No. 06-CV-1481

In the

District of Columbia Court of Appeals

BOARD OF TRUSTEES OF THE UNIVERSITY OF THE DISTRICT OF COLUMBIA,

Appellant,

v.

GRACIETTE DiSALVO and MICHAEL DiSALVO,

Appellees.

On Appeal from the Superior Court of the District of Columbia, Civil Division No. 2004 CA 003213 B (Hon. Geoffrey Alprin, Judge)

BRIEF FOR APPELLEES

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CERTIFICATE OF PARTIES

Plaintiffs-Appellees Graciette DiSalvo and Michael DiSalvo appeared below, and appear in this Court, through their counsel, Kenneth M. Berman and Lauren B. Pisano of Berman, Sobin & Gross, LLP, 481 N. Frederick Avenue, Suite 300, Gaithersburg, MD 20877. Also appearing in this Court on behalf of Plaintiffs-Appellees are H. David Leibensperer of Berman, Sobin & Gross, LLP and Peter T. Enslein of the Law Offices of Peter T. Enslein, P.C., 1738 Wisconsin Avenue, N.W., Washington, D.C. 20007.

Defendant-Appellant Board of Trustees of the University of the District of Columbia appeared below, through its counsel, Kimberly C. Johnson, Devanshi P. Patel, Theresa A. Rowell, Robert J. Spagnoletti and George C. Valentine of the Office of the Attorney General for the District of Columbia, One Judiciary Square, Sixth Floor South, 441 4th Street, N.W., Washington, D.C. 20001.

Defendant-Appellant appears in this Court through its counsel, Linda Singer, Edward E. Schwab, Todd S. Kim and Holly M. Johnson of the Office of the Attorney General for the District of Columbia.

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ISSUES ON APPEAL

I. Should the trial court's denial of UDC's motion for judgment as a matter of law be affirmed since the court correctly determined that Plaintiffs had adduced sufficient evidence to meet the required heightened foreseeability standard of proof?

II. Should UDC be permitted to raise on appeal for the first time the issue of whether Plaintiffs' expert failed to establish the basis for his national standard of care testimony when UDC did not preserve this issue at trial?

III. Should the trial court's denial of UDC's motion for judgment as a matter of law be affirmed since the court correctly determined that Plaintiffs' security expert's testimony adequately articulated a national standard of care for the provision of security in a parking garage?

STATEMENT OF FACTS

This case involves a vicious assault on Plaintiff Graciette DiSalvo, a scholarship student[1] at the University of the District of Columbia ("UDC"). On January 14, 2002, in an on-campus garage owned and controlled by UDC, Mrs. DiSalvo was attacked from behind by two assailants who sought to rob her.[2] One

[1] UDC had recruited Mrs. DiSalvo because she was a gifted tennis player. Mrs. DiSalvo decided to attend UDC after the school agreed to give her an annual scholarship of $7,000 and a monthly stipend of $225. J.A. 70, 72, 80.

[2] J.A. 90.

of them wounded her seriously with a knife by stabbing her through the cheek, fracturing a tooth.[3]

Mrs. DiSalvo and her husband alleged, and were awarded at trial, damages against UDC on a theory of premises liability.[4] What follows are the relevant facts that were adduced at trial.

A. UDC Campus Crime

UDC has a compact urban campus occupying a city block in Northwest Washington, bounded to the north by International Circle, to the east by Yuma Street, to the south by Connecticut Avenue, and to the west by Van Ness Street.[5] The campus consists of ten closely-clustered buildings.[6]

On-campus assaults were relatively rare at UDC until a wave of violent crimes targeted the school starting in July 2001.[7] On July 18, 2001, a man

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[3] J.A. 99.

[4] J.A. 67.

[5] Appended is a map of the campus; it was admitted into evidence at trial. J.A. 625.

[6] J.A. 625.

[7] Nearly all of the crime incident reports for the UDC campus during the period 1999 to January 14, 2002 were for property crimes, including the following: "items missing from desk during vacation" (J.A. 527); "money missing from unattended wallet" (J.A. 525); "lock and shoes missing from locker" (J.A. 523);

unlawfully entered a campus building and assaulted two police officers.[8] On October 10, 2001, a man was jumped by a group of seven men, unknown to him,[9] near another campus building.[10] On November 6, 2001, a female student was approached by an intoxicated man who struck "the left side of her face, snatch[ed] her cellphone [and] then fled[] the scene" -- the investigating officer reported the crime as a "robbery [with] force and violence."[11]

On November 21, 2001, a fugitive entered a UDC building unlawfully and assaulted an occupant.[12] On December 4, 2001, a man was knocked down at the

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"credit card missing from wallet" (JA 521); "textbook taken from desk" (J.A. 519); "laptop stolen from desk" (J.A. 517); "all items missing from locker including clothing, books, wallet, ID" (J.A. 513); "purse missing from under desk" (J.A. 511); "baton missing from locker" (J.A. 555); "radio reported missing" (J.A. 557); "18 rolls of stamps stolen from drawer that was forced open by unknown persons" (J.A. 558) and "temporary license tag removed by unknown person; vehicle stolen from the rear of this location" (J.A. 562).

[8] J.A. 950.

[9] The victim reported the assault on October 12, 2001. J.A. 515. The UDC police instructed the victim "if he saw any of the young men [who assaulted him] on campus to call the campus police for us [sic] to question them."

[10] J.A. 515.

[11] UDC appears to claim that the October 12, 2001 incident report victim was the same person who perpetrated the November 6, 2001 assault. UDC Br. at 5. However, the November 6, 2001 incident report, upon which UDC relies, does not identify the name of the perpetrator. J.A. 578-80.

[12] J.A. 509.

UDC Metro stop and personal items of his were taken.[13] Three weeks before Mrs. DiSalvo was attacked from behind, on December 5, 2001, a woman standing outside a campus building was approached from the rear, pushed to the ground (sustaining a head injury) and her shoulder bag was stolen -- the investigating officer reported the crime as a "robbery [with] force and violence."[14] The burgeoning on-campus crime was not made known to the students by UDC.[15]

B. Building 52 and its Garage

The Business and Continuing Education Building at UDC (Building 52) is a multi-story modern building with a below-ground garage (the "Garage"), however, it lacked any of the elements necessary to effect security as needed in these times.[16] The Garage was open to pedestrians who could enter and exit at will. The Garage permitted entry through four different means:- its front, its rear, from a deli on one side, and *via* the ramp that descended into the parking area.[17]

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13 J.A. 574.

14 J.A. 570.

15 J.A. 225-28.

16 J.A. 287-92.

17 J.A. 142.

On the day pertinent here, entry to the Garage did not require the use of an electronic access card or any equivalent device.[18] Upon entering, one saw a vacant guard booth at the ramp entranceway where no campus police officer, security guard or even a parking attendant was ever stationed.[19] There was no security camera anywhere in the Garage.[20] The general state of illumination was poor. There was no call button to summon security as needed.[21]

The building security guard was stationed on the first floor and was responsible for patrolling the entire building -- from the garage level below ground to each of the four levels above it.[22] The lack of a security camera prevented any remote surveillance of the Garage by the security guard at his first floor station.[23] The lack of a call box in the Garage thwarted any hope of speaking to the guard from there.

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[18] J.A. 139-40.

[19] J.A. 165.

[20] J.A. 163.

[21] J.A. 140.

[22] J.A 163, 184.

[23] J.A. 163.

C. The Assault

Into this inherently dangerous environment stepped UDC scholarship student Graciette DiSalvo, on January 14, 2001 at 3:30 p.m.[24]

Mrs. DiSalvo was authorized to use the Garage because she had purchased a permit from UDC that allowed her to do so.[25] She entered the Garage and parked her car with the expectation of attending class. When she stepped out of her car, however, she was attacked from behind by a knife-wielding man and another who demanded money.[26] In the midst of her shock and horror Mrs. DiSalvo felt sharp pain in her mouth.[27] She was feeling the tip of the assailant's blade as it pierced her cheek, severely injuring her teeth and jaw.[28] As the assault and robbery unfolded, Mrs. DiSalvo realized that she was bleeding profusely.[29]

By chance, while Mrs. DiSalvo was being attacked, a man entered the Garage through a door from the building but retreated almost immediately.[30] At

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24 J.A. 88.

25 J.A. 82.

26 J.A. 88.

27 J.A. 89.

28 J.A. 89.

29 J.A. 91.

30 J.A. 93.

this moment Mrs. DiSalvo broke free from her assailant and made a headlong rush for the same door.[31]

Mrs. DiSalvo took the elevator to the first floor, screaming for help.[32] She found the security guard's desk vacant. Thereupon, she entered the elevator again, ascending to the fourth floor.[33] There, Mrs. DiSalvo found help from a UDC employee who saw her condition and took her to an adjoining room. An ambulance, the campus police and the MPD were summoned[34] and these crews reported to that room.[35]

Mrs. DiSalvo was transported to the emergency room of Georgetown University Hospital where she received treatment for her wounds from a plastic surgeon as well as an ENT specialist who treated the injuries to her mouth.[36] In the weeks and months that followed, Mrs. DiSalvo required dental treatment including

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31 J.A. 93.

32 J.A. 93.

33 J.A. 94.

34 The incident report prepared by the police classified the crime as an "assault with intent to rob while armed." J.A. 619.

35 J.A. 94.

36 J.A. 95.

oral surgery and received psychiatric treatment for her recurrent nightmares and post-traumatic stress syndrome caused by the events described here.[37] Her face is scarred for life.

D. Lt. Phillip Morton

At the time of trial, Lieutenant Phillip Morton was a thirty-year veteran and former chief of the UDC police force.[38] He was called as a witness by Plaintiffs in their case-in-chief. Lt. Morton was, ironically, in his fourth floor office in Building 52 when the crime occurred.[39]

Lt. Morton made a number of important admissions as to the state of campus security when Mrs. DiSalvo was assaulted.

First, the campus police department was badly understaffed and poorly equipped. Lt. Morton admitted that "attrition was eating up [his] police force" -- not a single new officer had been hired between 1997 and 2002. In those years, Lt. Morton had repeatedly told UDC's administration that he needed: more officers; a computerized crime tracking system that permitted rapid exchange of information between UDC's security officers and the Metropolitan Police Department and FBI;

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[37] J.A. 99-100, 105-7.

[38] J.A. 125.

[39] J.A. 161.

radios and the assignment of a parking attendant or security guard to the Building 52 garage. All of his requests fell on deaf ears.[40]

Second, he admitted that in January 2002, unlike Building 52, the Student Services & The Law School Building (Building 38), Administration Building (Building 39), Arts & Sciences & Library Building (Building 41) and Engineering Building (Building 42) all had surveillance cameras in operation.[41] Lt. Morton also acknowledged that he had a "better chance of preventing crime" with more cameras."[42]

Third, by January 2002, UDC had already considered installing a campus-wide building access card security system which would have restricted access to the Garage to only those individuals entitled to use the facility.[43] UDC, however, decided no to do so.[44]

Fourth, UDC lacked any written policy regarding the frequency and manner in which Building 52 was to be patrolled by campus police.[45] Lt. Morton also

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40 J.A. 137-39, 156-57, 168-69.

41 J.A. 140, 167.

42 J.A. 141.

43 J.A. 139-40, 160.

44 J.A. 139-40, 160.

45 J.A. 157.

conceded that, on the day of the assault, the Garage was last patrolled two and a half hours prior to the attack and was not again patrolled that day.[46]

Fifth, Lt. Morton admitted that, unlike the garage in which Mrs. DiSalvo was assaulted, the Administration Building's garage had a campus police officer stationed at its entrance, a full-time parking attendant manning the attendant booth and a surveillance camera which scanned the premises.[47]

Sixth, he admitted that when the MPD responded to an on-campus criminal incident, UDC had no means of monitoring the crimes which the MPD had investigated.[48] As a result, UDC's police department could not be certain that it had full knowledge of the crimes being committed on campus.

E. Gregg McCrary

Gregg McCrary is a nationally recognized expert in premises security and crime prevention who appeared on Plaintiffs' behalf. The trial court accepted Mr. McCrary as an expert in this field, without any objection from UDC.[49]

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46 J.A. 162.

47 J.A. 166-67.

48 J.A. 169.

49 J.A. 215.

Mr. McCrary testified as to his extensive education and credentials in the field of security and crime prevention, including many years as a special agent and instructor in the field of security for the FBI.[50] He thoroughly analyzed UDC's security practices.[51]

Mr. McCrary testified that he formed his opinions about the case at bar based not only upon his extensive experience but also by: (1) visiting the UDC campus and the Garage;[52] (2) studying the UDC police and MPD crime incident reports spanning three years prior to the assault;[53] (3) reviewing UDC's security logs for the Garage;[54] (4) reviewing American Society of Industrial Security (the "ASIS") (a **national** organization) standards for parking lot security;[55] (5) regularly reading security publications that address "standards of care, and the issues involved in this case on a **national** basis;"[56] (6) discussing with colleagues at

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50 J.A. 205-7.

51 J.A. 217-21.

52 J.A. 216-17.

53 J.A. 218-19.

54 J.A. 218.

55 J.A. 221-22.

56 J.A. 223-24.

professional meetings the "issues involved in this case and the **national standard of care** regarding premises liability."[57] (Emphasis supplied.)

On direct, and again on re-direct, Mr. McCrary listed the many ways in which UDC breached the national standard of care for parking facilities:

First, UDC failed to warn the students, faculty and staff of the increasing number of violent crimes occurring on campus.[58] UDC's negligence was particularly troubling because "studies on revictimization . . . show that when you have one robbery, you are twice as likely to have [a] second[]; [i]f you have two, you are three times as likely to have third[.][59]

Second, once the violent crimes began, UDC failed to increase security by, *inter alia*, "flooding security or police into the areas where you are having robberies[.]"[60]

Third, UDC security in the Garage was woefully inadequate: (a) UDC lacked any policy or procedures for assuring the Garage was regularly patrolled; instead, patrols were insufficient, "random" and "haphazard;"[61] (b) UDC should

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57 J.A. 222.

58 J.A. 225-28.

59 J.A. 228.

60 J.A. 228-29.

61 J.A. 143, 231.

have used electronic access cards that restricted garage entry to the students and faculty who parked there;[62] (c) UDC should have had a parking attendant in the Garage to detect suspicious activity;[63] (d) because the Garage was "isolated," a surveillance camera should have been in place and regularly monitored;[64] and (e) the Garage should have been equipped with a call box to allow one to summon help in an emergency.[65]

At the close of his testimony, Mr. McCrary opined that the assault on Mrs. DiSalvo was "reasonably foreseeable" and, had UDC taken the measures described above, the crime likely would not have been committed."[66]

F. Post-Trial Proceedings

Following four days of trial, the jury returned verdicts in favor of Plaintiffs. The jury awarded damages to Mrs. DiSalvo of $300,000 on her negligence claim and $100,000 to her husband for loss of consortium. [67]

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62 J.A. 233, 287-89.

63 J.A. 232-33, 287-89.

64 J.A. 233.

65 J.A. 287-89.

66 J.A. 234-36.

67 J.A. 58.

Thereafter, UDC filed a motion for a judgment as a matter of law.[68] UDC raised two issues of pertinence here. First, UDC contended that "plaintiffs' expert, Mr. McCrary, failed to articulate a national standard of care for underground parking garages owned by a university or college."[69] Second, UDC argued that "plaintiff failed to satisfy the so-called 'heightened foreseeability' standard of proof that is required in a premises liability case where a criminal act of a third party is the direct cause of a plaintiff's injury."[70]

On November 2, 2006, the trial court issued a lengthy memorandum in which it denied UDC's motion.[71] The court carefully reviewed the evidence presented by Plaintiffs regarding the issues raised by UDC and reached the following conclusions.

First, "that, fairly read, McCrary's testimony adequately articulated a national standard of care for the provision of security in parking garages and stated

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68 J.A. 58.

69 J.A. 59.

70 J.A. 60.

71 J.A. 58.

a series of failures on the part of defendant to meet that standard, which the jury was entitled to rely upon if it was so inclined."[72]

Second, the trial court found that "the quantum of proof elicited by plaintiffs" met the heightened standard proof required.[73]

STANDARD OF REVIEW

This Court "review[s] denials of motions for judgment as a matter of law *de novo*. *George Washington Univ. v. Violand*, 932 A.2d 1109, 1119 (D.C. 2007). A "[j]udgment as a matter of law may be granted only if, viewing the evidence in the light most favorable to the opposing party, there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *Id*. (citations and internal quotation marks omitted). In its review of the trial record, the Court "avoid[s] weighing the evidence, passing on the credibility of witnesses or substituting [its] judgment for that of the jury." *Id.* (citations and internal quotation marks omitted).

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72 J.A. 60.

73 J.A. 60-61.

ARGUMENT

I

The Trial Court's Denial Of UDC's Motion For Judgment As A Matter Of Law Should Be Affirmed Since The Court Correctly Determined That Plaintiffs Had Adduced Sufficient Evidence To Meet The Required Heightened Foreseeability Standard of Proof.

A. Governing District of Columbia Precedent

"It is axiomatic that under a negligence regime, one has a duty to guard against only foreseeable risks." *Doe v. Dominion Bank of Washington, N.A.*, 963 F.2d 1552, 1560 (D.C. Cir. 1992). "As a general rule the proprietor of a place of public resort is subject to liability to his business invitees for injuries inflicted by the acts of other patrons or third persons if the proprietor by the exercise of reasonable care could have known that such acts were being done or were about to be done." *Grasso v. Blue Bell Waffle Shop, Inc.*, 164 A.2d 475, 476 (D.C. 1960) (citation and quotation marks omitted).

Where an injury is caused by the intervening criminal act of a third party, "[premises] liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent." *Potts v. District of Columbia*, 697 A.2d 1249, 1252 (D.C. 1997).

"Foreseeability of the risk must be more precisely shown because of the extraordinary nature of criminal conduct" and may not rest on "generic information" such as local crime rates or evidence of a "criminally active

environment." *Bailey v. District of Columbia*, 668 A.2d 817, 820 (D.C. 1995); Restatement (Second) of Torts, §§ 302A, 302B (1965).

To establish liability, however, a plaintiff is not required to show "previous occurrences of the particular type of harm" at issue. *District of Columbia v. Doe*, 524 A.2d 30, 33 (D.C. 1987); *Kendall v. Gore Properties*, 236 F.2d 673 (D.C. Cir. 1956) ("A defendant need not have foreseen the precise injury, nor should he have had notice of the particular method in which a harm would occur, if the *possibility* of harm was clear to the ordinarily prudent eye.") (emphasis supplied, footnotes and quotation marks omitted). Importantly, "[i]nadequate security precautions in a commercial building" where a victim is assaulted "are a 'critical, if not dispositive factor'" in finding a heightened foreseeability on the part of the building's owner. *Bailey*, 668 A.2d at 821.[74]

Moreover, when there is a "special relationship" between the plaintiff and defendant that entails a duty of protection, the heightened foreseeability requirement is lessened and can be met instead by a combination of factors which give defendants an increased awareness of the danger of a particular criminal act.

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[74] "The evidence in *Doe* [*v. Dominion Bank of Washington, N.A.*] showed that five floors of a thirteen-story building were vacant and the landlord had not taken steps to secure the vacant floors or to control access to the building. Therefore, outsiders could freely enter the vacant spaces without being observed. The victim was accosted by an intruder who entered the elevator she occupied when it stopped at one of the vacant floors. The victim was then forced into one of the vacant areas where she was raped. *Bailey*, 668 A.2d at 821 (internal quotations omitted).

Sigmund v. Starwood Urban Inv., 475 F. Supp.2d 36 (D. D.C. 2007) citing *Doe*, 524 A.2d at 33; *see also Doe v. Dominion Bank*, 963 F.2d 1552, 1561 (D.C. Cir. 1992).

D.C. cases "suggest a sliding scale [foreseeability test]: If the relationship between the parties strongly suggests a duty of protection, then specific evidence of foreseeability is less important, whereas if the relationship is not the type that entails a duty of protection, then the evidentiary hurdle is higher." *Workman v. United Methodist Committee on Relief of General Bd. of Global Ministries of United Methodist Church*, 320 F.3d 259, 264 (D.C. Cir. 2003). "This sliding scale approach makes sense, for 'the question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures against it; [w]hether a duty exists is ultimately a question of fairness.'" *Sigmund*, 475 F. Supp.2d at 36 (quoting *Cook v. Safeway Stores*, 354 A.2d 507, 509-10 (D.C. 1976)). UDC ignores this fundamental, outcome-determinative test, relegating it to a footnote in its brief.[75] *See* UDC Br. at 23 n.16.

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[75] "Looking to the existence of a special relationship is not novel; it is the basis for, and determines the contours of, the law of premises liability. The Restatement (Second) of Torts § 314A(3) (1965), provides: '[a] possessor of land who holds it open to the public is under a ... duty to members of the public who enter in response to his invitation.' The duty 'arise[s] out of special relations between the parties, which create a special responsibility.' *Id.* § 314A cmt. b. This 'duty to protect the other against unreasonable risk of harm extends to risks arising ... from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. *Id.* § 314A cmt. d." *Novak v. Capital Management and Development Corp*., 452 F.3d 902, 914 (D.C. Cir. 2006).

B. UDC's Duty to Mrs. DiSalvo

UDC was the business invitor of Mrs. DiSalvo when she was attacked in its Garage.

"It is fundamental and well-settled that a business invitor has a duty of care to its patrons while they are on its premises." *Novak*, 452 F.3d at 907. "A business visitor is a person who is invited to enter or remain on land for a purpose directly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 344 (1965).

"In the District of Columbia a business's duty extends to protecting its customers from foreseeable harm caused by third parties at its 'exit doorway and the approach thereto.'" *Novak*, 452 F.3d at 907-8 quoting *Viands v. Safeway Stores*, 107 A.2d 118, 121 (D.C. 1954).

"It has generally been held that the invitor is liable if he has not taken reasonable and appropriate measures to restrict the conduct of third parties of which he should have been aware and should have realized was dangerous."[76] *Id.*

There are several reasons why Mrs. DiSalvo was a business invitee of UDC.

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[76] The *Viands* court relied on the following passage from the Restatement (First) of Torts § 348 (1939): "an invitor is liable to a business invitee for injury caused by the accidental negligence or intentionally harmful acts of third persons if the invitor by the exercise of reasonable care could have (a) discovered that such acts were being done or *were about to be done*, and (b) protected the invitee by controlling the conduct of the third persons or giving a warning adequate to enable him to avoid the harm." *Id.* at 120-21 (emphasis in original).

UDC sold Mrs. DiSalvo the permit the school required to park in the Garage. UDC recruited Mrs. DiSalvo to attend its school and gave her a scholarship and monthly stipend that allowed her to do so.

Moreover, when the crime occurred, the Garage, the building in which it was located and the rest of the campus were owned and operated by UDC and under its exclusive control. Further, the Garage, and the rest of the campus, was patrolled by UDC's police force whose job it was to prevent crime from occurring there.[77] Moreover, when crime did occur it was the responsibly of the UDC police to take action to prevent it from re-occurring.[78]

In the District, a business has the duty to protect its customers from criminal assaults when "the criminal activity takes place in the portion of the premises *exclusively within its control* and the business has *exclusive power* to take preventive action. *Novak*, 452 F.3d at 906 citing *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (emphasis in original, citation and quotation marks omitted). Moreover, a parking lot operator in the District owes a duty to its business invitees to provide for their safety and wellbeing on its premises. *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1133-34 (D.C. Cir. 1969) (applying Restatement (Second) of Torts § 344 (1965)).

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77 J.A. 127-28.

78 J.A. 127-28.

Against the foregoing facts and precedent, UDC argues: "While there was a relationship between UDC and Mrs. DiSalvo, it was not one that suggests an extraordinary duty of protection, and it does little to bolster Mrs. DiSalvo's evidence of heightened foreseeability." UDC Br. at 24. Astonishingly, UDC does not even mention Mrs. DiSalvo's business invitee status which triggered UDC's duty to protect her from criminal assaults on its premises.

C. Prior Crimes

Contrary to UDC's contention, Plaintiffs do not rely upon "evidence suggesting that UDC suffered a high crime rate in the years preceding [Mrs. DiSalvo's] attack."[79] UDC Br. at 17. Indeed, the opposite is true: It is precisely because UDC was located in a relatively safe area of the District that the sudden increase in the months just prior to Mrs. DiSalvo's assault of on-campus violent, assaultive crime, perpetrated by persons unknown to their victims, that makes those crimes especially important in establishing UDC's heightened foreseeability. In the words of the immortal crime novelist Raymond Chandler, these incidents were as anomalous as "a tarantula on a piece of angel food cake." Undaunted, UDC raises an argument that Plaintiffs do not make and deftly mows it down -- a strawman.

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[79] Moreover, UDC is wrong in its assertion that Plaintiffs rely on evidence that "the Building 52 Garage was in a statistically high crime area" and "acquaintance-based assaults" to meet the foreseeability burden of proof. UDC Br. at 18, 25.

UDC's fleeting judgment is paraded into this Court with the notion that there was nothing particularly odious about the UDC crimes that preceded the crime committed against Mrs. DiSalvo. UDC avers that "[p]rior crimes did not predict an aggravated assault, because none involved a weapon or resulted in serious injuries." UDC Br. at 15.

Only the most terrifying or the most trivial seem to be the species of crime that UDC recognizes. Of course, the law is on Plaintiffs' side because it is well settled that foreseeability is not established merely by identical or otherwise equivalent behavior: "A defendant need not have foreseen the precise injury, nor should he have had notice of the particular method in which a harm would occur, if the *possibility* of harm was clear to the ordinarily prudent eye." *Kendall*, 236 F.2d at 682.

Moreover, Defendant's notion that non-aggravated assault stands alone as a species of assault not worthy of concern is positively ludicrous. UDC asks this Court to consider mayhem carried out by a man's fist or arms as completely benign next to a crime committed with a weapon.

The physical acts that preceded the admittedly horrific attack on Mrs. DiSalvo are: a man battering two police officers, seven men battering a lone man, a man who battered the face of a student as a means of stealing her cellphone, a fugitive who entered a UDC building and battered an occupant. Penultimately, a

short time before Mrs. DiSalvo was attacked, a woman outside a campus building was battered to the ground, injuring her head before making his getaway with her shoulder bag. UDC plays fast and loose with the outcomes of these prior crimes. The nature of those outcomes, however, were accident as opposed to essence. Any one of those prior victims could have been hurt worse than Mrs. DiSalvo. So what is UDC's point?

Indeed, UDC maintains that it cannot legally be deemed to have foreseen the possibility of Mrs. DiSalvo's assault unless there already had been an earlier assault specifically in Building 52 committed by an unknown knife-wielding perpetrator. UDC Br. at 14-16. Under UDC's construct, an owner of a building complex is immune from liability for an attack in any of his buildings unless a second crime occurs in the same building no matter how many other attacks have occurred in the complex. UDC's position is self-evidently wrongheaded.

UDC seizes fatuously upon the city block comprising the campus buildings: "None of the four incidents on which Ms. DiSalvo focused were close to the location of her assault[.]" UDC Br. at 15. UDC urges that the campus buildings are not close to one another. But UDC is forgetting at least two things. First, it would take only a few minutes, at most, to walk across UDC's campus. Two, even if UDC's campus were a large one in anyone's estimation, Plaintiffs' security

expert made it clear that the burgeoning on-campus crime found UDC *qua* UDC being targeted and that Mrs. DiSalvo's assault was "reasonably foreseeable."[80]

A map of the entire city drawn to the same scale as Plaintiffs' Exhibit 7 (a map of the UDC campus (Add.1)) would find the latter looking like a tiny speck within the boundaries of this jurisdiction.

One is left to wonder how UDC can argue with a straight face that this record, viewed by the jury in the light most favorable to Mrs. DiSalvo, had no legally sufficient evidentiary basis to find for her on this issue.

II

UDC Should Not Be Permitted To Raise On Appeal For The First Time The Issue Of Whether Plaintiffs' Expert Failed To Establish The Basis For His National Standard Of Care Testimony Because UDC Did Not Preserve This Issue At Trial.

"A basic rule of appellate procedure is that a party may not raise on appeal issues which he failed to raise below." *Spellman v. American Sec. Bank, N.A.*, 504 A.2d 1119, 1126 (D.C. 1986). UDC contends that its motion for judgment as a matter of law should have been granted because Plaintiffs' expert, Mr. McCrary, failed to establish a proper foundational basis for his opinion testimony regarding a national standard of care -- an essential element to establish a *prima facie* premises

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80 J.A. 236.

liability case. *See* UDC Br. at 31-41. However, UDC failed to preserve this issue at trial and therefore may not raise it on appeal for the first time.

UDC did not object when, on Plaintiffs' motion, the trial court accepted Mr. McCrary as an expert witness. On direct examination, and before he offered his opinions, Mr. McCrary listed the information which he used to determine the national standard of care. His testimony on this topic is summarized *supra* at 12-13.

Having laid this foundation, Plaintiffs' counsel put numerous questions to Mr. McCrary that explicitly or implicitly invoked the national standard of care, without any objection from UDC's counsel.[81] These are two examples:

> [Plaintiffs' counsel:]
>
> Same question with regard[] [to] having a parking lot attendant that both you and Lieutenant Morton spoke about. You indicated that there is no statute the government puts out that requires a parking lot attendant to be at the park[ing] garage at Building 52. Do you have an opinion, within a reasonable degree of certainty in your field, as to whether the national standard of care required that a parking attendant be at the parking garage at Building 52 in January 2002?
>
> A: In this situation, yes.
>
> Q: And what is that opinion?
>
> A: That it would be the right thing to do.

[81] J.A. 224-33, 287-92. UDC's counsel objected to only one of the national standard of care questions. J.A. 287.

Q: Within the national standard of care?

A: Yes.[82]

* * *

Q: Do you have an opinion, within a reasonable degree of certainty, as to whether the national standard of care necessitated audio capability at Building 52?

A: Yes.

Q: What is that opinion?

A: My opinion is that would be a reasonable thing to do. That would be the right thing to do within the national standard of care.[83]

Finally, UDC's counsel did not ask the trial court to strike Mr. McCrary's testimony once it was concluded.

The importance of preserving a foundational objection to an expert's testimony is illustrated by the Court's recent decision in *Hill v. Medlantic Health Care Group*, ___ A.2d ___, 2007 WL 2859940 (D.C. 2007). In that case, the Court affirmed entry of a judgment as a matter of law against a medical malpractice plaintiff because his expert's testimony "was insufficient to establish a basis for his knowledge of a national standard of care, and merely amount[ed] to the expert's personal opinion." *Id*. Unlike UDC, in *Hill* defense counsel did object on foundational grounds timely during trial to an expert's national standard of care

82 J.A. 288.

83 J.A. 288-89.

testimony. That it was imperative for UDC to make this objection was noted by the Court in *Hill*:

> [Plaintiff's] counsel attempted to elicit testimony establishing that when [defendant] Dr. Levitt left two screws in Mr. Hill's leg, his conduct did not comport with the national standard of care. *However, [defendant's] counsel objected, based on lack of foundation, and the objections were sustained by the trial court*.

Id. (emphasis supplied).

A contemporaneous objection affords the party offering expert testimony evidence an opportunity to supply any missing foundation. This is why the failure to do so precludes a party from challenging the foundational basis of an expert's testimony for the first time on appeal. *See Estate of Reinen v. Northern Arizona Orthopedics, Ltd*., 198 Ariz. 283, 286, 9 P.3d 314, 317 (2000). In *Nwaneri v. Sandidge*, 931 A.2d 466, 478 (D.C. 2007) the Court implicitly recognized this principle: "[B]cause [plaintiff's] trial counsel may have reasonably concluded that there was no need to go further in providing a sufficient basis for the expert's opinion [on the national standard of care] after the trial court overruled the foundational objection, we reverse the judgment of the trial court, and remand for a new trial."

See also Estate of Reinen, 198 Ariz. at 286-87, 9 P.3d at 317-18 (Arizona Supreme Court holding that any objection to qualifications of medical malpractice plaintiff's proffered expert witness, or foundation for his opinions, was waived,

where defendants did not raise a foundational objection either prior to or during expert's testimony, and instead chose to wait until close of plaintiff's evidence to make their objection.); *In re Marriage of Gambla and Woodson*, 367 Ill. App.3d 441, 853 N.E.2d 847, 864 (2006) ("The failure to request a *Frye* hearing results in the waiver of any objection to the foundation of an expert's opinion.")

Because UDC failed to object to the lack of foundation for Mr. McCrary's national standard of care testimony either before, during, or immediately after he gave it, UDC cannot now complain that the jury heard him speak.[84]

III

The Trial Court's Denial Of UDC's Motion For Judgment As A Matter Of Law Should Be Affirmed Since The Court Correctly Determined That Plaintiffs' Security Expert's Testimony Adequately Articulated A National Standard Of Care For The Provision Of Security In A Parking Garage.

Assuming *arguendo* that UDC preserved the issue, the evidence of record demonstrates that Mr. McCrary more than adequately articulated a national standard of care for the provision of security in a parking garage.

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[84] Likewise nonavailing is UDC's assertion that "Mrs. DiSalvo also presented evidence that UDC violated the [Clery Act, 20 U.S.C. § 1092(f)]. UDC Br. at 11 n.13. In fact, UDC did not object when Plaintiffs' counsel offered what UDC contends is Clery Act-barred evidence. J.A. 225. Indeed, UDC's counsel relied on the Clery Act in her opening statement and in her cross-examination of Plaintiffs' expert. J.A. 40. Moreover, when UDC's counsel finally raised the Clery Act issue during trial, the court gave a curative instruction. J.A. 420-22. UDC raised the issue again in its motion for judgment as a matter of law, which the trial rejected. J.A. 61-4. UDC abandoned the issue on appeal.

Earlier this year, in *Nwaneri*, the Court discussed its evolving jurisprudence on "the standard for determining admissibility of expert testimony regarding the national standard of care."[85] 931 A.2d at 471. The Court found a number of factors that will support admission of an expert's opinion. Of importance is testimony from the expert that his knowledge of the national standard of care is based on: (1) personal experience; (2) education; (3) discussions with colleagues; (4) attendance at national meetings; (5) literature in the field and/or (6) reference to a published standard.

Moreover, it is not necessary for the expert to invoke the term "national standard of care." Rather, expert testimony will be received when it is "reasonable to infer from [the] expert['s] testimony that a . . . standard is nationally recognized, so long as the testimony presents a sufficient basis upon which an inference can be made." *Id*. at 471-72 (citation and internal quotation marks omitted).

In short, an expert's opinion must "reflect[] evidence of a national standard and . . . not [be] based upon his own personal opinion, nor mere speculation or conjecture." *Id*. at 472 (citation and internal quotation marks omitted). "Our primary concern is whether it is reasonable to infer from the testimony that such a

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[85] The Court analyzed the following precedents: *Snyder v. George Wash. Univ.*, 890 A.2d 237 (D.C. 2006); *Hawes v. Chua*, 769 A.2d 797 (D.C. 2001) and *Travers v. District of Columbia*, 672 A.2d 566 (D.C. 1996).

standard is nationally recognized." *Id*. at 245 (citation and quotation marks omitted.)

As noted in the Statement of Facts *supra* at 11-12, Plaintiffs' security expert, Gregg McCrary, explicitly characterized every salient point to establish his knowledge of the national standard of care for the provision of security in a parking garage. This Court in *Nwaneri* endorsed every category of knowledge upon which Mr. McCrary relied in forming his opinion in the instant case.

UDC largely ignores the evidentiary rules governing the admission of expert testimony on national standards of care. Having not objected or cross-examined as required at trial, UDC now comes forward citing nothing and mischaracterizing the trial record and the law in a rambling discourse. Mr. McCrary's testimony rested squarely on the manual of the ASIS as well as constant reading of national periodicals concerning security and professional convocations at which national standards for security are addressed.

First, UDC asserts "Mr. McCrary did not provide any basis for his belief that the standards allegedly breached by UDC were nationally recognized." UDC Br. at 32. Yet this cannot be reconciled with McCrary's pellucid testimony to the contrary set forth above.

Second, UDC carps about Mr. McCrary's reliance on the "ASIS manual [because] he did not identify what standards were contained in the manual or how

they would apply to the Building 52 parking garage in January 2002." UDC Br. at 32-33. This is nonsense. Mr. McCrary stated his conclusions about the consensus industry parking lot standards published by ASIS -- a national security association:[86]

If UDC now sees the necessity of having probed the underpinnings of McCrary's testimony it should have done so at greater length on cross-examination. UDC did not. The failure to do so precludes UDC from challenging Mr. McCrary's testimony for the first time on appeal.

UDC also takes cheap liberties with the record, quoting Mr. McCrary for the proposition that "he also relied on 'just a bunch of literature . . . on crime prevention' that he found on the Internet." UDC Br. at 33. The greater context of the record finds Mr. McCrary saying this:

> [Plaintiffs' counsel]: You indicated you were also a member of the American Society Industrial Security?
>
> A. Yes.
>
> Q. What is that and what, if any, standards do they have?
>
> A. Again, there are different standards. There are legal standards, which I just talked about, the Clary Act. There are also consensual standards or private standards or ethical standards. All of those standards are sort of in place.

[86] J.A. 222.

> The consensual standards, it is sort of the agreement. They have a big manual they publish. It's hundreds and hundreds of pages on security and what is reasonable and standard, and how it should be approached and all of that. Those are generally considered to be consensual standards for the industry as to what is reasonable and prudent. That deals with parking lots, as well as all sorts of different issues, as well. There are certain standards that are there that are generally agreed upon as to what the standards are, as well.
>
> *There is also just a bunch of literature out there that is on crime prevention. And, I mentioned CPTED crime prevention through environmental design.*
>
> *It has been profusely published, and it is easily available you just go on the Internet and find all sorts of stuff very, very essentially. So, a lot of that documentation and information is out there*.[87]
>
> (Emphasis supplied.)

Third, UDC argues that "Mr. McCrary did not reference a specific source for the standards allegedly violated by UDC [or] specific standards by which UDC's conduct could be measured." UDC Br. at 32, 34. UDC cites nothing for the notion that an expert, unless specifically asked, must recite chapter and verse of the national standard. Mr. McCrary's testimony invited such inquiry by stating examples of how UDC's conduct fell short of that standard (*e.g.*, and without limitation: no controlled access to the Garage; no guard or attendant on duty in the Garage; no call box in the Garage; no regular patrolling of the Garage; and no surveillance camera in the Garage). In the face of UDC's subsequent nonfeasance at trial, Plaintiffs have satisfied their burden.

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[87] J.A. 222-23.

Fourth, UDC states that Mr. McCrary failed to "provide examples of comparable intuitions' security measures." UDC Br. at 37. But UDC cites nothing to support its contention that Mr. McCrary was required to do so.

In fact, the record shows that Mr. McCrary did testify that he was familiar with the garages of "campuses around the country" including the three-story garage at Marymount University in Virginia, the eight-story garage at George Washington University in the District and the tiered garage at Nova Southeastern University in Ft. Lauderdale, Florida.[88]

Indeed, it was during cross-examination that UDC's counsel elicited the very "comparable intuitions' security measures" testimony UDC claims Mr. McCreary failed to provide.[89] If UDC wanted more from Mr. McCrary, it was deprived not by any curtailment of the record by Plaintiffs but by its own failure to ask Mr. McCrary additional questions on cross-examination.

Finally, UDC obliterates the very point it attempts to make with its earlier assertion: "A national standard of care need not be based on examples of comparable facilities' practices." UDC Br. at 31.

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88 J.A. 242-49.

89 J.A. 242-49.

CONCLUSION

For the foregoing reasons the judgment of the trial court should be affirmed.

Respectfully submitted,

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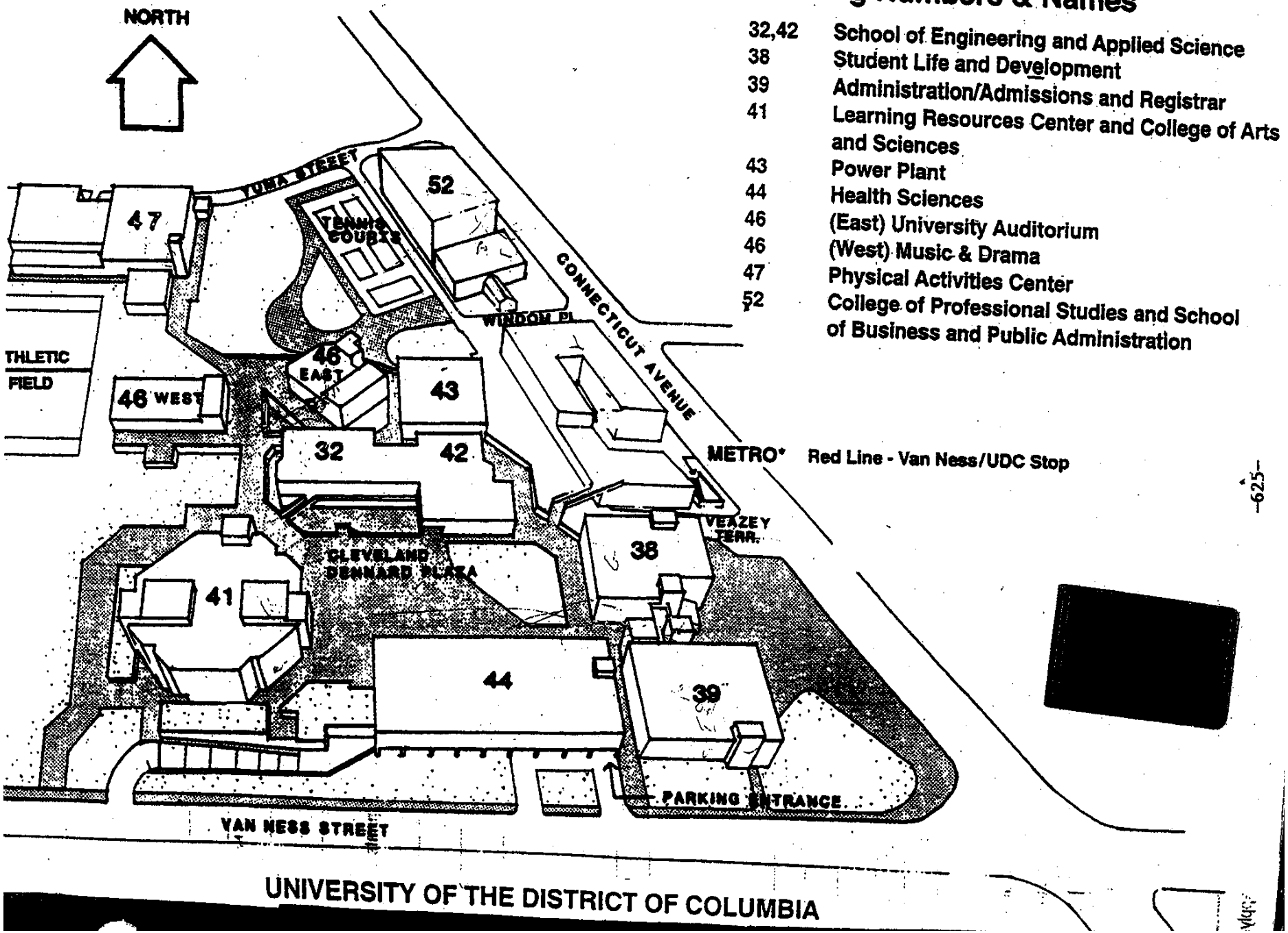
ADDENDUM

Plaintiffs' Exhibit 7 Map of the University of the District of Columbia Campus



Building Numbers & Names

32,42	School of Engineering and Applied Science
38	Student Life and Development
39	Administration/Admissions and Registrar
41	Learning Resources Center and College of Arts and Sciences
43	Power Plant
44	Health Sciences
46	(East) University Auditorium
46	(West) Music & Drama
47	Physical Activities Center
52	College of Professional Studies and School of Business and Public Administration

Add.1

CERTIFICATE OF SERVICE

No. 06-CV-1481
Board of Trustees of UDC v. DiSalvo

I, John C. Kruesi, Jr. being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press has been retained by BERMAN, SOBIN & GROSS, LLP, Attorneys for Appellees. I am an employee of Counsel Press.

On the **13th Day of November, 2007**, I served the within **Brief for Appellees** upon:

Linda Singer
Edward E. Schwab
Todd S. Kim
Holly M. Johnson
Office of the Attorney General for the District of Columbia
Sixth Floor South
441 4th Street, N.W.
Washington, D.C. 20001

via Hand delivery

Unless otherwise noted, 4 copies have been filed with the Court on the same date and in the same manner as above.

November 13, 2007