SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ELOYD ROBINSON, *et ux.*	*	
Plaintiffs,	*	2015 CA 008980 M Judge Neal Kravitz
v.	*	
THE METROPOLITAN WASHINGTON ORTHOPAEDIC ASSOCIATION, CHARTERED, *et al.*	*	
Defendants.	*	

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PLAINTIFFS' OPPOSITION TO MOTION FOR REMITTITUR OR NEW TRIAL

The plaintiffs oppose the motion of defendants Rida Azer and American International Orthopaedic Association to reduce the verdict amount or to grant a new trial. The Court conducted the trial with impeccable fairness. Plaintiffs' counsel said nothing improper, and certainly nothing that would warrant the drastic remedy of a new trial. The verdict was a fair and reasonable recognition of the devastating extent and nature of the injury.

A repeated theme of this motion is to protest the use of accurate but plain language to describe what happened here. Dr. Azer did, in fact, "negligently kill" Eloyd Robinson's leg. The plaintiffs proved that. His standard of care violations were in fact "egregious," as the evidence showed. This was, in fact, a mutilating injury. Mr. Robinson's history of playing in the Negro Baseball Leagues was only briefly mentioned at trial but was, in fact, relevant to his profound injury. The Robinsons' marriage has been deeply affected: Clara Robinson is now a full-time caretaker, and the fact that the marriage remains emotionally "strong," as she also testified, cannot erase this transformation.

Further grounds for this opposition follow.

I. The Evidence at Trial Fully Warranted the Words "Egregious," "Negligently Killed the Leg" and "Mutilated"

The leading case in the District of Columbia on granting a new trial for remarks of counsel is *Psychiatric Inst. of Wash. v. Allen*, 509 A.2d 619, 629 (D.C. 1986). There, the plaintiff's counsel in closing argument repeatedly accused witnesses of lying or fabricating their testimony. The Court of Appeals branded the plaintiff counsel's argument as "flagrantly unprofessional" and said "we condemn these statements in the strongest possible terms." Yet it affirmed the denial of a motion for new trial, because among other things, the trial court had properly instructed the jury that it was the sole decider of who was telling the truth and that it should reject arguments that appealed to jurors' passions. As the appellate court explained:

> The issue confronting us here, however, is whether counsel's statements were "likely to mislead, improperly influence, or prejudice the jury against the [Institute]," and, if so, whether "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 [Institute]. [omitting citations]

Psychiatric Institute, 509 A.2d at 628. More recently, in *President and Directors of Georgetown College v. Wheeler*, 75 A.3d 280 (D.C. 2013), the Court of Appeals also affirmed the denial of a motion for new trial based on closing arguments. The appellate court affirmed as rational the trial court's finding nothing improper in counsel's remark that "the jury system exists in our country to protect the community" and that standards of care "exist to promote patient safety and protect patient health," rejecting a defense argument that this was an improper "send-a-message" argument. 75 A.3d at 292-93.

While the courts use various yardsticks to decide whether to grant a new trial, a primary focus is on whether a miscarriage of justice would occur by allowing the verdict to stand. For example, in reversing a trial court's denial of a new trial motion in *Gebremdhin v. Avis Rent-A-*

Car System Inc., 689 A.2d 1202 (D.C. 1997), the Court of Appeals concluded: "Given the evidence supporting a liability finding against Avis' driver, the absence of any evidence to rebut Gebremdhin's *prima facie* case on liability, and the instructional error, it would be a miscarriage of justice to deny the new trial motion." 689 A.2d at 1204-05 (In that case, the Avis driver rear-ended the plaintiff at a traffic circle, never gave any good reason for it, and the trial court erroneously instructed the jury that skidding on wet pavement would justify a finding of lack of negligence, when there was no evidence the defendant had in fact skidded before impact.)

In short, granting a new trial for remarks of counsel would require a finding that:

- Counsel had said something grossly improper and unfair,
- And that counsel's remarks were unsupported by the evidence,
- And that the impropriety could not have been cured by instructions to the jury.

In this case, nothing like that occurred. The comments of counsel were fair, they were supported by the evidence, and the jury was properly instructed at all times. Indeed, conspicuously absent from the defense motion is any contention that the jury was incorrectly instructed on any issue. Moreover, because "the fairness of counsel's argument must be assessed in the context of all other evidence and proceedings at trial," *Haigler v. Logan Motor Co.,* 86 A.2d 108, 109 (D.C.1952), it is appropriate to briefly review the evidence of how badly Dr. Azer violated national standards of care for his profession.

A. Plaintiffs proved that Dr. Azer's care was "egregious"

The Court correctly held that the degree to which the defendant departed from applicable standards of care was a fair topic for discussion by plaintiff's experts. The evidence here, not only with the isolated use of the word "egregious" by one of plaintiff's experts but more

importantly by the entire course of the liability proof, fully warranted the conclusion that Dr. Azer had severely departed from national standards of care.

On redirect examination (not on direct, as the defense said in its motion at p. 4), Dr. Jeffrey Shapiro, one of plaintiff's two standard of care experts, used the word "egregious" to describe how badly Dr. Azer had violated the basic standards of care in his treatment of Mr. Robinson. He was asked to explain why he testified for the plaintiff, after the defense had, as the court put it at the bench, "implied that he was a hired gun … [with] a corrupt motive" to testify. (Ex. 1: Dr. Shapiro's Trial Testimony, at 12 (the quoted portion is from Dr. Shapiro's re-direct examination)).

Dr. Shapiro then testified:

> I love what I do. And I don't like to see doctors sued, because I'm a doctor. If I can defend a doctor because I think that he provided good care, I will do that. I turn away 95 percent of cases presented to me. And when I see a case that has the just merit and in this particular case is egregious –
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> MR. RUTLAND: I'd object. Move to strike, Your Honor.
>
> THE COURT: Hold on a second.
>
> THE WITNESS: -- I'll stop that.[1] (Ex. 1, at 12-13.)

Dr. Shapiro went on to explain how he used legal cases to educate the residents training under him. And he concluded with these words:

> I have spoken about this case in the more general term, because I want them not to do what was done here in this case, which was an injury that was preventable; and it was bad. So I use it in education purposes for the residents. (Ex. 1 at 14.)

Plaintiffs' other standard of care expert, Dr. Richard Matza, in his video testimony for trial, did not use the word "egregious" but implied as much when he described how

[1] The witness's actual word may have been "there," not "that."

unprecedented in his experience it was to see what happened with Dr. Azer's care of this patient. For example, he testified how inexplicable it was that Dr. Azer left Mr. Robinson with only half of a prosthetic knee and had failed to finish the procedure:

> I've had patients with all types of bone quality that I've seen in my practice, and when I was in training, and we -- not once did we not complete the procedure. I don't understand. It doesn't make any sense. (Ex. 2: Dr. Matza Trial Dep. Testimony, at 82.)

Other testimony of these highly qualified and experienced expert witnesses, who have between them carried out many thousands of total knee replacements, including regular work on patients with the kind of blood vessel narrowing that Mr. Robinson had, fully justified the conclusion that Dr. Azer's care was "egregious." They testified that his care was negligent in three distinct time periods: pre-operative workup, the surgery itself, and the post-operative care. To summarize the testimony briefly:

Pre-Operative Egregious Negligence

Dr. Azer never personally evaluated Mr. Robinson's vascular status in the right leg and never sent him to a vascular surgeon for such evaluation, despite his own recognition in the note he wrote after his first encounter with Mr. Robinson in April 2013 that Mr. Robinson had vascular disease in his legs and therefore a vascular consult was warranted. He proceeded instead with a standard pre-surgical evaluation that was carried out by the patient's primary care doctor, Dr. Ong, and only involved a cardiovascular consultation because Dr. Ong sent the patient to Dr. Crawford-Green, the cardiologist, who documented only an examination of Mr. Robinson's heart, not his leg. As a result, there is not a single notation by any doctor in Mr. Robinson's records of his vascular flow in the operated leg before the date of the surgery in July 2013. The only way that Dr. Azer's expert, Dr. Andrews, was able to say that Dr. Azer met the pre-

operative standard of care was his acceptance of Dr. Azer's deposition testimony that he did do a vascular evaluation despite never documenting one.

Even more egregiously, Dr. Azer planned the operation using a tourniquet, which is never recommended in a patient with peripheral vascular disease and especially if the patient has a stent in the operated leg. Dr. Azer knew the patient had vascular disease despite his failure to carry out any vascular evaluation to determine its extent. Plaintiffs introduced into evidence numerous statements from peer-reviewed medical literature that a tourniquet should never be used on a patient with peripheral arterial disease in the operated leg, and the defense produced no literature in response.

Finally, Dr. Azer admitted three times in his deposition – and then contradicted himself at trial – that he never knew about the existence of the arterial stent in the thigh onto which he placed the tourniquet until a month after the surgery. Plaintiffs showed that the existence of the stent was documented in the pre-op medical evaluation report that Dr. Ong sent to Dr. Azer, and was visible in an x-ray in Dr. Azer's files. So there was no excuse for his not knowing this important fact.

Egregious Negligence During Surgery

Dr. Azer not only used a tourniquet on a thigh with a stent, in contradiction of the advice of all published literature, but he did so at high pressure for a total of four hours, far beyond what was acceptable, according to plaintiff's experts. Then, as noted above, he failed to finish the implant process and left the patient without a femoral component, something Dr. Matza had never seen in his 39 years of doing this type of surgery.

Egregious Negligence Post-Operatively

As described in detail by Dr. Shapiro, Dr. Azer failed to do an immediate post-operative evaluation as required by the published literature (including Dr. Butt's article in the Journal of Arthroplasty), even though the nurses in the PACU repeatedly paged him to come see his patient. Then, once he belatedly saw the patient the next day and over the course of the following month, each of Dr. Azer's post-operative evaluations of Mr. Robinson was negligently carried out. The plaintiffs introduced photographic evidence (the cell phone photo by the Robinsons' son) that, 17 days post-operatively, the surgical wound was thickened and the skin around the knee was discolored, both signs of poor healing and of potential vascular compromise, and yet Dr. Azer's only comment in his note of that visit on August 2 was that the "wound is healed." Use of the long leg cast in this post-op period when a brace would have sufficed only worsened the collateral circulation in the leg. On August 16, when other evidence showed that the foot was turning black, Dr. Azer's note failed to mention the foot at all and continued to say that the surgical wound was "healed" when the later photographs taken at the hospital showed that it had never healed. In short, he completely missed a dying leg that was happening under his nose. This happened because Dr. Azer's visits lasted a mere minute or two, and he never even touched Mr. Robinson's leg, according to the patient, his wife and son.

When the patient finally was sent to United Medical Center on August 19, the doctors and nurses there documented a leg that was obviously beyond salvage, with large areas of black gangrene all over the knee and lower leg. The pathologist who inspected the amputated limb wrote that the leg was "mummified" in places, and the vascular surgeon documented that the stent was occluded. All of this was completely missed by Dr. Azer in his cursory inspections of the leg in the post-operative period.

Egregious Negligence and Causation

Finally, what makes Dr. Azer's care even more egregious is the simplicity of what needed to be done to fix the problem he created: a single telephone call by Dr. Azer to a vascular surgeon, either before the surgery, immediately after when the nurses in the PACU reported a cool foot with no palpable pulses, or any time thereafter up through August 2. A vascular surgeon would have told Dr. Azer not to use the tourniquet, and if he persisted anyway, a vascular surgeon could have repaired the damage by re-opening the occluded stent or doing an arterial bypass.

None of that evidence was seriously contested. Instead, the defense put on a "causation defense" alleging that microvascular disease from diabetes, completely independent of Dr. Azer's surgery, caused the leg to die. The problem here was that Mr. Robinson had no documented microvascular disease in that leg or anywhere else in his body, and if it did exist, it should have shown itself in multiple places.

Thus, in light of all that evidence, Dr. Shapiro's brief comment that the care was "egregious" was fully justified. And the reference to this testimony in plaintiff's closing argument was in no way inflammatory or improper. The defense argues that the issue is only whether the care was "reasonable" and that any characterization of just how unreasonable the care was is improper. The defense never explains this counter-intuitive argument. Surely if a driver in a car crash case was driving 90 miles per hour in a 30 mph zone, counsel would be permitted to use "egregious" or a similar adjective. In a medical negligence case, when juries frequently give the benefit of the doubt to the doctor defendant for simple errors, it is important that the plaintiff be able to show the severity of the violations of standards of care.

"Egregious" is a word that has been used by courts in this jurisdiction to describe certain acts of medical negligence. For example, in *Haven v. Randolph*, 494 F.2d 1069, 1070 (D.C. Cir. 1974), the D.C. Circuit said:

> Allowing a jury to make its own inferences from the proven facts may be permissible when a physician has committed a blunder so egregious that a layman is capable of comprehending its enormity. An example is the case of a surgeon who leaves a sponge in an incision after removal of a kidney.

The D.C. Court of Appeals has cited this statement from *Haven* as established law here. *See Posada v. Kilpatrick*, 547 A.2d 163, 168 (D.C. 1988) and many other cases.

Plaintiffs do not contend the care here was so egregious as to dispense with the need for expert testimony. Still, the point is that the courts have recognized that standard of care violations are not just an on/off switch of reasonable vs. not reasonable, but subject to gradations and in some cases, so bad as to be egregious. For example, in *Burton v. United States*, 668 F. Supp. 2d 86, 91 (D.D.C. 2009), Judge Lamberth wrote in his findings of fact and conclusions of law in a Federal Tort Claims Act case:

> As noted *supra* Part III. C.1.a., the defendant makes much of Dr. Potter's treatment of Capt. Burton on February 7, 2003, arguing that because Dr. Potter palpitated Capt. Burton's leg but found no tenderness, found neurovascular sensation intact, and concluded that Capt. Burton's peri-ankle swelling and nighttime swelling were not atypical, Dr. Potter concluded that Capt. Burton did not have DVT and thus did not need to be warned of it. What Dr. Potter's actions instead show is his awareness of at least some risk of DVT faced by Capt. Burton, and that despite this awareness, Dr. Potter failed to mention the risk to Capt. Burton. The defendant's failure to warn is therefore particularly *egregious* in this case.

Burton v. United States, 668 F. Supp. 2d at 103 (emphasis added).

B. The terms "negligently killed" and "mutilated" were accurate and appropriately used

1. "Negligently killed the leg…"

Throughout the trial, expert witnesses on both sides referred to Mr. Robinson's amputated leg as a "dead leg" and a "leg that died." Pathologist Dr. McTighe said, without

objection, that the leg was “good and dead” for two to four weeks before the eventual amputation, which corresponded with the four weeks of post-operative care when the patient was under Dr. Azer’s exclusive care and Dr. Azer failed to see that the leg was dying. In addition, the pathologist who inspected the amputated leg described it as “mummified” in places, a process that had to have gone on for a long time.

All of this justified the preview in the opening statement that Dr. Azer had “negligently killed the leg.” The full statement was:

> MR. MALONE: Chapter three, Dr. Azer negligently kills this patient's leg; and we believe he needs to be held accountable for that.
>
> MR. RUTLAND: Objection, Your Honor.
>
> THE COURT: Objection is sustained as to the statement of personal opinion.
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> MR. MALONE: I'm sorry. I didn't mean to do that. My personal opinions don't matter, ladies and gentlemen; and the judge will tell you that. And if I say I believe something, I'm saying "we" generically as plaintiffs; not me personally as a lawyer. Is that okay, Your Honor?
>
> THE COURT: I'd try to leave out the word, "believe," altogether. (Ex. 3: Opening Statement, at 4-5.)

Plaintiff’s counsel then elaborated:

> MR. MALONE: That's chapter two on neglecting this patient. Chapter three: The doctor is personally responsible for killing the leg.
>
> MR. RUTLAND: Objection.
>
> THE COURT: The objection is overruled.
>
> MR. MALONE: Dr. Azer broke some very basic rules that keep patients safe and healthy. Doctors call these "standards of care." (Ex. 3: Opening Statement, at 19.)

The context makes clear that counsel was talking about negligently killing the leg by violating standards of care. The defense argument that plaintiffs were alleging that Dr. Azer

intentionally harmed the patient is simply not correct. The dictionary definition of "to kill" is "to cause the death of."[2] That is most assuredly what Dr. Azer did to Mr. Robinson's leg.

Along the same lines, the defense protests plaintiff's reference to "the grim reaper" in closing argument. As counsel explained at the bench after the defense objected, the intent in using the analogy was to start a chronological discussion of the injuries from the moment the negligence began, nothing more. The defense argues now this was unfairly inflammatory because this is not a wrongful death case, which the term evokes. But this is, in the most profound sense, a wrongful death case: the negligently caused death of a vital limb. And when expert witnesses on both sides, with no objection, repeatedly used the words "dead" and "dying" to refer to Mr. Robinson's leg, they acknowledged that death was an appropriate way to talk about what happened here.[3]

2. "Mutilated"

This word used in opening statement is another example of an accurate use of vocabulary by plaintiff's counsel. Here is the dictionary definition[4] of the verb "mutilate:"

> 1. to injure, disfigure, or make imperfect by removing or irreparably damaging parts: *Vandals mutilated the painting.*
> 2. to deprive (a person or animal) of a limb or other essential part.

Anyone looking at the photos of Mr. Robinson's leg shortly before it had to be amputated, with the large splotches of black, dead and mummified tissue all over it, would fairly

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[2] From http://www.dictionary.com/browse/kill?s=t

[3] The defense also now asserts that when plaintiff's counsel resumed his argument after the objection to "grim reaper" was sustained, by telling the jury "Forget about the grim reaper. Let's look at it from the beginning from Mr. Robinson's point of view of what he's experiencing in real time," (Ex. 4: Closing Argument, at 13) that this was somehow an intentional flouting of the court's ruling. (Defense Mot. at 5.) The assertion makes no sense and is incorrect.

[4] From http://www.dictionary.com/browse/mutilate?s=t

say it had been mutilated. And anyone looking at his remaining stump of a leg would also use that word, which is, as the dictionary shows, a synonym for disfigure, and also means to deprive someone of a limb. The defense motion is at war against the correct use of synonyms. Nothing improper or inaccurate was said by plaintiff's counsel.

II. The Allegation that Plaintiffs Improperly Injected Race into the Trial is False

The defense contends that the brief references at trial to Mr. Robinson's career as a professional baseball player in the Negro Leagues, with the racial segregation and Jim Crow prejudice that went with that, were somehow a nefarious attempt to get the jury to decide the case on something not relevant to the evidence. This argument is false on multiple levels. It insults the intelligence of the jury, which was composed of a remarkably well educated group of professionals (including a lawyer who was CEO of a large trade association, a New York Times social media editor, a social scientist from the Census Bureau and a real estate broker). It also denies the clear relevance of Mr. Robinson's history to what happened to him with Dr. Azer and seeks to erase from the case an important part of who he is and how this injury affects him. Finally, the argument falsely accuses plaintiff's counsel of an unethical scheme, to which we plead "Not Guilty!"

What did not happen in this trial is perhaps as important as what did. Plaintiff's counsel never argued, implied or hinted that Dr. Azer may have treated Mr. Robinson differently because of his race. Not a word was ever mentioned about Dr. Azer's own status as a foreign-born person. Most importantly, there was never any suggestion that the jury should compensate Mr. Robinson for having experienced racial discrimination. In fact, quite to the contrary, counsel's mention of "drinking from the same water fountain" in closing argument was intended to make the point that Mr. Robinson had overcome his personal history of being treated differently

because of his skin color but could not overcome the negligent killing of his leg inflicted by Dr. Azer. The precise argument went as follows:

> MR. MALONE: Working full time up until a few days before this surgery, he's lost what he loved about that. He loved his job because he's right by the ballpark. He could retell baseball stories about the old days back in the Negro baseball leagues, and he toured 38 states and a number of Canadian provinces. And we know that he some adversity during that time too. We know what it was like. *But here's a man to [who] put that adversity behind him.* He drinks out of the same water fountain as everybody does now. He can greet in that walking around –
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> MR. RUTLAND: I object, Your Honor. I'm sorry. I have to object to that.
>
> THE COURT: Overruled. Let's just move on.
>
> MR. MALONE: Okay. He's a personable man, who greets all of the dog walkers with the names of their dogs. He knows them. *And now, he's reduced to dependency and isolation and immobility.* (Ex. 4: 17 (emphasis added)).

In ruling on the water fountain motion for mistrial at the bench, the Court said:

> The reference to the drinking from the water fountain, I'm not sure that it has great relevance to anything here. But I think it's an overstatement to say that it injects issues of race into the case. I just think that the fact of the matter was that was testimony that the plaintiff played baseball in the Negro Leagues back in the late 40's and early 50's. I think anyone who's at all a student of history knows what people engaged in that pursuit endured. And I think that, to the extent that the reference to "drinking from water fountains" referred to an issue of race, it didn't do so in a way that went beyond the extent that issue was already in front of the jury. I should also add that, you know, that the fact of the matter is that the defendant isn't a Native American or an immigrant. And to the extent that the emphasis on everyone being treated equally in the court favors the plaintiff, given that he's a racial minority, I think it also potentially favors the defendant and can protect against any unfair prejudice that members of the jury might've been inclined to show toward him. And so I guess what I'm trying to say is that both parties can benefit from a sensitivity on the part of the jury for insuring that everyone be treated equally and be respected and thought of in a dignified way, regardless of their beginnings. (Ex. 4, at 24-25.)

The defense also protests the introduction in evidence of photographs of Mr. Robinson with his teammates and on his baseball card as somehow improperly injecting race into the trial. Again, we plead not guilty. Mr. Robinson's personal history, which necessarily involves the fact that he is African-American, was an important part of understanding the profound nature of the

injury inflicted by Dr. Azer. The stories that Mr. Robinson told briefly on the witness stand – batting 1,000 against Satchel Paige because he had only one at-bat and playing for $5 a game when he was 14 years old with whatever team called him first – were the same kind of stories he could tell in his security rounds of the Yards Park next to Nationals Stadium. There was a reason Mr. Robinson worked as a security guard in a park next to a major league baseball stadium. It was so he could continue to be around the game, meeting and talking with people who were interested in his stories. These are stories he can no longer tell because he can't do his job and is a virtual prisoner in his home, because of Dr. Azer's egregious negligence.

Mr. Robinson's history as a professional athlete was also why Dr. Azer could remark repeatedly in his pre-operative records (and in sharp contrast to his lawsuit story that Mr. Robinson was a high risk patient for whom he did the procedure only because he felt sorry for him) that Mr. Robinson was in great shape but for his knee arthritis and looked like a man in his 60s, not in his 80s.

The mentions of "Negro Leagues" and "Jim Crow" were brief and not dwelled on for any improper purpose. Is the defense actually suggesting that the mere mention of these words caused three African-American jurors to vote for an African-American plaintiff against an Egyptian-American doctor defendant when they otherwise wouldn't have? And what about the five white jurors? The defense argument smacks of desperation.

The case cited by the defense, *Scott v. Crestar Fin. Corp*., 928 A.2d 680 (D.C. 2007) was a case of alleged racial discrimination, unlike ours. And the closing argument by plaintiff that caused the trial court to order a new trial stands in sharp contrast to this case. In *Scott,* the plaintiff's lawyer repeatedly used an improper "send a message" argument asking the jury in effect to punish the defendant bank because it was large and because it had chosen to defend

itself in court. See Scott, 928 A.2d at 686-87. Nothing remotely like that happened here. No one asked the jury to send a message to Dr. Azer or to punish him or to do something else related to Mr. Robinson's race or Dr. Azer's ethnic status.

The other case cited by the defense in this section – a South Dakota Supreme Court case, *Loen v. Anderson*, 692 N.W.2d 194, 198 (1997) – was a personal injury car crash case in which the plaintiff's counsel, despite the defendant having admitted liability and despite court orders not to mention how far the defendant had exceeded the speed limit, nonetheless repeatedly injected the defendant's speed into his closing argument. Nothing like that happened here. Plaintiff's counsel never violated this Court's orders – not once. The defense is reduced to arguing that plaintiff's counsel was too tardy in opening statement in clarifying that the plaintiff was not showing the baseball photos to contend that plaintiff somehow would have returned to work as a professional ball player if he had not been injured by the defendant. But that had nothing to do with race, only with the defense's argument that Mr. Robinson's athletic history was too remote in time to be relevant. It was relevant, as plaintiffs demonstrated, in the link between his security guard work, to which he planned to return two weeks after Dr. Azer's surgery, and his athletic history.

Finally, it is worth noting that despite the defense protests of plaintiff's comments that they contend were intended to inflame the jury into a punishing mood, the defense never asked for the standard instruction that only compensation was at issue and that the jury was not to assess any amounts to punish the defendant. See District of Columbia Standardized Civil Jury Instructions No. 13.12 (punitive damages not authorized where only negligence is shown). Perhaps that is because defense counsel know in their hearts that plaintiff's counsel never sought

to inflame the jury and that there was no need for such an instruction. But in any case, the instruction was available and would have been given if requested.

III. The Jury's Assessment of Damages Was Fully Justified by the Evidence

The jury's verdict on damages in no way exceeded what the evidence showed was the profound and permanent nature of the injury inflicted by Dr. Azer on Mr. Robinson and Mrs. Robinson.

A. Legal Standard for Remittitur in the District of Columbia

The defense concedes that the standard for reducing a jury's assessment of the amount of damages is that the verdict must have "shocked the conscience" of the court. Defense Mot., 3. Nonetheless, because the defense goes astray in failing to follow this standard correctly, it is appropriate to briefly review the case law which shows how high a hurdle this standard imposes. The District of Columbia Court of Appeals – and before it, the D.C. Circuit – has used various formulations of the legal standard for when a trial court is authorized to reduce a jury's verdict for personal injury damages. The trial court must find that the verdict "shocks the [court's] conscience,"[5] or "was the result of passion, prejudice, or mistake,"[6] or was "monstrous,"[7] or a combination of these words.[8] All of these formulations work to accommodate the balance that

[5] *District of Columbia v. Hawkins,* 782 A.2d 293, 304 (D.C. 2001): "Only where the verdict is so excessive as to shock the conscience will a substantial remittitur or new trial be warranted."

[6] *Capitol Hill Hospital v. Jones,* 532 A.2d 89, 93 (D.C. 1987), quoting *May Department Stores v. Devercelli*, 314 A.2d 767, 775 (D.C. 1973)

[7] *Taylor v. Washington Terminal Co.*, 133 U.S. App. D.C. 110, 113 n.9, 409 F.2d 145, 148 n.9, cert. denied, 396 U.S. 835 (1969); *City Stores Co. v. Gibson*, 263 A.2d 252, 252-53 (D.C. 1970).

[8] *District of Columbia v. Murtaugh,* 728 A.2d 1237, 1241 (D.C. 1999) (overruled on other grounds): "Before granting a motion for a new trial, the court must find that the verdict is

the court must strike between respecting the jury's constitutional role under the 7th Amendment to decide the facts of the case and exercising judicial oversight when there has been a miscarriage of justice.

In addition, the jury verdict bears a presumption of validity. In *Louison v. Crockett,* 546 A.2d 400, 403 (D.C. 1988), the court introduced its discussion of a remittitur issue with this quotation from the often-cited case of *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 595 (D.C. 1985): "Trial courts have historically given great weight to jury verdicts, granting a new trial only where there are unusual circumstances which convince the trial judge, who has also heard the evidence and seen the witnesses, that the jury had been improperly influenced by non-germane factors or that its verdict is clearly unreasonable."[9] The *Louison* court went on to remand the case to the trial court for a written explanation of why it had denied the defendant's request for remittitur, while stressing that it owed deference both to the trial court's decision and to the jury's verdict. The court commented, "In exercising this so-called double deference, *i.e.*, deference to both jury and trial court, this court has been so reluctant to reverse a trial court's denial of a motion for remittitur or new trial that we have yet to do so." *Id.,* 546 A.2d at 404.

In its recent decision of *Cuevas v. Wentworth Group,* 226 N.J. 480, 144 A.3d 890 (2016), the New Jersey Supreme Court examined in depth that state's standard for remittiturs – "shocks

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against the weight of the evidence, or that there would be a miscarriage of justice if the verdict is allowed to stand. An excessive verdict is on which is "beyond all reason, or is so great as to shock the conscience. *Wingfield v. People's Drug Stores Inc.*, 379 A.2d 685, 687 (D.C. 1977)."

[9] See also *Croley v. Republican Nat'l Committee,* 759 A.2d 682, 703 (D.C. 2000), in which the appellate court quoted with approval the trial judge's rationale in refusing to reduce the verdict: "Trial courts have historically given great weight to jury verdicts. [Citation omitted.] And when parties have chosen the jury process as the means of resolving a legal dispute, it only seems proper for the court to afford significant deference to the collective wisdom of the jury."

the judicial conscience" – very much like the D.C. standard. The Court stressed the need to focus on the facts of the case at issue, as opposed to verdicts in other cases, and concluded:

> In the end, a thorough analysis of the case itself; of the witnesses' testimony; of the nature, extent, and duration of the plaintiff's injuries; and of the impact of those injuries on the plaintiff's life will yield the best record on which to decide a remittitur motion.

Id., 144 A.3d at 907.

Just such a trial court's analysis of the evidence was praised by the D.C. Court of Appeals in *WMATA v. Jeanty,* 718 A.2d 172, 180 n. 14 (D.C. 1998). The appellate court quoted at length from Judge Weisberg's decision refusing to reduce the verdict, in which he wrote that the verdict for the plaintiff's pain and suffering was "much higher than the court would have predicted based on the evidence, but not so high as to shock the court's conscience …" The trial court went on to describe details of the plaintiff's "painful and debilitating" shoulder injury and concluded, "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." At the end of this quotation of the trial court's reasoning, the appellate court concluded: "We believe that the judge addressed the issue of damages candidly and in a balanced manner, and we discern no error of law." Id. at 180 n.14.

B. The Facts Easily Justify the Amounts of the Verdicts

Both Mr. Robinson and his wife Clara Robinson have suffered profoundly from Dr. Azer's negligence, starting on July 16, 2013 and for the rest of their lives. Here is a summary of the evidence:

1. Before he came under Dr. Azer's care in the spring of 2013, Eloyd Robinson had severe arthritis in his right knee but still managed to walk an outdoor security beat full-time, an estimated five miles or 10,000-12,000 steps each night. He was a sociable man who knew by name all the dogs being walked in the park he patrolled. His manager dubbed him the "ambassador of the Yards" because of his outgoing manner. His last day at work was a few days before July 16, 2013, and he turned into his employer a calendar showing his plan to use only some of his sick days and to return to work by August 2. See testimony of Mr. Robinson and his supervisor Norman Buffalo.
2. Mr. Robinson had been a professional athlete, playing 2nd baseman in the Negro Baseball Leagues in the 1940s and 1950s, and was still in excellent physical condition in his 80s except for the knee arthritis. According to the testimony of Dr. Ong, Mr. Robinson's primary care doctor, Mr. Robinson carried a history of diabetes, but Dr. Ong further testified that Mr. Robinson had large-vessel arterial narrowing in his leg yet did not have diabetic microvascular disease and that his blood sugars as shown by his A1C testing were in the normal range.
3. Mr. Robinson was a good candidate for knee replacement, and if it had been competently carried out by Dr. Azer, he would have had a normal functioning knee. See testimony of Dr. Richard Matza and Dr. Jeffrey Shapiro, plaintiff's orthopedic

experts. Intervention as late as August 2, 2013 would have saved the leg, according to plaintiff's vascular surgeon expert Dr. Paul Collier.

4. Mr. Robinson walked into the hospital on July 16, 2013 using his own legs for the last time in his life. Because of Dr. Azer's negligence in leaving his patient first with half a knee and then with a leg that had to be amputated above the knee with only a short stump remaining, Mr. Robinson lost the ability to walk normally for the last ten years of his life expectancy; the four years between surgery and trial, and his remaining six years of life according to the life tables, as testified by Dr. Craig Lichtblau, plaintiff's physical medicine expert.
5. As everyone in the courtroom could see when Mr. Robinson used his walker to get out of his wheelchair and walk 20 feet to the witness stand, even moving a short distance on his feet is a painful struggle and exhausts him. Mounting the steps into the witness chair was also an ordeal. Even the defense physical medicine expert, Dr. Panagos, conceded that Mr. Robinson is only a "household ambulator," and not a "community ambulator" as he had been just before the surgery. In his own house, Mr. Robinson hops on his good leg from bed to bathroom and uses a stair glide device to get up and down the stairs for the multiple levels of the house.
6. Mr. Robinson has fallen on at least three occasions, including once in the middle of the night where he lay on the floor for an hour before a family member found him. He is at daily risk for falling because of his unsteadiness with the prosthetic leg and because of his inability to feel where the leg is, which doctors call lack of proprioception. Accordingly, the safest management plan would be to have a home aide with him 24 hours a day, according to Dr. Lichtblau.

7. According to the testimony of Clara Robinson, their son Kevin Robinson, and friends Mel Ott Battle and Keith Gillespie, a previously outgoing and active man now spends most of his time in his bedroom watching television. He seldom ventures out of the house because of self-consciousness and "not wanting to be a burden" on his family. When he does go out in public, he finds using public bathrooms so distressing that he drinks only enough water to swallow his medications. (In the first two months after Dr. Azer's surgery, Mr. Robinson had to wear adult diapers because of his inability to negotiate even a bedside commode.)
8. The physical pain attributable to Dr. Azer's negligence was severe from the outset. Nurses documented "10 out of 10" pain both in the initial surgical stay on July 16-17, 2013, and repeatedly in the hospital stay beginning on August 19, 2013, even for multiple days after the leg was amputated on August 23. Before the amputation, as he lay in a hospital bed with a blackened, mummified leg, one nurse's note recorded that Mr. Robinson was screaming from the pain. Mr. Robinson himself testified with quiet understatement: "I didn't know a human could stand such pain and live."
9. While that excruciating level of pain has eased, Mr. Robinson still has stump pain and pain in his shoulders and opposite leg which are overused. He will require periodic rounds of narcotic painkillers and other drugs for his pain and phantom sensations of the absent leg, according to plaintiff's expert Dr. Lichtblau.
10. Mrs. Robinson told the defense life care planner, Ms. Karns, that she attends to her husband's needs constantly from when she gets up in the morning around 8 o'clock until she goes to sleep. Mrs. Robinson testified that their marriage was still strong but that she had no time to do things for herself that she easily could before. (See further

discussion of the impact of his injury on her in the section below responding to the defense attack on the consortium verdict.)

All of the above evidence easily justified plaintiff's counsel's observation in both opening and closing statements that Dr. Azer's negligence had permanently deprived Mr. Robinson of his dignity, independence, mobility and productivity and had turned the Robinsons' marriage upside-down.

C. The defense arguments against the verdicts disregard the evidence.

In the face of all this evidence, and with no complaint that the jury was improperly instructed on damages,[10] the defense mounts a thin protest that amounts to pleading for the defense lawyers' personal standard of what a reasonable verdict would have been, and on a flawed comparison to other verdicts.

1. The consortium verdict was reasonable.

The defense contends that Mrs. Robinson defeated her own consortium claim by testifying that her marriage was still strong and not affected by her husband's injury. (Defense Mot., at 12-13, 15.) She was, of course, referring to the emotional bond between them. Other aspects of her testimony and other witnesses make it clear that his injury has had a profound impact on her, their relationship and their household. For example, because her husband is unable to walk more than 20 feet without being exhausted, he must use a wheelchair, and she is the one who always pushes him (*See* Ex. 5, Clara Robinson Trial Testimony, at 33). When he takes a shower or bath, she is always there. (Ex. 5, at 36.) She described extensive household

[10] See *Hechinger Co. v. Johnson*, 761 A.2d 15 (D.C. 2000), where the court rejected a contention of an excessive verdict, ruling among other reasons that the jury was properly instructed on the measure of damages and is presumed to follow its instructions. As noted below, the court in *Hechinger* also affirmed plaintiff's use of a *Colston* argument in closing.

services which Mr. Robinson previously did that he can no longer perform: all the grocery shopping, car maintenance, yard work, and home improvements such as kitchen cabinets, flooring, sinks, doors, light fixtures, and more. (Ex. 5, at 37-38). His injury has ruined their plans to travel in retirement, and they have not even taken weekend trips that they used to enjoy. (Ex. 5, at 40-42.) He is reclusive and no longer wants to leave the house, and because she worries about leaving him alone, that has affected her ability to socialize. (Ex. 5, at 42-44). She used to rely on Mr. Robinson to do the family driving and to take her to the doctor and run other errands. Since he can no longer drive, she does all that now. (Ex. 5, at 6-7, 44-45). In the testimony of the defense life care planner Ms. Karns, the witness conceded that in her interview of Mrs. Robinson in the family home, Mrs. Robinson told her that her day is now 100% devoted to taking care of her husband from the moment she gets up in the morning until bedtime.

In short, the defense's quotation of a single, short passage from Mrs. Robinson about her strong marriage is out of context and unfair. The defense's paraphrase of the jury instruction on consortium – which was given without objection by the defense – also omits key elements. The instruction 13-6, which was given without modification except to remove "sexual relations," includes "material services" and "other matters generally associated with a marital relationship." The final paragraph of the instruction repeatedly boils down consortium to "services and companionship." All these matters were profoundly affected for Clara Robinson, and the verdict for her was a sober and fair reflection of the totality of the evidence.

2. The verdict for Mr. Robinson's damages was reasonable.

As noted above, the defense attacks Mrs. Robinson's verdict based on a single snippet from her testimony and omitting all the other testimony from her and other witnesses on the impact of this injury on her and the marital relationship. But when the defense turns to Mr.

Robinson's verdict, the attack is based on no evidence whatsoever. Entirely omitted from the defense brief, as if the testimony never was given, is any reference to the ruinous impact on Mr. Robinson of his leg amputation. The defense does not even contend that the verdict for Mr. Robinson was "against the clear weight of the evidence," as it did in attacking the consortium verdict (Def. Mot., at 12-13). It just says the verdict was too high in comparison to other cases. This is a fatal flaw for the defense motion, because it ignores the long-standing law here and elsewhere that jury verdicts rise or fall on the specific evidence of the case, not on extraneous matters.

In *Capitol Hill Hospital v. Jones,* 532 A.2d 89, 93 (D.C. 1987) (Steadman, J.), the Court of Appeals affirmed a trial court's refusal to reduce a pain and suffering verdict and said: "While the parties cite cases granting both higher or lower amounts for pain and suffering to bolster their contentions about this verdict, *we have said that excessive verdicts should not be measured strictly on a comparative basis.* Rather: 'Each case in this area necessarily rises or falls on its own facts and the trial court in ruling on the question of whether or not a jury verdict is excessive must determine on the totality of facts before it whether it was the result of passion, prejudice, or mistake.' *May Department Stores v. Devercelli*, 314 A.2d 767, 775 (D.C. 1973)." (Emphasis added.) In its recent decision in *Cuevas v. Wentworth Group,* 226 N.J. 480, 144 A.3d 890 (2016), the New Jersey Supreme Court had this to say about "comparable" verdicts:

> We do not believe that having our trial courts review snippets of information about cases that are not truly comparable is a worthwhile use of judicial resources or likely to bring greater justice to either plaintiffs or defendants. We therefore disapprove of the comparative-case analysis in deciding remittitur motions.

Id., 144 A.3d at 906-907. In the District of Columbia, there is no hard-and-fast rule against using comparative case analysis, but still, our Court of Appeals has repeatedly made clear that the analysis must focus first and foremost on the facts of this case. On that, the defense is utterly

silent. The defense says not one word about the disfiguring and devastating injury suffered by Mr. Robinson, except to place it in a category of amputation verdicts and to argue that verdicts in court should follow some sort of workers' compensation-type schedule of so much for an eye and so much for a limb.

If this Court does choose to look at other verdicts, we offer our own survey that shows that Mr. Robinson's verdict is well within the range of what other juries have found. See Ex. 6: Daniel Singer Declaration ¶¶ 3-5.

3. Plaintiffs' "Colston" argument followed the law and this Court's pretrial ruling.

This Court ruled before trial, in accordance with a substantial body of case law in this jurisdiction, that it would be proper for plaintiff's counsel to make a *Colston*-type argument for money damages. See Ex. 7: Order of March 2, 2017.

The defense now misstates the *Colston* holding, by taking out of context the Court of Appeals' language that counsel is not allowed to ask for a specific amount of damages. (Def. Mot., at 10.) So we review here what the *Colston* court actually said and did.

In *District of Columbia v. Colston*, 468 A.2d 954 (D.C. 1983), which concerned an injury that left the plaintiff blind in one eye, plaintiff's counsel said to the jury in closing argument: "How much is a healthy eye worth? You cannot restore his vision but you can compensate him for the loss. Is an eye worth five hundred thousand? Eight hundred thousand? A million? That is for you to say. That is for you to decide." *Id.* at 956, 957 n. 1. The Court of Appeals said the argument was "not improper" and that such an argument was a proper effort by plaintiff's counsel "to stress those aspects of the case that contribute to its seriousness." Id. at 958 (internal citations omitted).

In *Hechinger Co. v. Johnson*, 761 A.2d 15 (D.C. 2000), a patron sued a hardware store for damages for the serious brain injury he sustained when an employee of the store assaulted him. *Id.* at 18-19. In closing, plaintiff's counsel argued: "I can't tell you what his injuries are worth. That's up to you to determine how much he is to receive. *I can't tell you if it is a million dollars, if it is two million dollars, or if it is three million dollars. That is for you to decide*. *Id.* at 22 (emphasis in original). On appeal, the Court found "no material difference between the dollar figure argument sanctioned in *Colston* and the one that [the plaintiff's] counsel made in this case. Neither counsel asked the jury to award a specific dollar amount, and both told the jury that it was for them to decide the proper measure of damages." *Id.* Also, as in *Colston*, "the trial court instructed the jury that it must base its decision on the evidence, without sympathy, prejudice or passion, and that the statements of counsel are not evidence. The jury is presumed to follow the court's instruction." *Id.*

Most recently, as pointed out in our brief on the motion *in limine* and three accompanying exhibits, a panel of the Court of Appeals in *Chucker v. Berger* summarily affirmed a plaintiff's verdict against a *Colston* challenge, and the en banc court twice refused to take up the issue en banc. (*See* Pl. Opp. to Def. Mot. *in limine* to preclude a Colston argument, filed in this court on Feb. 23, 2017 along with Exhibits 1, 2, and 3 accompanying the Opposition.)[11]

Counsel's argument in this case was not materially different from those approved repeatedly by the Court of Appeals. Plaintiff's counsel suggested[12] to the jurors that if they

[11] See also *Howard University v. Roberts-Williams*, which involved a former university professor who was denied tenure and sued for breach of contract, another case in which the court approved a *Colston*-type argument. 37 A.3d 896, 899 (D.C. 2012).

[12] The defense misstates and distorts plaintiff's use of the word "suggest" in its brief at p. 11, claiming that the suggestion of a method for announcing initial numbers was an improper

reached the issue of damages, one way of assuring everyone on the jury would have a say in the number would be to write their numbers on separate sheets of paper before going around the room to discuss them orally. This was in line with the court's instruction cautioning jurors against stating a firm view at the outset of deliberations. Counsel then said:

> MR. MALONE: Put your feeling out there literally on the table and then open them up and see what the range is. Likely, there will be a range. Will some of your numbers be in eight figures? Will some be more? Will some be less?
>
> MR. RUTLAND: Objection, Your Honor.
>
> MR. MALONE: That's not for me to say.
>
> THE COURT: Objection's overruled.
>
> MR. MALONE: It's for you to decide, based on the evidence that at the end of this case I suggest that you will look Eloyd Robinson and Clara Robinson in the eye, and you will say, "We balanced it out. We did fair justice." (Ex. 4, at 20.)

4. The defense's invitation to consider insurance coverage in deciding this motion is improper and should be rejected.

At the start and the end of their brief (pp. 2 and 17), the defendants state that they have $6 million worth of insurance coverage and ask the court to reduce the combined verdicts to a sum within that. The existence of liability insurance and its amount are both out of bounds for any calculation of a fair and reasonable verdict. *See* Advisory Committee Note to F.R.E. 411 ("More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.") Just as a plaintiff would not be able to argue to the jury that his or her damages are within the defendant's insurance coverage, it should be no different on a post-trial motion when the defendant invites the Court to sit as a 13th juror to reduce a verdict to a number within the tortfeasor's coverage. *See Safeway*

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suggestion of a verdict amount. Counsel did not do what the defense claims he did, as any fair reading of the transcript will show.

Stores v. Buckmon, 652 A.2d 597, 604-05 (D.C. 1994) (noting that plaintiff's counsel may not seek to bring the fact of insurance before the jury). It was Dr. Azer's choice as to how much insurance coverage he purchased, and it was his insurer's choice to force this case to trial by its settlement posture. They must live with those choices now and must not be allowed to impose their decisions on the plaintiffs.

5. The defense effort to impeach the verdict with post-verdict juror statements is improper.

The testimony by defense counsel about interviewing jurors after trial (Def. Mot., at 12, n. 1) is inappropriate, and plaintiffs move to strike this from the record. A jury verdict may not be impeached by post-trial statements from jurors. This is long-standing black-letter law in this jurisdiction. *See, e.g., Boykins v. United States,* 702 A.2d 1242, 1247 (D.C. 1997). Certainly, second-hand hearsay testimony from counsel is even more inappropriate. For the record, the undersigned plaintiffs' counsel did not hear the purported remarks of the jurors about devising their own life care plan. But we did hear jurors who reflected a sober, careful approach to the evidence and to their deliberations, totally at odds with the defense's contention that the jurors were somehow inflamed into a passionate non-logical verdict.

IV. Conclusion

This motion proceeds on a false and personally offensive narrative: that plaintiffs' counsel deliberately broke the rules of advocacy and whipped the jury into an irrational and excessive verdict. That is utterly false and unworthy of defense counsel. If anything, the shoe is on the other foot with repeated improper arguments made in this motion and the studious avoidance of any fair discussion of the evidence on liability and damages.

Any careful consideration of the totality of the evidence and arguments at trial leads to the inescapable conclusion that plaintiffs did nothing improper at trial and that the jury responded logically and rationally to the defendants' egregious negligence with an appropriate verdict that acknowledged the devastating nature of the injuries inflicted by the defendants. The court should deny the motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served on the following counsel of record on July 17th, 2017, via email or the Court's electronic filing system to:

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