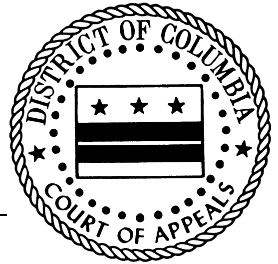

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No. 23-CV-976

DISTRICT OF COLUMBIA COURT OF APPEALS

ASEGEDECH KELECHA

Appellant

v.

SARA MENGHESHA

Appellee

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(Judge Danya Dayson)

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal because it is taken from a final order of the D.C. Superior Court that disposes of all parties' claims.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by declining to examine a juror about the jury's deliberations, when the juror suggested in a post-trial note that the verdict was not unanimous?
2. Has Defendant waived her claim of insufficiency of evidence as to punitive damages, by failing to raise it in the trial court? If not, was there sufficient evidence for the jury to award punitive damages?
3. Has Defendant waived her claim that the punitive damages awarded by the jury were constitutionally excessive, by failing to raise it in the trial court? If not, were they constitutionally excessive?

STATEMENT OF FACTS

Plaintiff Sara Menghesha was illegally evicted from a room she was renting from Defendant Asegedech Kelecha, at the beginning of the Covid public health emergency. After Defendant changed the locks, on May 1, 2020, Plaintiff became homeless for six days, huddling in bus shelters and a metro station. She was terrified that she would get sick, die, and leave her children alone. (12/12/22 Tr. at 135 line 22 -148 line 6.)

STATEMENT OF THE CASE

After Defendant conceded liability in this case, the parties proceeded to a jury trial on damages. The jury found that Defendant's conduct was "outrageous, grossly fraudulent, or reckless toward the safety of [Plaintiff]" and awarded Plaintiff $7,500 in compensatory damages and $75,000 in punitive damages. [377-78]

Defendant made no motion for judgment as a matter of law as to the sufficiency of the evidence for punitive damages before the case was submitted to the jury.

After the jury returned its verdict, a juror emailed the trial court's chambers, with subject line "Deliberation", and saying in the body of the email:

> I did not agree on any of the decisions that was presented to me during the deliberations on the Civil Case trial that I had served on as a Juror on December 12, 2022. My recollection from your "Instructions" is that as Jurors we were suppose to agree on all terms unanimously.

[379].

Defendant subsequently filed a motion for a new trial, on the grounds that 1) her counsel was unaware of emails being sent to chambers during the trial, cc'ing him, and 2) the juror note suggested that the jury's verdict was not unanimous. [380.] Defendant's motion for a new trial did not include as grounds that there was insufficient evidence to award punitive damages, or that the damages amount constituted a due process violation. Id.

The trial court first denied Defendant's motion for a new trial, with regard to all issues other than the non-unanimous jury. [437-452.] The trial court subsequently also denied the motion with regard to the non-unanimous jury issue, on the grounds that the requested post-trial inquiry "would run contrary to the prohibition – the general prohibition against post-trial inquiry into the deliberative process." [506-519; see also Order Denying Motion for Reconsideration at 533-538.]

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion when it declined to examine Juror 12 about the jury's deliberations. Defendant was asking for an inquiry that would have violated FRE 606(b), which has been followed by the Court.

Defendant did not raised its two other claims at the trial court level, and therefore has waived them. These claims are 1) that there was insufficient evidence for the jury to award punitive damages and 2) that the punitive damages award was excessive and thus in violation of the due process clause of the Constitution. To the extent the Court disagrees with regard to waiver of these issues: there was sufficient evidence before the jury for it find in favor of Plaintiff on punitive damages, and the punitive damages that the jury awarded (exactly ten times the compensatory damages) did not violate the Constitution.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO EXAMINE JUROR 12 ABOUT THE JURY'S DELIBERATIONS.

A denial of a motion for a new trial is reviewed for abuse of discretion. *Queen v. D. C. Transit Sys., Inc.*, 364 A.2d 145, 148 (D.C. 1976) ("When reviewing the trial court's denial of a motion for a new trial, a reversal is not warranted unless there was an abuse of discretion.") When the issue raised is whether to hold a hearing on possible juror misconduct, the D.C. Circuit Court of Appeals has said: "We afford the District Court especially broad discretion to determine what manner of hearing, if any, is warranted about intra-jury misconduct." *United States v. Bostick*, 416 U.S. App. D.C. 304, 329, 791 F.3d 127, 152 (2015).

Here, the trial court denied the relevant portion of Defendant's motion for a new trial[1] after rejecting Defendant's request for an opportunity to examine a juror as to how the jury reached its verdict. Defendant's proposed questions for the juror all would have violated Federal Rule of Evidence 606(b).

Federal Rule of Evidence 606(b) prohibits the post-trial inquiry that Defendant requested before the trial court:

---

[1] The trial court had rejected the other portions of Defendant's motion, not relevant here, via written Order on July 25, 2023, [437-452].

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Rule 606(b)(1).[2]

No tribunal may inquire into the substance of jury deliberations. A verdict must stand, even in the face of credible allegations that the deliberations were conducted improperly, that some jurors had pressured others, that a verdict was reached non-unanimously, that jurors had failed to follow instructions or been confused, or that a juror assented to a verdict without fundamentally believing the verdict was correct. *Sellars v. United States*, 401 A.2d 974, 981–82 (D.C. 1979). "After a jury has given its verdict, has been polled in open court and has been discharged, an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late." *Id.*

Even viewed in the light most favorable to Defendant, the juror note only implies that the jury failed to follow the trial court's instruction about unanimity—which, as *Sellars* teaches, cannot disturb a verdict.[3]

---

[2] Rule 606(b) "codifies the common law rule articulated in *Sellars* that renders juror testimony to impeach a verdict inadmissible." *Kittle v. United States*, 65 A.3d 1144, 1150 (D.C. 2013). See also *Fortune v. United States*, 65 A.3d 75, 82 (D.C. 2013).

[3] Other jurisdictions have similarly articulated the principle that jury verdicts should almost always be immune from subsequent impeachment by jurors having second thoughts: "While each juror was not polled individually, the jury was polled as a

Before the trial court, Defendant argued that a "clerical error" exception, found at 606(b)(2), applies. Defendant has abandoned that argument on appeal. See Appellant's Brief at 22-23. Rather than reargue that there was a "clerical error" that would allow examination, Defendant now adopts a new argument, that prohibited testimony would not be needed: "Kelecha should have been given an opportunity to discovery through voir dire of Juror #12 whether there was a unanimous verdict at the time that it was announced in open court and memorialized on the signed verdict sheet." (Appellant's Brief at 23.)

Defendant argues that "none of the items in [FRE 606(b)(1)] applied here." (Brief at 22). But the items of evidence prohibited by this rule include a juror's testimony "about any statements made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." FRE 606(b)(1). This is exactly what the court would need to inquire about, to determine how the jury reached its verdict. Defendant does not explain, nor could she, how she could ask the juror whether there was a unanimous verdict, without asking about what

---

group and the jurors responded in open court that it was their verdict. Not a single juror indicated that he was confused or did not know what he was doing. Where jurors in their jury room and in open court gave their unanimous assent to a verdict which was accepted by the court and the jury discharged, it is too late thereafter for individual jurors to change their minds and claim that they were mistaken or unwilling in the assent which they gave." *U.S. v. Chereton*, 309 F.2d 197 (6th Cir. 1962) (citing Wigmore, Evidence (McNaughton Revision) § 2355 p. 717).

occurred during the jury's deliberations.[4]

The trial court here probed exactly this question, asking Defendant's counsel to suggest very concrete questions that he proposed asking the juror, without delving into what occurred during deliberations. [480-502]. Defendant's counsel was unable to come up with such questions during that hearing, but he agreed to present concrete questions at a second hearing. The specific questions that Defendant then proposed (as e-mailed by her counsel to the trial court before that second hearing) were as follows:

> *Q 1. Near the end of your jury deliberations on December 14, 2023 did the foreperson take or request from you, the jurors, a vote on the amount of general damages to be awarded (referring to the award of ~7,000)?*
>
> *(If answer to Q 1 is yes):*
>
> > *Q 1(a) How did the foreperson ask you to express your vote on the amount of general damages; was it a hand vote, oral vote?*
> >
> > *Q 1(b) How, if at all, did you express to the foreperson your vote on general damages to be awarded?*
>
> *(If answer to Q 1 is no):*
>
> > *Q 1(c) As a juror, you were not asked to vote on the general damages to be awarded?*

[4] And, as importantly, the question before this Court now is whether the trial court abused its discretion in denying Defendant's motion for a new trial, based on the facts and arguments it was presented with. (Defendant should not be permitted to make substantially new arguments now, for the first time on appeal.) Before the trial court, the briefing and argument centered fully around whether the "clerical error" exception to Rule 606(b)(1) applied.

Q 2. Near the end of your jury deliberations on December 14, 2023 did the foreperson take or request from the jurors, a vote on the amount of punitive damages to be awarded (referring to the award of ~75,000)?

(If answer to Q 2 is yes):

> *Q 2(a) How, if at all, did the foreperson ask you to express your vote on the amount of punitive damages; was there a hand vote, oral vote?*
>
> *Q 2(b) How, if at all, did you express your vote to the foreperson on the amount of punitive damages to be awarded?*

(If answer to Q 2 is no):

Q 2(c) As a juror, you were not asked to vote on the punitive damages to be awarded?

[536; also at R. 166-67 (PDF at 185-86.)]

The trial court, reviewing these proposed questions, responded:

> this seems to me to be sort of Exhibit A of the type of questions we are not allowed to ask a jury. Because it does, in fact, go into the deliberative process of the jury—I mean, it goes sort of beyond even what I would have imagined… I mean, I can't really imagine a more stark example of getting into the deliberative process.

[509].

Defendant's counsel was afforded a final opportunity to defend his proposed questions—to explain how recalled jurors could be questioned without improper inquiry into the jury's deliberative process. Defendant's counsel said, "Well, I mean, these questions, they pertain only to the last, I don't know, few minutes of the deliberations." [515]. The trial court bypassed this irrelevance, and found, "I

think the more reasonable interpretation of this is that this is a single juror that is seeking to impeach the verdict rather than a clerical mistake." [516]. The court further explained, "I think you've actually just demonstrated what a clerical error would be. If the amount was the issue, that's a clerical error." [517]. But that wasn't the issue. The verdict in this case was read out in open court. Juror #12 did not raise any objection to it. Nobody tried to congratulate the wrong side. Juror # 12 just said, days later, "we were suppose[d] to agree on all terms unanimously." [382]. Again, that is not a basis for a new trial in the District. *Sellars v. United States*, 401 A.2d 974, 981-82 (D.C. 1979).

The trial court acted in accordance with a century of thoroughly settled law: the courts have consistently decided that the internal deliberations of a jury are (with very few exceptions not applicable here) sacrosanct.

None of Defendant's offered authority supports her argument that the juror's note requires a new trial. Her proposed distinction between "the deliberative process of reaching a verdict" and a situation in which "the deliberative process had ceased improperly" (Brief at 24) is supported by no authority. Defendant speculates that "[a]n objective consideration of this sequence of events leads to the logical conclusion that something improper incurred [sic] during jury deliberations." (Brief at 20, emphasis added). In other words, Defendant very precisely seeks the forbidden post-verdict exploration into the

substance of jury deliberations.

Defendant misreads the cases on which she relies. *U.S. v. Bagnariol,* 665 F.2d 877, 884 (9th Cir. 1981) discusses allegations that a juror went to the library, conducted an independent investigation into one of the parties, and revealed his results to the other jurors—the classically-excepted showing of improper *extrinsic* influence.

U.S. v. Madrid, 842 F.2d 1090, 1094 (9th Cir. 1988) likewise analyzes whether *"*ex parte communication to a juror" introduced "a reasonable possibility of prejudice to the verdict." *Id.* at 1094.

Defendant's reference to *Economou v. Little*, 850 F.Supp. 849 (N.D. Cal. 1994) is puzzling, because the vast bulk of that opinion is a survey of cases from many jurisdictions sternly disfavoring post-verdict interviews of jurors except upon a threshold showing of improper ***outside*** influence (*id., passim*), including *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980), in which the Ninth Circuit held that even after the defendants were told by members of the jury that the verdict had not been unanimous, it would have been reversible error to PERMIT any sort of inquiry—after the jury is discharged, "jurors may not claim that their assent was mistaken or unwilling." *Id.*

Defendant's reference to *Attridge v. Cencorp Divsion of Dover Technologies Int'l, Inc.*, 836 F.2d 113 (2nd Cir. 1987) is also inapplicable. As she herself notes,

the post-verdict inquiry in that case was only permissible because the jury's genuine clerical error was revealed by asking them one question: 'what was your understanding as to what the verdict was; what was the jury verdict?' (Brief at 26). In this case, there is no hint of any confusion as to what the verdict *was*. Juror 12 did not object when that verdict was read out in open court as the jury's verdict. Juror 12's note itself demonstrates that everybody knew what the verdict was, complaining that "we were suppose to agree on all terms unanimously." [379]. If there had been no shared understanding of what the verdict was, Juror 12 would have no way of knowing—two days after she was discharged— that she had not wholeheartedly embraced it.

Univ. Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, fn 43 (5th Cir. 1974) lands on Plaintiff's side of the issue Defendant seeks to raise: "a juror may not subsequently impeach a verdict by stating how it was reached." So does *Young v. United States*, 163 F.2d 187 (10th Cir. 1947), which refused to disturb the verdict because any mischief was inherent to the jury's deliberations, so there could be no question of extrinsic misconduct or clerical error.

Defendant cites *Fox v. United States*, 417 F. 2d 84, 89 (5th Cir. 1969), but that decision is probably no longer good law even in the Fifth Circuit, since the decision was issued in 1969, six years before the adoption of FRE 606. In the years since *Fox* was decided, the Fifth Circuit has sided with the FRE, and the rest

of the country: in *United States v. Ortiz*, 942 F.2d 903 (5th Cir. 1991), two jurors insisted that they had not joined in any unanimous vote in favor of a guilty verdict, and the defendant, citing *Fox*, sought a new trial. But the court held that 'voting' was a 'component of deliberation,' and therefore the jurors trying to give evidence about the allegedly non-unanimous vote were "impermissibly seek[ing] to testify as to any matter or statement occurring during the course of the jury's deliberations." Id. at 913.

In *United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987), the Fifth Circuit upheld a trial court's decision to amend the verdict to accurately reflect what the jury had decided, because the verdict read out in court reflected a conviction on all counts, but several jurors subsequently told the court that they had unanimously agreed to acquit the defendant on one of the counts. Nobody had to ask any juror about the substance of deliberations, or how the vote was conducted, because the jurors told the court that the verdict had been written down incorrectly.

The closest Defendant comes to a relevant citation that might support her argument is *State v. Johnson*, 198 P.3d 769 (Kan. Ct. App. 2008). The specific reversible legal error identified in that case was the trial court's failure to comply with a Kansas statute requiring that a verdict be read to the jury in open court, and that "inquiry [be] made" of the jury as a whole "whether it is the jury's verdict," after which "[i]f no disagreement is expressed, and neither party requires the jury

to be polled, the verdict is complete and the jury discharged from the case." *Id.* at 779 (*citing* K.S.A. 22-3421). In that case, the intermediate appellate court held that as a matter of state law, the trial court's failure to specifically ask the jury, as a whole, whether the announced verdict was their verdict, *when combined* with a subsequent juror's note that "[t]here were two of us *not* wanting to vote guilty," gave rise to the "question whether a truly unanimous verdict was reached in this case," and justified a new trial. *Id.* at 781-83,

District law has a different statutory mechanism to ascertain unanimity of the jury: each party has the right to poll each juror individually. "After the verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually." D.C. Sup. Ct. R. 48. Accordingly, here, after the verdict was announced in open court, before the jury was discharged, the court asked the parties whether they wished to poll the jurors [367-368]. Defendant declined the offer, no jurors expressed disagreement or dissent with the verdict, the jury was discharged, and the verdict became final [368-369].

The trial court did not abuse its discretion by rejecting Defendant's post-trial request to ask a juror how the jury reached its verdict; it did not abuse the "broad discretion" it exercised while determining "what manner of hearing, if any,

is warranted." *United States v. Wilson*, 534 F.2d 375, 349 (D.C. Cir 1976).[5] With that request denied, Defendant could offer no evidence and made no other argument that a new trial was needed, and Defendant's motion for a new trial was denied.

II. DEFENDANT HAS WAIVED CLAIMS RELATED TO INSUFFICIENCY OF EVIDENCE OR EXCESSIVE DAMAGES.

A party arguing evidentiary insufficiency on an issue must move for judgment as a matter of law (formerly known as a directed verdict), and such a motion "may be made at any time before the case is submitted to the jury," D.C. Sup. Ct. R. 50(a)(2). If the motion is not granted, the motion must be renewed within 28 days after entry of judgment, D.C. Sup. Ct. R. 50(b). The failure to make such a motion "precludes a party from questioning on appeal the sufficiency of the evidence." *Molovinsky v. Fair Emp't Council*, 683 A.2d 142, 147-48 (D.C.

[5] Defendant also makes a brief sally, on pages 27-28 of her Brief, upon the notion that her trial counsel's failure to request a poll of the jury indefinitely preserved her ability to challenge the verdict instead of waiving it. She does this by emphasizing the text for "and the jury is polled and discharged" and "after the jurors have assented to the verdict in a poll in open court" in various decisions discussing when the verdict becomes final. Id. Under Defendant's implicitly proposed version of the law, it would be malpractice for a losing party to ever poll a jury, because without a poll, no verdict ever becomes final. This, of course, stands the matter on its head—as Defendant herself notes earlier in her brief, a verdict becomes final either way: "the verdict is final when it is read in open court, or, if polling is requested and conducted, at the end of the poll." Brief at 9, citing *Queen v. D.C. Transit System, Inc.*, 364 A.2d 145 (D.C. 1976).

1996).

Because Rule 50 is identical to Rule 50 of the federal Rules of Civil Procedure, the Court may look to decisions of the federal courts interpreting the federal rule as persuasive authority in interpreting the local rule. *Street v. Hedgepath*, 607 A.2d 1238, 1243 n.5 (D.C. 1992). The Supreme Court has affirmed that a party who fails to comply with Rule 50(b) “forecloses its challenge to the sufficiency of the evidence.” *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 404, 126 S. Ct. 980, 987 (2006). “[E] ven if the District Court was inclined to grant a new trial on the basis of arguments raised in respondent's preverdict motion, it was without the power to do so under Rule 50(b) absent a postverdict motion pursuant to that Rule.” Id. The strict operation of this procedure also plays out in *Campbell v. District of Columbia*, 894 F.3d 281 (D.C. Cir. 2018). There, the defendant made a Rule 50(a) motion for judgment as a matter of law on two theories before the case was submitted to the jury. The motion was denied; the jury returned a verdict for the plaintiff on one count; the defendant then renewed its motion on one of its theories under Rule 50(b), but added “a new argument that it did not make in its earlier Rule 50(a) motions.” *Id.* at 285. Both arguments were rejected, and the defendant appealed. The D.C. Circuit first noted that like any appellate court, “[w]e do not… lightly disturb a jury verdict. Judgment as a matter of law is appropriate only if the evidence and

all reasonable inferences that can be drawn therefrom are so one-sided that reasonable men and women could not have reached a verdict in plaintiff's favor." *Id.* at 286. The appellate court then ruled on the merits of the argument that had been made in the defendant's 50(a) motion, but declined to even consider the argument that had been raised for the first time in the 50(b) motion to the trial court post-verdict, because the defendant "failed to preserve [that] argument, and such a failure generally precludes appellate review." *Id.* at 288.

In *Molovinsky,* the Court held that Mr. Molovinsky waived an argument that there was insufficient evidence to support punitive damages, where Mr. Molovinsky did not make a motion for judgment as a matter of law before the close of evidence. (The Court also held that Mr. Molovinsky waived arguments that there was insufficient evidence that Mr. Molovinsky's company was an "employment agency" and that his conduct was a "discriminatory practice," under applicable law, because Mr. Molovinsky had not renewed his motion for judgment as a matter of law, on those issues, as required by the rule.)

In *District of Columbia v. Hickey*, 150 A.2d 463 (D.C. 1959), the Court held that the parties' failure to request directed verdicts at the close of the evidence precluded the parties from arguing insufficiency of evidence on appeal. In *Daka, Inc. v. McCrae*, 839 A.2d 682, 691 (D.C. 2003), the Court rejected Daka's argument that there was insufficient evidence to support any damages.

("We reject this argument for the reason alone that Daka has not preserved it."). See also *Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 339 (D.C. 2022) ("challenges not included in Iron Vine's and Second Factor's Rule 50(a) motions are unreviewable.)

For over 70 years it has been settled that an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand" based on the insufficiency of the evidence, unless the party challenging the judgment made a Rule 50(b) post-trial motion. *Cone v. W. Va. Pulp & Paper Co.,* 330 U.S. 212, 218 (1947). The Supreme Court held that the type of relief Defendant seeks here "calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Id.* at 216. This is the rule because of the trial judge's opportunity, having heard all testimony, "to view the proceedings in a perspective peculiarly available to him alone." Absent a motion to the trial court, giving the trial court with its unique perspective "first crack at the question" of the sufficiency of evidence, "an appellate court is powerless to review the sufficiency of the evidence after trial." *Dupree v. Younger*, 598 U.S. 729, 734 (2023).

In none of her many post-trial filings did Defendant ever challenge the submission of punitive damages to the jury, nor mention any possible Constitutional challenge to the amount of damages awarded. As a matter of law,

the issues of insufficient evidence for punitive damages, and excessive punitive damages, have been waived.

Far from preserving her right to challenge the sufficiency of the evidence by moving to prevent the jury from ever being asked about punitive damages, Defendant, via counsel, worked with Plaintiff's counsel and the trial court on the wording of the punitive damages questions on the verdict sheet [324]. She *participated* in asking the jury to consider whether the evidence supported an award of punitive damages. She never filed a Rule 50(b) motion to renew any request for judgment as a matter of law, because there was nothing to renew. So unlike the losing party in *Campbell* (who preserved one of his theories), she has no right to appellate review on these issues.

Defendant never gave the trial court an opportunity to decide on her argument that it should not have submitted punitive damages to the jury. It is beyond this Court's review.[6]

Defendant Has Also Waived Her Claim
That the Punitive Damages Award Was Excessive

Since 1987, this Court has repeatedly held that the District follows the

[6] In a footnote (Appellant's Brief at 35, note 6), Defendant suggests that "plain error" review might still be appropriate. However, there is no "plain error" exception to the rule that failure to make Rule 50 motions constitutes a waiver of arguments and precludes appellate review. *Iron Vine Sec., LLC v. Cygnacom Sols., Inc.*, 274 A.3d 328, 339 n.13 (D.C. 2022). Even if there were, there are no "exceptional" circumstances here that would justify such review.

example of other Courts of Appeal: "where relief from a verdict is desired on the ground that the damages awarded by the verdict are inadequate or excessive, a motion for a new trial is necessary to raise these matters and preserve them for appeal," and when a disappointed party fails to afford the trial court "the opportunity to pass on" the claim, this Court lacks jurisdiction. *Keener v. Karr*, 528 A.2d 1236, 1237 (D.C. 1987). This Court cited *Keener* in 2007, when it upheld a verdict awarding a wrongfully evicted tenant $11,826 in compensatory and $100,000 in punitive damages. *Oliver v. Mustafa*, 929 A.2d 873 (D.C. 2007). The case proceeded similarly to this one, and ended as this one should:

> [W]e decline to address Ms. Oliver's arguments that the punitive damages were excessive, not supported by the evidence, and in violation of her due process rights under the Fifth Amendment. Though Judge Ross gave Ms. Oliver thirty days to file post-trial motions, she filed none. This court will not review a verdict for inadequate or excessive damages unless such arguments were made to the trial court in post-trial motions.

Id. at 879, *citing Keener, supra. See also Upton v. Henderer, 969 A.2d 252, 253 (D.C. 2009).*

Defendant is challenging the trial court's submission of punitive damages to the jury, arguing that the record lacks clear and convincing evidence of her malice. But Defendant lost her chance to make this argument the moment the case was first *submitted* to the jury.

Defendant's argument that the record did not contain enough evidence of her malice for the question of punitive damages to be submitted to the jury has

been waived and is not properly before this Court.

Defendant made no motion for judgment as a matter of law before or after the case was submitted to the jury.

III. THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE PUNITIVE DAMAGES AWARD.

In the alternative, Plaintiff submits that the record did, in fact, contain plenty of evidence supporting a punitive damages award.

The jury heard from Plaintiff that Defendant asked Plaintiff and her roommates to move out. (12/13/22 Tr. at 17 line 25.) The tenants told her it was winter. (12/13/22 Tr. at 18 line 2.) "And she said I'm giving you two months to move out. And then the pandemic hit." (12/13/22 Tr. at 18 line 3.) "She asked us to -- to pay $50 more and we told her that this is Corona time, we cannot do that. And we told her that the D.C. law also doesn't to allow that. Then she asked all of us to move out." (12/13/22 Tr. at 18 line 5.)

The lockout occurred on May 1, 2020.

She testified as follows, on cross-examination:

> Q: When you arrived the evening of May 1st, 2020, you tried your key and it didn't work, correct?
> A: Correct, yes.
> Q: Okay. And you didn't submit any evidence or text or e-mail indicating that you requested a copy of the key, did you, that day?
> A I did not. It's because I was calling her repeatedly. To be locked out of your house, at the time when there was Corona, was very stressful. So, I repeatedly called her and I was outside the house.
> Q But you didn't talk to her, correct?

> A She did not answer my call, but I would leave her voice message asking her to please open up the door, open the -- because I was locked outside.
> Q You then decided to call the D.C. police. Do you recall the reason you called the D.C. police and what you might have -- do you recall what you told them when you called?
> A Yes, I do. I told them that I was a legal tenant, that I had been a legal tenant for more than one year, that I paid my rent on time, but that the landlord changed the locks.
> Q And the police showed up, correct?
> A Yes, they did.
> Q You spoke with the police at that time, correct?
> A Yes. I spoke to them like what I just stated.
> Q And then the police left. And then, at that time, you left, correct?
> A They came and they asked me to call her in front of them, and I called her twice. She did not pick. Then they said let's give her some time. Then they waited for me for quite some time. Then they called her themselves, but she did not pick. Then they left.

(12/13/22 Tr. at 19 line 25.)

Also, on redirect:

Q: You said you called Ms. Kelecha several times, left her messages on May 1st, 2020. Did she ever call you back?

A She did not.

(12/13/22 Tr. at 28 line 4.)

During March and April 2020, Plaintiff and Defendant exchanged multiple texts related to a lack of heat in the unit, and related to Defendant not accepting Plaintiff’s rent for April. (12/13/22 Tr. at 81 line 16 to 88 line 17.)

Defendant gave Plaintiff a notice on April 1, 2020 [98] that read, in part, as follows, translated into English:

> Now I'm giving you a 30-days notice to vacate, the last notice to vacate. Other than your clothing and some items, the rest of the furniture are mine. So, I will respectfully ask you to vacate by April 30, 2020 and find another place. And after that, I'm intending to change the keys to the outer – the front door as well as to your room. And I am asking you to be understanding of -- of that.

(12/13/22 Tr. at 53 line 2.)

Defendant’s version of the events on May 1, after she changed the locks: Plaintiff never called her. “No text, no voice mail, no missed calls.” (12/13/22 Tr. at 6, line 2.)

Defendant also testified that if Plaintiff had contacted her and asked her for a key, she would have given it to her. (12/13/22 Tr. at 67, lines 1-8.) But she also then admitted that when the parties were at a TRO hearing a few days after the lockout, she and her attorney opposed Plaintiff’s request for a Temporary Restraining Order. (12/13/22 Tr. at 111, lines 5-10.)

The jury had enough evidence before it to determine that Defendant did in fact change the locks to evict Plaintiff, as she had said she would do, and that Plaintiff did in fact call her many times on May 1 after the lockout, but Defendant ignored her calls.

Plaintiff’s counsel summarized these facts in his closing argument (Trial Transcript 12/13/24 at 138-149).

Malice “need not (and usually cannot) be proven by direct evidence, but may be inferred from all the facts and circumstances of the case.” *Robinson v.*

Sarisky, 535 A.2d 901, 906 (D.C. 1998). *See also Jemison v. National Baptist Convention, U.S.A., Inc.,* 720 A.2d 275, 285-286 (D.C. 1998) ("The finder of fact can infer the requisite state of mind from the surrounding circumstances").

Defendant presented a different view of events: she claimed "that she mistakenly believed that her tenant had voluntarily and deliberately terminated her tenancy." (Brief at 30). In arguing that there was no clear and convincing evidence supporting the submission of punitive damages to the jury, she claims that "[t]here was undisputed evidence presented at trial to support the Defendant's version of facts"-- specifically, her testimony that "if [Plaintiff] had asked [her] for a key, [she] would have given it to her" [303]. But describing this testimony as a presentation of 'undisputed evidence' pushes the boundary of candor to this tribunal. The point was strongly disputed—to the apparent satisfaction of the jury—when Defendant's testimony was thoroughly impeached, spanning twelve pages of transcript [302-313]. The jury heard that, in fact, Plaintiff did ask for a key: she filed an emergency motion seeking a TRO to let her back into her home. A reasonable person who had made an honest mistake, sincerely believing that their tenant had voluntarily moved out, would have been appalled to learn of an emergency motion for a TRO seeking to be let back into the property.

Instead, as Plaintiff pointed out, Defendant appeared at the TRO hearing. [303- 304] Mr. Schimel (who appeared at the TRO hearing, and who is once again

representing her on this appeal) strongly opposed Plaintiff's motion on Defendant's behalf. Defendant heard everything Mr. Schimel said, and Mr. Schimel presented several details that he apparently learned from Defendant: he said that Defendant had shown him a copy of a Notice to Quit she had sent Plaintiff [30], he demonstrated some knowledge of the layout of the home [31], and he articulated the nature of Defendant's grievances against Plaintiff. [31-32]. And Defendant certainly seemed closely aligned with Mr. Schimel at that hearing. She was sworn in, and testified that she agreed with everything he had said. [38]. And when she realized that Mr. Schimel's opposition to the TRO was unsuccessful, she interrupted the deputy clerk's attempt to schedule the next hearing and inveighed against giving Plaintiff a key until she was quelled by the judge: "…Ms. Kelecha, I'm sorry. I explained to you, I'm sorry that you don't accept my explanation. I accept that you disagree with my explanation. Okay, I accept that you disagree with me and that's fine." [46-47]. This in particular—following the rest of the TRO hearing—cannot be credibly squared with Defendant's sworn testimony at trial that she would have given Plaintiff a key [305].

The trial court instructed the jury: "You have heard evidence that a witness in this case made an earlier statement under oath subject to the penalty of perjury at a hearing and that this statement may be inconsistent with her testimony here at

trial… If you find that the earlier statement is inconsistent with the witness' testimony here in court, you may consider this inconsistency in judging the credibility of the witness." [331-332]. The jury had ample record evidence on which they could reasonably have concluded that when Defendant described the lockout as having been an innocent mistake, she was lying.

IV. THE PUNITIVE DAMAGES AWARD WAS NOT EXCESSIVE

Also, although Defendant waived her right to contest this issue, the magnitude of the punitive damages award is by no means 'clearly prejudicial' to her 'substantive rights.' This Court has affirmed a punitive damages award of $42,677.50, where $1 of compensatory damages were awarded. *Howard Univ. v. Wilkins*, 22 A.3d 774 (D.C. 2011) (identifying circumstances justifying great disparities in punitive versus compensatory damages). The question of punitive damages was submitted to the jury with Defendant's consent and active participation, after her testimony seeking to prove her intent was resoundingly impeached using her own prior inconsistent statements. And the resulting award of $75,000 used a ratio comparable to the upheld award in *Oliver v. Mustafa*, *supra*, and a far less extreme ratio than the upheld award in *Wilkins*.

In *Oliver*, the D.C. Court of Appeals followed *Keener*. Mr. Mustafa was awarded $11,826 in compensatory damages and $100,000 in punitive damages, due to his wrongful eviction and breach of contract claims. The claim, amount,

and ratio of punitive to compensatory damages, and the appellant's failure to challenge the amount or the ratio in any filing with the trial court, followed by a Constitutional challenge raised for the first time on appeal, are all strikingly similar to the facts of the instant case. This Court affirmed the verdict there, as it should here.

Appellant's Brief acknowledges this issue as well, noting that because she is challenging the punitive damage award for the first time on appeal, she cannot be heard unless her case raises the 'exceptional situation' of a 'clear miscarriage of justice' caused by an 'obvious' error that 'jeopardizes the very fairness and integrity' of the trial. Appellant's Brief at 35, fn 6. Her argument that she has presented such a case is, quoted in its entirety: "This is such a case." *Id.*

But it isn't. She was represented at trial by counsel of her choosing. Via counsel, she participated in drafting the jury instruction on punitive damages, rather than objecting to their presentation. Via counsel, she spent a year post-trial arguing against the verdict, during which she sought and obtained two extensions of time. She tells us nothing that would tend to explain anything that changed, surprised her, or unfairly prevented her from making any and all challenges she wanted to make against the verdict at a time when, under the rules, those challenges would have been cognizable. She has identified no exceptional situation that unfairly prevented her from making this argument in the proper form

and at the proper time, or made any other argument should prompt this Court to use its discretion to consider, for the first time on appeal, her (incorrect) argument that the record contains no evidence of her malice.

Appellant has retained different counsel on appeal, and with her new counsel she is making new arguments. Nothing about this is an "exceptional situation." If this maneuver sufficed to get the losing party a 'do-over' jury trial, then no adjudication would ever be final until one or both parties ran out of money, gave in to despair, or exhausted the District's supply of attorneys willing to rotate in and take another crack at the case.

CONCLUSION

A jury awarded $82,500 in damages to Plaintiff for an illegal, self-help eviction during the beginning of the Covid public health emergency. Defendant has not presented any cognizable challenge to that outcome. Plaintiff asks the Court to affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am filing the foregoing on November 18, 2024, via the Court's e-filing system, which shall automatically cause a copy to be served on Richard Schimel, counsel for Appellant, rschimel@lawofficesres.com.

/s/ Marc Borbely
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