from other jurisdictions on which the Hospital relies,[38] which in any event are not

---

[37] *See Dennis v. Jones*, 928 A.2d 672, 675, 677 (D.C. 2007) (jury instructed on contributory negligence where the doctor informed the patient of the risk of smoking, told her that her continued smoking might cause her injury, she continued smoking until the day of her surgeries, and her continued smoking contributed to her post-surgical complications); *Hall v. Carter*, 825 A.2d 954, 956–57, 961 (D.C. 2003) (jury found abdominoplasty patient contributorily negligent where her doctor warned her that smoking deterred wound-healing, she continued to smoke until the day of surgery, misrepresented the extent of her smoking, then had difficulty healing); *Durphy*, 698 A.2d at 463-64, 466, 467 (contributory negligence submitted to jury where the patient with a foot condition that developed into osteomyelitis and eventually required amputation was informed of the seriousness of his condition and that he might lose his foot but refused to permit a cast to be placed on his foot and otherwise failed to cooperate in his treatment by missing appointments, not taking his medicine, not wearing protective coverings for his feet, and not being hospitalized when it was recommended); *cf. Waas*, 648 A.2d at 179, 183-84 (jury instructed on contributory negligence where "[t]he concept of the general need to cooperate in medical matters was not challenged at trial by [the plaintiff]; to the contrary, his testimony and argument was aimed at explaining the reasons for his conduct."); *Scoggins*, 419 A.2d at 1006 (in tenant's action against landlord for injuries from falling ceiling, evidence that tenant hung plants from ceiling near visible crack would support contributory-negligence instruction; no issue presented of tenant's failure to follow landlord's instructions or lack of knowledge of condition of ceiling before its collapse).

[38] *See, e.g.*, *Hopkins v. Silber*, 785 A.2d 806, 813 (Md. Ct. Spec. App. 2001) (plaintiff who attempted to have sexual intercourse six times within six-week period after penile-implant surgery during which his surgeon instructed him to refrain from such activity "knew that his premature attempts to engage in sexual intercourse involved some risk"); *Schliesman v. Fisher*, 158 Cal. Rptr. 527 (Cal.

binding precedent.[39]

For the Hospital, the upshot is to blame Ms. Dunbar for not acting expeditiously in the face of a serious risk unknown to her only because the Hospital's nurse practitioner, who was well aware of the risk and on whom Ms. Dunbar relied, decided not to disclose it. "A party may not profit from his own wrong."[40] To have allowed the Hospital to present a contributory-negligence defense in these circumstances would have been contrary to law and unfairly prejudicial.

The Hospital concedes that Plaintiffs "had an evidentiary basis to argue that Ms.

Ct. App. 1979) (ordered not published) (plaintiff with diabetes who failed to follow his physicians' orders regarding diet and weight reduction had been counseled "regarding the importance of diet as the preferred means of controlling his diabetes"); *cf. Dunn v. Cath. Med. Ctr. of Brooklyn & Queens, Inc.*, 389 N.Y.S.2d 123, 124 (N.Y. App. Div. 1976) (contributory negligence not at issue; holding that trial court erred in declining to charge jury, as requested by defendant physician, "that it should consider, in mitigation of damages, whether negligence on the part of the plaintiff subsequent to the alleged malpractice contributed to her injuries").

[39] *See* authorities cited *supra* note 32.

[40] *Hawthorne v. Canavan*, 756 A.2d 397, 401 (D.C. 2000) (citation omitted); *see also Bell v. Jones*, 523 A.2d 982, 996-97 (D.C. 1986) (holding that, as a matter of law, plaintiff architect was not contributorily negligent for relying on defendant engineer's survey plat; architect "was not bound to anticipate negligent conduct" by the engineer but rather "could reasonably assume that [the engineer] would fulfill his duties, including the duty to exercise reasonable care" (citing *Stager*, 494 A.2d at 1311)).

Dunbar was not aware of her risk of dying from an ectopic pregnancy." (Def.'s Mot. for J. as a Matter of Law 4.). But it is also true that the Hospital had no evidentiary basis to argue that Ms. Dunbar was or should have been aware of her risk of dying from an ectopic pregnancy.

In sum, there was an insufficient factual predicate to support a contributory-negligence defense.

II. The jury fairly considered the informed-consent claim.

A. This Court need not reach the issue of the Hospital's informed-consent liability.

At trial, two separate claims of liability were submitted to the jury: one for negligence and one for failure to obtain informed consent. (A. 825-26.) The jury's finding that the Hospital's negligence was a proximate cause of Ms. Dunbar's death — which the Hospital does not challenge — is alone sufficient to support the verdict, irrespective of the informed-consent claim. Accordingly, this Court does not need to reach the issue whether the informed-consent claim was properly submitted to the jury.[41]

[41] *See Wilson Sporting Goods Co. v. Hickox*, 59 A.3d 1267, 1274 (D.C. 2013) ("a finding that the evidence was sufficient on any one of the claims found by the jury will support the judgment in this case in its entirety" (citing *Nat'l R.R. Passenger Corp. v. McDavitt*, 804 A.2d 275, 284 (D.C. 2002) (affirming verdict of liability where evidence "was sufficient to justify submission of any one of [the plaintiff's] theories of negligence, even if the evidence did not justify submission of the other

B. The Hospital cannot now challenge the sufficiency of the evidence.

The very title of the Hospital's argument proclaims its procedural infirmity: "The evidence at trial does not support informed-consent liability." (Br. of Appellant 33.) That is the mantra of a motion for judgment as a matter of law, relief the Hospital never sought on informed consent at trial.

"A party who omits from its [Rule 50(a) preverdict] motion [for judgment as a matter of law] a particular evidentiary ground is precluded from later raising that theory in a renewed motion for judgment as a matter of law after the verdict or in an appeal."[42] Only the grounds asserted in the motion made during trial may be raised in the posttrial motion.[43] The trial court correctly held that the Hospital could not wait until after verdict to make this argument. Preserving an objection to a jury instruction is not the same as challenging the sufficiency of evidence.

---

theories"))); *District of Columbia v. Banks*, 646 A.2d 972, 976 (D.C. 1994) ("Because we are compelled to affirm the judgment on the basis of the jury's verdict as to [the plaintiff's] negligent supervision claim, . . . we do not reach the issues relating to [the defendant's] alleged gross negligence."); *cf. District of Columbia v. Wical Ltd. P'ship*, 630 A.2d 174, 182 (D.C. 1993) ("Courts should not decide more than the occasion demands.") (citation omitted).

[42] *Iron Vine Sec., LLC v. Cygnacom Solutions, Inc.*, 274 A.3d 328, 338 (D.C. 2022) (footnote omitted).

[43] *See*, *e.g.*, *Bloom v. Beam*, 99 A.3d 263, 266 (D.C. 2014) (citing precedent) (the requirement is "strictly construed").

C. The Hospital misapprehends the informed-consent doctrine.

1. The Hospital mistakenly argues that conduct comprising actionable negligence may not also support a claim for lack of informed consent. (*See, e.g.,* Br. of Appellant 34 ("If such a claim is viable, it alleges negligent treatment — not a negligent failure to obtain the patient's informed consent to treatment.").) On the contrary, it is not uncommon for a single nexus of facts to yield multiple theories of liability, with differing elements being applied to the same set of circumstances.[44] So it is with medical negligence and the informed-consent doctrine.[45] That there may be factual overlap does not skew the analysis. These are two separate theories, and the court below correctly treated them as such.

2. The Hospital repeatedly offers an incorrect, citation-free, counterintuitive constriction of the informed-consent doctrine. (*See*, *e.g.,* Br. of Appellant 33 ("it

---

[44] *See*, *e.g.*, *Jarrett v. Woodward Bros.*, 751 A.2d 972, 974-75, 977 (D.C. 2000) (claims of common-law negligence and negligence *per se*); *Fry v. Diamond Constr., Inc*., 659 A.2d 241, 246-49 (D.C. 1995) (six alternative theories of liability arising from the same circumstances); *Payne v. Soft Sheen Prods., Inc.,* 486 A.2d 712, 721 (D.C. 1985) ("A plaintiff may plead a claim of manufacturer negligence in failing to warn about foreseeable harm from a product, may claim strict liability for injury derived from the same failure, or may do both.") (citation omitted).

[45] *See, e.g.*, *Miller-McGee v. Wash. Hosp. Ctr*., 920 A.2d 430, 436 (D.C. 2007) (permitting a "new theory of recovery" (lack of informed consent) to be added to a complaint alleging medical negligence "because it seems clear that the lack of informed consent claim rests on the same set of facts alleged in the existing" complaint); *Canterbury*, 464 F.2d at 778 (separate claims against a physician for

certainly does not require warnings of the risks of *non-compliance* with medical instructions"), 34 ("Apparently, no state or federal court has ever construed informed-consent liability to encompass a healthcare provider's duty to warn a patient of the risks of non-compliance with medical instructions."), 35 ("Not disclosing to a patient the risks of not following agreed-upon instructions to show up for testing does not fall under the umbrella of the informed-consent doctrine, which has never required such warnings to patients.") The Hospital's view is at war with this Court's jurisprudence.[46]

a. As far as Ms. Dunbar knew, NP Belna's proposed treatment consisted of her returning to the clinic, on a date scheduled, so she could receive a repeat blood test to confirm her pregnancy. As a "competent adult human being," Ms. Dunbar had "the right" "to reject [that] proposed treatment," but she needed to "rely heavily on the knowledge and advice of" NP Belna.[47] "In order to make an intelligent and informed choice" on whether and when to return for a repeat blood test, Ms.

---

failure to obtain informed consent to surgery and negligent performance of the surgery).

[46] *See, e.g.*, *Dennis*, 928 A.2d at 672 (informed-consent claim prevailed; physician alleged the patient failed to follow his instruction "to quit smoking at least a month before the surgery" but the patient denied knowing smoking's impact on surgery).

[47] *Crain*, 443 A.2d at 561.

Dunbar needed "first [to] obtain the facts necessary to make the decision."[48] To satisfy those "information needs," "at a minimum," NP Belna was required to "disclose the nature of [Ms. Dunbar's] condition, the nature of the proposed treatment, . . . and the nature and degree of risks . . . in abstaining from the proposed treatment."[49] If knowing a particular risk would bear on Ms. Dunbar's decision to skip or postpone her repeat blood test, it needed to be disclosed.[50] It was information she had "every right to expect."[51]

b. The Hospital recognizes that "Plaintiffs had an evidentiary basis to argue that Ms. Dunbar was not aware of her risk of dying from an ectopic pregnancy." (Def.'s Mot. for J. as a Matter of Law 4.) Indeed, there was compelling evidence authorizing the instruction on informed consent and permitting reasonable jurors to find that NP Belna never told Ms. Dunbar (i) that her return visit was to allow testing to diagnose her ectopic pregnancy, (ii) that her medical condition required that she immediately come in for this treatment, or (iii) that the risks of not

---

[48] *Id.*

[49] *Id.* at 562; *see also Canterbury*, 464 F.2d at 787-88 (noting the need to communicate "the results likely if the patient remains untreated"); *Crain*, 443 A.2d at 562 ("we agree with [*Canterbury*] and its rationale").

[50] *Canterbury,* 464 F.2d at 787 ("all risks potentially affecting the decision must be unmasked") (footnote omitted).

[51] *Id.* at 782 (footnote omitted).

returning for the appointment involved very serious consequences, including death.[52] Not merely were there "sins of omission"; NP Belna deliberately withheld material information because she "saw no reason to frighten Ms. Dunbar with the prospect of dying from an ectopic pregnancy" (Br. of Appellant 35). But disclosing that information was necessary: There was no evidence suggesting that Ms. Dunbar, an otherwise healthy "competent adult human being," could not "handle the truth." Whether well-intentioned or not, NP Belna's infantilization of Ms. Dunbar formed the essence of an informed-consent claim.[53]

3. The Hospital fares no better with its argument that an informed-consent claim may lie "only" with failing to disclose the risks of having or foregoing a specific medical procedure. (*See* Br. of Appellant 36.) The Hospital engages in logical fallacy: Because there are cases applying the informed-consent doctrine in medical-procedure cases, says the Hospital, then the doctrine applies only in medical-procedure cases. The law is not so narrow.

---

[52] *See Washington Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 577 (D.C. 2011) ("[a] 'party is entitled to a jury instruction upon [a] theory of the case if there is sufficient evidence to support it'" (quoting *Waas*, 648 A.2d at 183)).

[53] *See, e.g.*, *Canterbury*, 464 F.2d at 789 (informed-consent doctrine does not permit withholding information based on a "paternalistic notion" that "presumes instability or perversity for even the normal patient").

Crain and *Canterbury* teach that the informed-consent doctrine derives from the right of every person to make an informed decision on what treatment to accept. If, as in this case, a patient is suffering a latent medical condition, not only must the condition and its treatment options be disclosed, but the healthcare professional must also disclose the consequences of failing to comply with the treatment that is intended to confirm and cure the latent condition. This Court has recognized the doctrine as applicable in cases of procedures *and* in cases of treatment.[54]

The Hospital's case authority does not help it. In *Cauman v. George Washington University*,[55] for example, the circumstances did not present an informed-consent claim at all. The principal holding was that "District of Columbia law does not recognize a claim for negligent infliction of emotional distress resulting from a wrongful birth."[56] In reaching that holding, the Court also rejected an argument that the plaintiffs could couch their claim as one for lack of informed consent. Not only had the plaintiffs not pled that theory of recovery, but

---

[54] *E.g.*, *Gordon v. Neviaser*, 478 A.2d 292, 294 (D.C. 1984) ("material information regarding the proposed *treatment* must be communicated to the patient") (emphasis added); *Crain*, 443 A.2d at 562 (healthcare provider "must disclose," among other things, "the nature of the proposed *treatment*" and "the nature and degree of risks and benefits inherent in undergoing and in abstaining from the proposed *treatment*") (emphasis added).

[55] 630 A.2d 1104 (D.C. 1993).

[56] *Id*. at 1109.

also the patient had, in fact, undergone the diagnostic test, and the claim arose from the negligent failure to interpret the results properly.[57] The Hospital's remaining D.C. cases similarly do not deny the duty to inform a patient about the consequences of a patient's inaction, or that her pregnancy is potentially life-threatening. The cases simply present different circumstances.[58]

III. The jury fairly compensated each child for his or her loss.

After observing counsel, witnesses, and jurors, and knowing the evidence and how it was perceived, the trial judge found the jury's award well supported and neither extreme nor shocking. (A. 832-42.) The Hospital cannot show why this Court must reject these consistent findings of judge and jury.[59] This Court's review

---

[57] *Id*. at 1105, 1108.

[58] *See Cleary v. Group Health Ass'n*, 691 A.2d 148, 151, 154 (D.C. 1997) (physician did not fail to inform but rather allegedly gave the patient inaccurate information; plaintiff "concedes that his is not an informed consent case"); *Jones v. Howard Univ., Inc.*, 589 A.2d 419, 422 (D.C. 1991) (claim failed because of the absence of a legally cognizable injury); *Gordon*, 478 A.2d at 296 (claim failed because of insufficient evidence of causation); *Kelton v. District of Columbia*, 413 A.2d 919, 920 (D.C. 1980) (claim failed because it was time-barred).

[59] *See Asal*, 247 A.3d at 277 ("The scope of this review [of the denial of a motion for remittitur] is 'especially narrow' because 'the trial court's unique opportunity to consider the evidence in the context of a living trial coalesces with the deference given to the jury's determination of such matters of fact as the weight of the evidence.'" (quoting *Campbell-Crane & Assocs.*, 44 A.3d at 945)); *Bond v. Ivanjack*, 740 A.2d 968, 976 (D.C. 1999) ("we must accord great deference to the trial court's decision to grant or deny a motion for new trial based on excessiveness

of an order denying a new-trial motion on the ground of excessive verdict is "very restricted."[60] Indeed, to undersigned counsel's knowledge this Court has never issued a reported decision reversing denial of a remittitur.[61] Particularly as to the relief awarded the three children, "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.'"[62]

A. Each child suffered economic and noneconomic loss.

The Hospital's discontent rests on two elements of relief for Ms. Dunbar's children: damages for loss of their mother's (a) "household services" and (b) "parental guidance, care, support and education." (Br. of Appellant 39-45.)

---

of the verdict and may reverse that decision only for abuse of discretion" (quoting other D.C. authority); *Louison v. Crockett*, 546 A.2d 400, 403 (D.C. 1988) (emphasizing the "unusual circumstances" necessary to overcome the "great weight" afforded jury verdicts).

[60] *Louison*, 546 A.2d at 404 (internal quotation marks and citation omitted).

[61] *But see Gordon v. Rice*, 261 A.3d 224, 226, 232 (D.C. 2019) (holding that, to enable "meaningful review," remand required to allow trial court to state its reasons for not ordering a larger remittitur on punitive damages); *Louison*, 546 A.2d at 407 (remanding so trial court could state reasons "clarify[ing]" its denial of remittitur).

[62] *Campbell-Crane & Assocs.*, 44 A.3d at 945 (emphasis added) (quoting *Langevine v. District of Columbia*, 106 F.3d 1018, 1024 (D.C. Cir. 1997)).

First, the Hospital is mistaken now to argue that there must be an economic value assigned to the latter relief. (Br. of Appellant 40.) At trial, the Hospital was not so narrow-minded. Plaintiffs proposed jury instructions identifying two "elements" of "lost services" under the Wrongful Death Act. (A. 707.) As Plaintiffs explained, their proposed instruction "only talks about these two elements." (A. 707-08.) "One is the lost household service which is an economic figure. And the other one is the loss of guidance, education and support which is a noneconomic figure." (App. 707.) The court asked the Hospital for its position, and its counsel responded unequivocally: "That's fine[,] Your Honor. We're fine with the plaintiffs' proposed changes" (A. 708). And that is how the court instructed the jury. (A. 766-67.)

Second, the Hospital's waiver of objection to this instruction was well founded.[63] Regardless of terminology, these two "elements" are consistent with Plaintiffs' theory of the case, this record, and common sense. "Household services" are "[t]hings like cooking, cleaning, laundry[,] yard work, care of the children, this type of thing." (A. 352.) Because these items can be purchased "in the marketplace," it is possible for an economist to use data routinely relied upon to calculate "a value" on them. (A. 352-53, 363-69.) By contrast, the second element

---

[63] *See* SUPER. CT. CIV. R. 51.

— the value of a parent's intangible support — "cannot be quantified with mathematical precision," and so "'the amount of damages to be awarded must be based largely on the good sense and sound judgment of the jury . . . [and] all the facts and circumstances of the case.'"[64]

Third, the Hospital confounds the law. The second "element" is not compensation for "grief and sentimental loss." (Br. of Appellant 39.) Indeed, immediately before instructing the jury on the two "elements," the trial court admonished, "The Wrongful Death Act does not permit you to and you must not award [the children] any amount for the sorr[ow], mental distress or grief or for the loss of love and affection that they may have suffered because of Tiffaney Dunbar's death." (A. 766.) The jury is presumed to have followed these instructions.[65]

B. Each child's noneconomic loss was soundly grounded in evidence.

For two years before her death, Ms. Dunbar, her four-year-old son (J.D.), and her ten-month-old daughter (T.D.) lived with Ms. Dunbar's adult sister, Shanaye

---

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

[65] *See*, *e.g.*, *Blackwell v. Dass*, 6 A.3d 1274, 1278 (D.C. 2010); *Psychiatric Inst. of Wash. v. Allen*, 509 A.2d 619, 627, 629 (D.C. 1986).

Batey. (A. 301, 302, 311.) From Ms. Batey, the jury learned that Ms. Dunbar "always said she wanted a big family" (A. 311; *see also* A. 303), "loved her babies" and "didn't put anything before" them, and was "caring," "very motherly," and "[k]new how to care for her kids" (A. 303). "[T]hat's the best way to describe my sister," Ms. Batey testified. (A. 303.)

Morgan Savoy, a friend who knew Ms. Dunbar for 16 years, also described her as a "caring mother" who "interact[ed]" with her children "[a]bout every time that I saw her." (A. 226-27.) Even Mark Mitchell, M.D., a physician at the Hospital who had treated her, testified, "I know she was dedicated to her children." (A. 295.)

Ms. Batey illustrated the kinds of activities Ms. Dunbar provided for her children (*e.g.*, A. 304, 315-19), and acknowledged why she cannot substitute for her sister (A. 315-18). Her examples included how Ms. Dunbar's young son J.D. misses his mother's comfort as he copes with learning difficulties and anger (A. 316-17); how her oldest child, a young lady now 13 years old, missed her mother's advice and comfort when she experienced her first menstrual period (A. 318); and how the children will miss their mother's help with athletics (A. 316, 317.)

C. The jury fairly determined each child's relief.

1. For the children's loss, Plaintiffs presented, without objection, the testimony of three witnesses with firsthand knowledge of Ms. Dunbar's relation with her

children, four photographs, and three very short videos — of 83 seconds, 108 seconds, and 135 seconds, respectively — recording counsel's conversation with each child. None of this evidence was inflammatory or otherwise objectionable. There was no "day in the life" video, home movie, or other emotionally charged display.

2. Plaintiffs' opening statement (A. 123-42) and closing argument (A. 781-805, 805-11) betray no unfair appeal. "We're not here for sympathy," counsel said. (A. 139.) The damages sought for the children are not for "sadness" on the loss of a parent. (A. 140, 802.) The Hospital's experienced trial counsel interposed only one objection to Plaintiffs' closing argument, and that was to the use of an argument expressly approved in *District of Columbia v. Colston*,[66] and reaffirmed by this Court thereafter.[67] (*See* A. 691-95, 781.) The Hospital otherwise did not object, move for a mistrial, or ask for any special or limiting instruction.[68]

---

[66] 468 A.2d 954, 957-58, 957 n.1 (D.C. 1983).

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

[68] *See, e.g., District of Columbia v. Bethel*, 567 A.2d 1331, 1336-38 (D.C. 1987) (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") (emphasis added) (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

3. This Court has rejected multiple pleas to revisit the propriety of the *Colston* argument. (*See* A. 876-80.) No decision hints that the argument would be improper for intangible claims under the Wrongful Death Act, and the Hospital fails to cite any authority to support its contention. The argument applies to claims, of whatever nature, for which jurors must ascertain their own amount of what is fair, without economic guidance.[69] And it is notable that this jury did not appear swayed by the *Colston* argument: When arguing for an award for Ms. Dunbar's pain and suffering, Plaintiffs' trial counsel said, "Some of you might think that's worth 5 million. Some of you might think it's worth 10. Some of you might think it's worth 15 or more. Again, that's completely up to you." (A. 803-04.) The jury decided upon $500,000 — a fraction of what trial counsel had mentioned.

4. In any event, the trial court charged the jury, without objection, that "t]he statements and arguments of the lawyers are not evidence"; "[y]ou should decide the case without prejudice . . . sympathy or favoritism"; "[t]he defendant is liable to pay damages only for the harm that the defendant's conduct caused"; and "you must not award . . . any amount for the sorr[ow], mental distress or grief or for the

---

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").

[69] *See Roberts-Williams*, 37 A.3d at 912 (holding *Colston* argument not improper as to plaintiff's damaged career and professional reputation).

loss of love and affection that [the children] may have suffered." (A. 747, 748, 762, 766.) The court instructed the jurors to evaluate the intangible loss of each child separately, and to apply the law and their common sense to determine damages that would fairly compensate each child for the loss of their mom's guidance and other support over their lifetimes. (A. 749-50, 755, 763-64, 766-67.) Finally, immediately before the jurors began deliberations, the court exhorted them to "[r]emember that you are not advocates." (A. 812-13.)

The purity of this record stands in stark contrast to those of other cases in which trial judges granted remittiturs.[70]

D. The relief awarded each child is well within reason.

The Hospital suggests there must be "an economist's expert testimony" assigning "monetary value" to a mother's nurture. (Br. of Appellant 42.) That is not the law.[71] The jurors' collective wisdom will value the loss of a mother who will

---

[70] *Compare*, *e.g.*, *Scott v. Crestar Fin. Corp.*, 928 A.2d 680, 688 (D.C. 2007) (verdict marred by counsel's "improper remarks"); *Bond*, 740 A.2d at 977 (verdict "in part motivated by passion" and "bias against the defendant"); *Finkelstein*, 593 A.2d at 599 (verdict "reflected the jury's determination to punish the District"); *Moss v. Stockard*, 580 A.2d 1011, 1035-36 (D.C. 1990) (verdict resulted from a jury that was "improperly motivated").

[71] *See, e.g., 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 "view that definite dollar values be established . . . went

not be there to guide her children as they learn right from wrong, strive for academic achievement, deal with bullies and bigots, navigate the vicissitudes of social media, 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 whom if anyone to accept as a life partner. Ms. Dunbar's children will need their mother, and suffer from her loss, each in his or her own way.

In wrongful-death actions, "close relatives of the deceased . . . may recover compensation from the wrongdoer commensurate with the loss sustained."[72] The jury met its duty to "strike a 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."[73] The jurors were attentive and gave every indication that they understood the evidence. Many took notes. They deliberated for more than five hours over two days. By their decision, the jury did

---

beyond the requirements of the proof upon which the good sense and sound judgment of the jury were to operate"); *accord*, *Binker*, 492 A.2d at 863-64 (citing *Elliott* with approval; "[i]n wrongful death actions, 'the amount of damages to be awarded must be based largely on the good sense and sound judgment of the jury . . . [and] all the facts and circumstances of the case'" (quoting other D.C. authority)).

[72] *District of Columbia v. Hawkins*, 782 A.2d 293, 303 (D.C. 2001) (quoting *Semler v. Psychiatric Inst. of Wash.*, 575 F.2d 922, 924-25 (D.C. Cir. 1978)).

[73] *Phillips v. District of Columbia*, 458 A.2d 722, 726 (D.C. 1983).

all the law permits to help each child overcome the loss of his or her mother. The jury's award of $5 million for each child compares favorably with other local verdicts, which the Hospital pointed to below (*see* A. 841-42), even if it were helpful to engage in such comparisons.[74] This verdict, and the trial judge's approval of it, cannot be said to be "beyond all reason,"[75] "so great as to shock the conscience,"[76] or "so inordinately large as *obviously* to exceed the maximum limit of a reasonable range within which the jury may properly operate."[77] The judgment has earned this Court's deference.[78]

Affirming the denial of a remittitur, in *Washington Metropolitan Area Transit*

---

[74] *See Daka Inc. v. Breiner*, 711 A.2d 86, 100 (D.C. 1998) ("excessive verdicts should not be measured strictly on a comparative basis"); *Finkelstein*, 593 A.2d at 598 (cautioning against "facile comparisons of verdicts"); *Capitol Hill Hosp. v. Jones*, 532 A.2d 89, 93 (D.C. 1987) ("[e]ach case . . . necessarily rises or falls on its own facts" (quoting *May Dep't Stores Co. v. Devercelli*, 314 A.2d 767, 775 (D.C. 1973))).

[75] *E.g.*, *District of Columbia v. Bamidele*, 103 A.3d 516, 521 (D.C. 2014) (citations omitted).

[76] *Id*.

[77] *Daka*, 711 A.2d at 100 (emphasis added) (internal quotation marks and citation omitted).

[78] *See*, *e.g.*, *Campbell-Crane & Assocs.*, 44 A.3d at 945-47; *Croley v. Republican Nat'l Comm.*, 759 A.2d 682, 703 (D.C. 2000); *Hughes v. Pender*, 391 A.2d 259, 263 (D.C. 1978) (quoting *Taylor v. Wash. Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir. 1969)).

Authority v. Jeanty this Court approved this language from trial 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.[79]

As the trial court acknowledged (A. 842), that teaching applies no less in this case.

---

[79] 718 A.2d 172, 180 n.14 (D.C. 1998); *see also Campbell-Crane & Assocs.*, 44 A.3d at 945 ("[i]t is not our role to credit or weigh the evidence of injury"); *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 902 (D.C. 2008) ("We are obliged to respect the jury's prerogatives.").

Conclusion

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

/s/ Marc Fiedler

____

* MARC FIEDLER #413316
mfiedler@koonz.com
KOONZ MCKENNEY
JOHNSON & DEPAOLIS LLP
2001 Penn. Ave., NW, Suite 530
Washington, DC 20006
(202) 659-5500

/s/ Alfred F. Belcuore

____

ALFRED F. BELCUORE #181560
alfred.belcuore@belcuorelaw.com
LAW OFFICES OF ALFRED F. BELCUORE
336 Constitution Ave., NE
Washington, DC 20002
301-367-2992

Attorneys for Appellees

Of Counsel

CATHERINE D. BERTRAM
#425052
katie@blg-dc.com
BERTRAM LAW GROUP, PLLC
20 F Street, NW, 7th Floor
Washington, DC 20001
202-803-5800

ALLAN M. SIEGEL
#4447705
siegel@dc-law.net
CHAIKIN, SHERMAN,
CAMMARATA & SIEGEL, P.C.
1232 17th St., NW
Washington, DC 20036
202-659-8600

January 26, 2023

CERTIFICATE OF SERVICE

This certifies that on this 26th day of January, 2023, the foregoing Brief for Appellees was served electronically, using the Court's electronic delivery service, on Counsel for Appellant, Derek M. Stikeleather and Janet A. Forero, Esquires, Goodell, DeVries, Leech & Dann, LLP, One South Street, 20th Floor, Baltimore, Maryland 21202; and Daniel C. Costello and Timothy D. Fisher, Esquires, Wharton Levin Ehrmantraut & Klein, P.A., 104 West Street, P.O. Box 551, Annapolis, Maryland 21404-0551.

/s/ Alfred F. Belcuore

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

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

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

      (1) the acronym "SS#" where the individual's social-security number would have been included;
      (2) the acronym "TID#" where the individual's taxpayeridentification number would have been included;
      (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
      (4) the year of the individual's birth;
      (5) the minor's initials; and
      (6) the last four digits of the financial-account number.

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

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

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

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

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

Alfred F. Belcuore
Signature

22-CV-532
Case Number(s)

Alfred F. Belcuore
Name

1-26-2023
Date

alfred.belcuore@belcuorelaw.com
Email Address