EFiled: May 20 2014 11:40PM EDT
Filing ID 55477930
Case Number 146,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GAIL HELM and SCOTT HELM,	§	
	§	No. 146, 2014
Plaintiffs Below,	§	
Appellants,	§	Court Below: Superior Court
	§	of the State of Delaware, in and
	§	for Kent County,
v.	§	
	§	C.A. No. K12C-03-014 RBY
206 MASSACHUSETTS AVENUE,	§	
LLC, and GALLO REALTY, INC.,	§	
	§	
Defendants Below,	§	
Appellees.	§	

APPELLANTS' OPENING BRIEF

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I. NATURE OF PROCEEDINGS

This personal injury action was filed in the Superior Court in and for Kent County on March 7, 2012. The Plaintiffs, Scott and Gail Helm ("Mr. Helm," "Mrs. Helm," "Plaintiff," or, collectively, "Plaintiffs"), rented a beach house located at 206 Massachusetts Avenue in Lewes, Delaware ("Property"), for a week during July 2010. On July 10, the first night the Plaintiffs were in the Property that year, Mrs. Helm fell descending the stairs sustaining serious injuries to her foot. Plaintiffs asserted claims for (1) negligence, (2) breach of contract, and (3) loss of consortium.

Pursuant to the original Scheduling Order, as modified by the Court pursuant to an agreement of the parties, dispositive motions were to be filed no later than July 1, 2013. On June 14, 2013, Defendant Gallo Realty, Inc. ("Gallo") filed its Motion for Summary Judgment asserting two defenses. First, it claimed no liability to Plaintiffs as it was only acting as agent for the owner of the Property in which Mrs. Helm was injured. Second, and alternatively, Gallo argued an indemnification provision in the Residential Lodging Agreement signed by Plaintiffs exonerated it of liability. Gallo was permitted to file a brief in support of its motion, which it did on June 18, 2013. Plaintiffs filed a responsive pleading and supporting brief on July 2, 2013; Gallo filed a reply brief on July 19, 2013.

On June 27, 2013, Defendant 206 Massachusetts Avenue, LLC (the "LLC"), filed its Motion for Summary Judgment. In its Motion, the LLC asserted the defenses of primary assumption of risk, the Plaintiff's comparative negligence exceeding Defendants' negligence, and the protection of the same indemnification provision asserted by Gallo. Plaintiffs filed a responsive pleading on July 12, 2013; the LLC filed its reply on July 26, 2013.

On July 30, 2013, Plaintiffs requested oral argument before the Superior Court, which was held on September 20, 2013. The Court reserved decision until December 12, 2013, at which time two Orders were entered ("December Order"). The first granted Gallo's Motion for Summary Judgment on the grounds of the indemnification agreement and that Plaintiff Gail Helm, as a matter of law, primarily assumed the risk of her injury and was more negligent than Defendants, presumably under 10 *Del. C.* § 8132. The second Order granted the LLC's Motion for Summary Judgment on the grounds that Plaintiff Gail Helm, as a matter of law, primarily assumed the risk of her injury and was more negligent than Defendants.

Plaintiffs timely filed a Motion for Reargument on the grounds that Gallo never raised the issue of primary assumption of the risk or comparative negligence, that the Court granted summary judgment despite the existence of material facts on the issue of liability, that the Court misapplied precedent in determining that Mrs. Helm was more negligent than Defendants as a matter of law, and that the Court

closed the case despite the existence of a breach of contract claim not disposed of through summary judgment. The LLC timely responded to the Motion for Reargument on December 30, 2013, and Gallo filed its response one day later.

The Superior Court denied the Motion for Reargument on February 20, 2014 ("February Order"). In its decision, the Court ruled Gallo had argued assumption of the risk at the September 20 hearing without objection and that the Court could grant summary judgment on that ground under Rule 56. The Court determined the disputed facts were not relevant to the issue of assumption of risk/comparative negligence. The Court stood by its earlier decision to grant summary judgment on the issue of Plaintiff's comparative negligence exceeding Defendants' negligence as a matter of law. Finally, the Court held Plaintiffs failed to establish damages for their breach of contract claim (although that issue was never presented in the motions for summary judgment) and that Gallo had only been an agent and was not liable for the breach of contract claim, even though in its December 12 Order, the Court ruled summary judgment was inappropriate on the issue of the nature and scope of Gallo's agency. This appeal timely followed on March 20, 2014.

II. SUMMARY OF ARGUMENT

1. The Superior Court erred in granting Defendants summary judgment on the issues of primary assumption of risk and comparative negligence as a matter of law. The Court disregarded admitted disputes of fact regarding liability and causation pertaining to Plaintiff Gail Helm's fall, it improperly weighed evidence (against the non-moving Plaintiffs), and granted summary judgment to Defendants on two highly factual defenses that should properly be resolved by a jury.

2. The Superior Court erred in holding the Indemnification Provision applicable to shield Defendant Gallo from liability. The Court found the Provision to apply while expressly not addressing Plaintiffs' arguments the Provision was ambiguous. The Court did not address whether the Provision was sufficiently clear to indemnify Defendants, whether it was ambiguous, or whether it violated public policy, any of which could have resulted in the Provision not applying.

3. The Superior Court erred in granting summary judgment to Defendants on Plaintiffs' breach of contract claim. It either erred in interpretation or ignored Plaintiffs' arguments about the inapplicability of certain provisions. It initially found the principal-agency relationship between Defendants was subject to disputed facts rending summary judgment inappropriate, but then granted summary judgment relying, in part, on that relationship. Finally, it found the contract was not breached despite undisputed testimony it had been breach.

III. STATEMENT OF FACTS

On March 4, 2010, Plaintiff Gail Helm signed a Residential Lodging Agreement with Defendant Gallo to rent the property located at 206 Massachusetts Avenue, Lewes, Delaware for one week commencing on July 10, 2010. (A193-94.) While Mrs. Helm and her family had rented this property the previous two summers, Mrs. Helm had not been present for much of the week they rented the Property in 2008. (A148.) And in 2009, due to unrelated health problems, Mrs. Helm did not leave the beach house very often; thus she did not often traverse the steps on which she was ultimately injured. (A148.)

On the afternoon/early evening of July 10, 2010, Plaintiffs arrived at the Property. (A144.) Mr. Helm, as was his custom, unloaded the Plaintiffs' belongings from the car while Mrs. Helm visited with her family who had arrived at the Property earlier in the day. (A150.) Mrs. Helm learned from her family, however, the Property was not clean when her other family members had arrived. (A144.) The floors were dirty and the house smelled of urine. (*Id.*) Despite the efforts of other family members, the Property was still not clean and still smelled of urine when Mrs. Helm arrived. (A145.) After investigating the smell, Mrs. Helm discovered the rugs in the upstairs bathrooms were the source of the urine smell. (*Id.*) Mrs. Helm took the rugs down the stairs at approximately 8:00 p.m. while it was still daylight and put the rugs in the washing machine located on the

first floor of the Property. (*Id.*) Mrs. Helm went back upstairs and resumed visiting with her family. (*Id.*) They had dinner delivered in. (A148.)

Sometime between 11:00 p.m. and midnight, Mrs. Helm went to take the rugs out of the washing machine and place them in the dryer. (A146.) As she began to descend the stairs from the second floor of the Property, which contained the kitchen and main living areas, to the first floor, which contained the washer and dryer, she attempted to turn on the light in the foyer at the bottom of the stairs. (A145.) She realized, however, that there was no light switch at the top of the stairs to control the light in the foyer on the first floor at the bottom of the steps. (*Id.*) Moreover, the light at the top of the stairs was on an angled ceiling. (A149, A153, A160.) That light, therefore, was angled away from the bottom of the steps. (A153, A160.) This created a situation where the bottom of the steps was very dark. (*See* A146.) There was no flashlight in the Property. (A104-05.)

Mrs. Helm had nothing in her hands as she descended the stairs, and she used the handrail on the left side of the stairs. (A146.) As she neared the bottom of the stairs, Mrs. Helm realized she could not see the step in front of her. (*Id*.) Because the sun had set since the last time she had been down the stairs, there was no outside light coming in. (*See A145-46, A148*.) In deposition, Mrs. Helm testified:

Q. As you stood there and couldn't see the bottom of the steps, did you ask your husband to go down himself and move the items to the dryer, or did you ask him to go with you?

A. Neither.

Q. So is it fair to say that you didn't see a safety issue as you stood there, looking down?

A. I definitely saw a safety issue.

Q. Well, if you did, why didn't you ask one of those other five or six people in the house to help you?

A. Why would I put them in jeopardy? It's bad enough one person might. I knew it was unsafe when I looked down there. But proceeding with caution was my answer to it.

Q. So you saw a safety issue and basically said: I can handle this?

A. Yes.

(A105)

Mrs. Helm recalled the banister on the right side of the stairs curled near the bottom of the steps. (A146.) She therefore moved to the right side of the stairs and used the banister as her guide down the remainder of the stairs. (*Id.*) When she began to feel the banister curl, she cautiously felt with her left foot to make sure that she was on the last step. (*Id*.) Believing she was at the bottom, she put her weight down on her foot. (*Id*.) Unfortunately, it was not the last step, and her left foot rolled over the edge of the stair. (*Id*.) She tried to grasp the handrail, but

it was of an unreasonably large size and unreasonable shape for her to grasp. (*Id.*; A150; A172-78, A180-83.) Because she was unable to arrest her fall with the handrail, Mrs. Helm fell down the few remaining stairs and into the wall at the bottom of the stairs. (A147.)

Her family heard her fall and came to see what happened. (*Id.*) Her sister testified that when they first came to the top of the stairs, it was so dark they could not even see Mrs. Helm at the bottom of the stairs. (A162.) When someone was able to get down to her and turn the light on at the bottom of the stairs, it was apparent Mrs. Helm's left foot was broken. (A147.) She was taken via ambulance to Beebe Medical Center. (A144.) She was ultimately diagnosed with three broken bones in her left foot and a Lisfranc injury. (A144; A184-86; A187-90.)

IV. ARGUMENT

A. The Superior Court Erred in Granting Summary Judgment to Defendants as There Are Material Facts in Dispute and as Neither Defendant is Entitled to Judgment as a Matter of Law.

1. Question Presented

Did the Superior Court err in granting summary judgment to Defendants when the Defendants acknowledged disputes of material facts regarding liability and causation and when this Court has stated that determinations of primary assumption of risk and comparative negligence are matters for the jury? (A206-14; A292-306; A327-28; A342-44.)

2. Scope of Review

The Delaware Supreme Court reviews "'motions for summary judgment under a *de novo* standard of review.'" *Handler Corp. v. Tlapechco*, 901 A.2d 737, 744 (Del. 2006) (internal citations omitted). It reviews "'*de novo* the Superior Court's grant of summary judgment both as to facts and law to determine whether or not the undisputed facts, viewed in the light most favorable to the opposing party, entitle the moving party to judgment as a matter of law.'" *Id.*

3. Merits of the Argument

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law." R. Civ. P. 56(c). The movant "bears the burden of demonstrating ***both*** the absence of a material issue of fact ***and*** entitlement to judgment as a matter of law." *Atamian v. Gorkin*, 2000 Del. LEXIS 15, at *7 (Del. Jan. 18, 2000) (emphasis added). Furthermore, "any doubt concerning the existence of a factual dispute must be resolved in favor of the non-movant." *Id.* Similarly, "all reasonable inferences flowing" from the facts "must be viewed in the light most favorable to the non-moving party." *Cruz v. G-Town Partners, L.P.*, 2010 Del. Super. LEXIS 515, at *5 (Del. Super. Dec. 3, 2010). "The judge who decides the summary judgment motion may not weigh qualitatively or quantitatively the evidence adduced on the summary judgment record." *Cerberus Int'l., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (2002).

a. The Superior Court Ignored Admittedly Disputed, Material Facts Regarding Liability and Causation.

Before summary judgment can be granted to a party, the moving party must show no dispute as to material facts. R. Civ. P. 56(c); *Atamian*, 2000 Del. LEXIS 15, at *7. In Footnote 2 of its Motion for Summary Judgment, the LLC identified disputed facts regarding the lighting and banister that caused Mrs. Helm's injuries. (A86.) These are the two key elements of Plaintiffs' claim about the defective premises that caused Mrs. Helm's injuries. Plaintiffs maintain the banister used by Mrs. Helm as she descended the steps did not conform to the standard of care in that it was too large and of an improper shape to be "graspable." (A172-79; A180-

183.**)** The LLC disagrees. (A232-51.) Both the Plaintiffs and the Defendants hired experts to opine regarding the safety of the handrail and banister lining the stairs. In addition, Plaintiffs argue the stairs were unsafe and unreasonably dangerous because the light illuminating the bottom of the steps could not be turned on from the top of the steps before Mrs. Helm descended the stairs. (A145.)

The Court, however, glossed over the admitted dispute regarding the banister and focused solely on the lighting in its initial decision. (*See generally* December Order.) On reargument, the Court held the dispute regarding the graspability of the banister was not material to a determination of liability. (Feb. Order at 4.) A fact is "material" if a reasonable person would "'attach importance to [it] … in determining his choice of action in the transaction in question….'" *Harper v. Russell*, 2003 Del. LEXIS 555, at *5 (Del. Nov. 10, 2003) (internal citations omitted and modification in original). Part of Plaintiffs' primary claim is the banister was defective such that Mrs. Helm could not arrest her fall once it began. Nothing could be more material to this case than a dispute about the "graspability" of the banister. Because of the dispute of material facts – noted by Defendant LLC in its own Motion for Summary Judgment – the grant of summary judgment was error that must be reversed.

b. The Superior Court Improperly Weighed the Evidence Presented and Then Construed It Against Plaintiffs.

In concluding (1) Mrs. Helm's negligence was greater than Defendants' as a matter of law under 10 *Del. C.* § 8132 and (2) she assumed the risk of descending the stairs, thereby barring any recovery, the Superior Court both improperly weighed the evidence in deciding summary judgment and failed to give Plaintiffs, non-moving party, the benefit of all reasonable inferences flowing from the facts. *Cerberus*, 794 A.2d at 1150; *Cruz*, 2010 Del. Super. LEXIS 515, at *5.

While Mrs. Helm acknowledged the stairs were dark as she descended them, she did so to take care of the property (i.e., rugs) belonging to the LLC and/or Gallo. (A56; A148.) In descending the stairs, Mrs. Helm relied on a banister to guide her safely down to the bottom of the stairs. (A146.) She had no reason to believe, however, the banister was not properly graspable and would be of no assistance if she fell. She could not obtain a flashlight to aid in her descent of the stairs because there was no flashlight in the Property. (A148.) Although she had rented the house in the two prior seasons, she did not have occasion to be up and down those stairs as much as would be expected in the two prior seasons. (A148-49.) These are facts to be considered and weighed in determining whether Mrs. Helm (1) was more negligent than Defendants and (2) assumed the risk of injury.

The Court found negligence on both sides. (Dec. Order at 6.) Then, despite the substance and context of Mrs. Helm's testimony, the Superior Court focused on

a few of her words to find her negligence was "indisputable." For example, she "'definitely'" saw a safety issue, she knew it was "'unsafe,'" and she did not want to put others in "'jeopardy.'" (*Id.*) The Court ostensibly equated the term "indisputable" with "exceeding Defendants' negligence" for purposes of 10 *Del. C.* § 8132. This is incorrect. "Indisputable" means "[unquestionable]" and has nothing to do with quantity. Merriam Webster's Collegiate Dictionary 593 (10th ed. 1996). But the Superior Court leaped from Plaintiff's "indisputable" negligence to Plaintiff's negligence exceeding that of Defendants. To make this leap, the Superior Court necessarily weighed evidence, completely ignored the facts outlined in the preceding paragraph and the facts and argument about the banister's graspability in the December Order, and concluded Mrs. Helm's negligence outweighed Defendants' negligence.

Worse yet, the Court, failed to give the benefit all reasonable inferences to Plaintiffs as the non-moving party and gave those benefits to Defendants. *See Cruz*, 2010 Del. Super. LEXIS 515, at *5. First, when confronted on reargument about its failure to address the graspability issue, the Court determined Mrs. Helm must have known of the banister's lack of graspability even though there was no evidence put forth that she knew anything about the banister's graspability. (Feb. Order at 4.) This is an inference from the facts, but it was given to the moving parties rather than the non-moving parties. At a minimum, Plaintiffs were entitled

to the inference that had Mrs. Helm known the bannister was useless, she would not have descended the stairs. Second, the Court completely ignored Mrs. Helm's testimony (and any inferences to be drawn therefrom) that she was trying to protect Defendants' rugs by going down to the washing machine that evening when it stated she went down the stairs without "any compelling reason or time element urging her on." (A56; A148; Dec. Order at 7.) It also ignored that she was carefully stepping with each foot and using the banister as a guide. (A146.) Finally, when confronted with disputed expert testimony regarding the material issue of the graspability of the banister, the Court committed reversible error in necessarily determining Plaintiffs' expert opinion was inferior to Defendant's expert opinion. Reversal is necessary.

c. The Application of Primary Assumption of Risk as Well as The Application (and Extent) of Comparative Negligence are Questions for the Jury.

In addition to the existence of disputed material facts regarding liability and causation, Defendants were not entitled to judgment as a matter of law on the issues of assumption of risk or Plaintiffs' negligence exceeding Defendants' negligence. R. Civ. P. 56(c). In *Koutoufaris v. Dick*, this Court stated "primary assumption of risk involves the ***express*** consent to relieve the defendant of any obligation of care while secondary assumption consists of voluntarily encountering a known unreasonable risk which is out of proportion to the advantage gained."

604 A.2d 390, 397-98 (Del. 1992) (emphasis added). Primary assumption of risk involves "a bargained-for, agreed-upon shifting of the risk of harm." *Id.* at 398. Secondary assumption of risk "is totally subsumed within comparative negligence," which was enacted by the legislature in 1984. *Id.* This Court later reaffirmed this statement of the law. *Spencer v. Wal-Mart Stores E., L.P.*, 930 A.2d 881, 885 (Del. 2007) (internal citations omitted). Delaware's comparative negligence statute provides that a plaintiff's negligence does not bar her claim as long as her negligence does not exceed that of the defendants. 10 *Del. C.* § 8132. Either way, assumption of risk is an affirmative defense that "is 'fact intensive and not susceptible to disposition, as a matter of law, through summary judgment.'" *Tucker v. Albun, Inc.*, 1999 Del. Super. LEXIS 468, at *24 (Del Super. Sept. 27, 1999) (*quoting DiOssi v. Maroney*, 548 A.2d 1361, 1368 (Del. 1988)).

1. Primary Assumption of Risk

The Superior Court found Mrs. Helm primarily assumed the risk in descending the stairs because she "expressly appreciated the danger of it . . . but . . . did not avoid it." (Dec. Order at 7.) No evidence was ever presented, however, that she gave "express consent to relieve the defendant[s] of any obligation of care" or engaged in "a bargained-for, agreed-upon shifting of the risk of harm." *Koutoufaris*, 604 A.2d at 397-98. For this to be primary assumption of risk, Mrs. Helm must have conveyed to the LLC or Gallo she knew there was a risk of dark

stairs ***and*** an unusable banister and she consented to that risk. Appreciating a risk differs from relieving a tortfeasor from the obligation of care. Moreover, as she had no way of knowing the banister was useless in a fall scenario, she could not have appreciated or consented – expressly or impliedly – to that risk or voluntarily encountered it. *See Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 881-84 (Del. Super. 2005). Furthermore, neither of the "common themes" of primary assumption of risk exists here. *Id.* at 883. She did not descend the stairs "out of a desire to satisfy a personal preference." *Id.* Instead, she did so to protect the property of Defendants. (A56; A148.) Nor did she choose "to engage in [an] inherently risky activity . . . acknowledge[ing] that [s]he and others engaging in such activity may not act with 'ordinary care.'" *Id.* Walking down stairs is not "inherently risky," and, as just explained, she did not acknowledge or expect Defendants' lack of ordinary care. Simply, she did not primarily assume the risk.

Two cases direct that primary assumption of risk is not applicable in this case. In *Spencer*, an employee of a business inside a Wal-Mart was entering the Wal-Mart store. 930 A.2d at 883. She had worked there "for several years, and was familiar with the parking lot." *Id.* at 886. Instead of using the sidewalk, she proceeded through "a stream of water" that, unbeknownst to her, had frozen. *Id.* at 883, 886. Following *Koutoufaris*, this Court held this was secondary assumption of risk to be determined by a jury. *Id.* Mrs. Helm's case is indistinguishable. She

had been to the Property on two occasions prior for vacation and had used the stairs to some extent. (A148-49.) Like the *Spencer* plaintiff who chose to walk through water in cold conditions, Mrs. Helm proceeded down the stairs even though they were dark. (A105, A146, A148.) Mrs. Helm's case is even stronger than *Spencer* because she did not know the banister was useless if she fell. Thus, at most, this is secondary assumption of risk that should be submitted to a jury.

Croom involved spectators at an automobile race where the plaintiff fell off of a homemade scaffold. *Croom v. Pressley*, 1994 Del. Super. LEXIS 385, at *1 (Del. Super. July 29, 1994) (Ridgely, J.) The plaintiff testified "he appreciated a risk of falling off the scaffold if he wasn't careful," but the Court rejected primary assumption of risk as a grounds for summary judgment because "it may be inferred that this statement demonstrates no more than secondary assumption of the risk." *Id.* at *16. "Because of the varying inferences," there was a genuine issue of material fact on whether the plaintiff's conduct was primary or secondary assumption of risk; the Court denied summary judgment. *Id.* The *Croom* plaintiff's statement that "he appreciated a risk of falling off the scaffold if he wasn't careful" is nearly identical to Mrs. Helm's statement that she "saw a safety issue" that could be handled through care. (A105, A146, A148.) The Superior Court should have followed *Croom* and found Mrs. Helm's actions and awareness could be primary or secondary assumption of risk to be determined by a jury.

Reliance on *Brady v. White* is misplaced. 2006 Del. Super. LEXIS 390 (Del. Super. Sept. 2, 2006). *Brady* involved a veterinarian who sued a dog's owners after the dog bit her while she was treating the injured dog. *Id.* at *1, *3. Critical to the Court finding the veterinarian assumed the risk the dog would bite her was the veterinarian's status as a professional who was injured in the course of her employment. *Id.* at *9-10. Indeed, a subsequent Delaware case cited *Brady* as the basis for the "Veterinarian's Rule," suggesting *Brady*'s holding is limited to its facts. *Russo v. Zeigler*, 2013 Del. Super LEXIS 203, at *5 (Del. Super. May 30, 2013). Mrs. Helm was not a professional injured in the course of her occupation, and *Brady* is accordingly inapposite. Furthermore, *Brady* is in derogation of both *Koutoufaris* and *Spencer*, which clearly state that unless the negligence is of the primary type, i.e., ***expressly*** relieving defendant of liability, assumption of risk is part of a comparative fault analysis. 930 A.2d at 885-86; 604 A.2d at 397-98.

Frelick v. Homeopathic Hosp. Ass'n, also relied on by the Superior Court, applied contributory negligence to find the plaintiff's conduct barred her recovery. 150 A.2d 17, 19-20 (Del. Super. 1959). But the Delaware Supreme Court subsequently stated in *Laws v. Webb* that enactment of the comparative negligence standard in 1984 eliminated the concept and application of contributory negligence in Delaware. 658 A.2d 1000, 1005-06 (Del. 1995), *overruled on other grounds*, *Lagola v. Thomas*, 867 A.2d 891, 896 (Del. 2005). *Frelick*, therefore, is legally

inapposite. *Frelick* is also factually distinguishable. Unlike the *Frelick* plaintiff, who was aware of all of the circumstances surrounding the dangerous condition, Mrs. Helm only knew the bottom of the staircase was dark; she did not know the banister not graspable until she began to fall and could not arrest her fall. *Frelick*, 150 A.2d at 20; A145-46, A253-54; A172-79; A180-83. Again, giving the non-moving Plaintiffs the benefit of all reasonable inferences, the significance of Mrs. Helm's lack of knowledge about the banister's lack of graspability is that but for the unusable banister, Mrs. Helm would likely not have been injured.

2. Secondary Assumption of Risk/Comparative Negligence

The Superior Court ignored facts relevant to whether Mrs. Helm primarily assumed and whether her negligence exceeded that of Defendants. As noted, both primary assumption of the risk and comparative negligence are fact driven inquiries for the jury. *Tucker*, 1999 Del. Super. LEXIS 468, at *24; *Safee v. Falter*, 1996 Del. Super. LEXIS 21, at *2 (Del. Super. Jan. 25, 1996). And "[b]ecause secondary assumption of risk is generally a question of fact to be determined by the jury, '***its degree remains a jury question***.'" *Spencer*, 930 A.2d at 886 (emphasis added) (internal citations omitted). As explained in Sections IV.A.3.a and b, *supra*, there are facts, some of which are disputed, that must be weighed in determining whether or not Mrs. Helm assumed the risk of her injury or was more negligent than Defendants. Without limitation, these include why she

was descending the stairs evening, precautions she took in descending the stairs, and her knowledge of the graspability (or lack thereof) of the banister.

Mrs. Helm's case is analogous to *Koutoufaris*. There, the plaintiff entered a dark parking lot at night to go to her car. 604 A.2d at 393. She asked a co-worker to accompany her part of the way to her vehicle. *Id.* After the co-worker left, however, she was assaulted by an unknown assailant in the parking lot. *Id.* The Supreme Court affirmed the trial court's decision to allow the jury to determine issues of comparative negligence where plaintiff's conduct could be construed as secondary assumption of the risk. *Id.* at 395-98.

Similarly, Mrs. Helm acknowledged the stairs were dark. (A405, A146, A148.) Like the *Koutoufaris* plaintiff who had someone accompany her to her vehicle, Mrs. Helm used care to navigate the stairs by feeling the stair ahead of her with her foot and using the banister as a guide to what she thought was the bottom of the stairs. (A146.) Nonetheless, both plaintiffs were injured. Thus, as in *Koutoufaris*, a jury should consider the surrounding facts to determine if and to what extent comparative negligence applies.

The Superior Court relied on *Trievel v. Sabo* to support its holding Mrs. Helm was, as a matter of law, more negligent than Defendants. 714 A.2d 742 (Del. 1998). Initially, *Trievel* involved different facts. The plaintiff in *Trievel* attempted to cross the heavily travelled Route 1 on a bicycle. *Id.* at 745. Rather

than walking her bicycle across the four-lane highway, she mounted her bicycle and rode out in front of an oncoming vehicle. *Id.* She had passed warning signs approaching the highway where she was ultimately killed. *Id.* In affirming the trial court, this Court noted *Trievel* was a "rare case[]" that involved "overwhelming evidence, viewed in the light most favorable to the . . . [p]laintiffs." *Id.* at 745, 746. Of significance, too, was that there was only weak evidence of defendant's negligence. *See id.* at 746.

Mrs. Helm saw some danger with the dark steps although that danger was far less severe than crossing a heavily travelled four-lane on a bicycle in the face of oncoming traffic. There were no warning signs leading up to the danger, and Mrs. Helm did not learn of the defective banister until it was too late. Finally, unlike *Trievel*, there is more than weak evidence of Defendant's negligence.

Trievel also involved a different procedural posture and legal standard. The *Trievel* plaintiffs' case had already been presented to the jury. *Id.* at 743-44. The defense did not put on a case-in-chief at trial and instead moved under Rule 50 for judgment as a matter of law after plaintiffs rested. *Id.* at 744. The trial court granted judgment as a matter of law to the defendant. *Id.*

Trievel is inappropriate legal precedent in this case because the standards of Rule 50 (judgment as a matter of law) and Rule 56 (summary judgment) are different. Rule 50 governs actions that have reached trial and provides, in part:

> [i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against the party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Del. R. Civ. P. 50(a). Motions under Rule 56, however, may be brought at any time by a defendant and should be granted when there is "no genuine issue as to any material fact ***and*** . . . the moving party is entitled to a judgment as a matter of law." Del. R. Civ. P. 56(b) & (c) (emphasis added). Procedurally, under Rule 50, the plaintiff presents its entire case to a jury before a ruling. Under Rule 56, however, summary judgment can be granted without presentation of the entire case. A Court, therefore, after hearing a plaintiff's entire case before a jury, is in a better position to determine whether a plaintiff was more negligent than a defendant under Rule 50 than under Rule 56. *See Jackson v. Thompson*, 2000 Del. Super. LEXIS 413, at *4 (Del. Super. Oct. 12, 2000) (distinguishing *Trievel* on the ground of Rule 50 versus Rule 56). Further, Rule 56 puts an additional requirement on the Rule 50 standard by requiring there be no dispute as to material fact. Thus, *Trievel* does not govern the instant case.

B. The Superior Court Erred in Holding the Indemnification Provision of the Residential Lodging Agreement Valid.

1. Question Presented

Did the Superior Court err in finding the Indemnification Provision, one lengthy, run-on sentence that was susceptible to multiple interpretations, protected Defendant Gallo when the Court failed to address Plaintiffs' argument the provision was ambiguous? (A115-18; A136-38; A206-14; A311-17.)

2. Scope of Review

The Supreme Court "review[s] contract interpretation *de novo*." *Riverbend Cmty., LLC v. Green Stone Eng'g., LLC*, 55 A.3d 330, 334 (Del. 2012). Additionally, and as stated above, this Court reviews *de novo* a grant of summary judgment for "'whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the moving party is entitled to judgment as a matter of law.'" *Id.* (internal citations omitted).

3. Merits of the Argument

Both Defendants sought exoneration from liability on the basis of an indemnity and "hold harmless" provision in the Residential Lodging Agreement signed by Mrs. Helm approximately four months before she arrived at the Property for vacation. Paragraph 4(d) of the Residential Lodging Agreement provides:

> Guest agrees to defend, indemnify, and hold harmless Owners and Prudential Gallo, REALTORS from and against any and all damage, loss, liability or expense, including, without limitation, attorney fees and legal costs, suffered directly or by reason of any claim, suit or judgement [sic], brought by or in favor of any person or persons, including without limitation minors, for damage, loss or expense due to, but not limited to, bodily injury and/or property damage sustained by such person or persons which arises out of, is occasioned by, or is in any way attributable to Guest's use or occupancy of the premises or the acts or omissions of Guest or guests, invitees or licensees of Guest, including without limitation friends and relatives of Guest, except to the extent caused by the sole negligence of Owner.

("Indemnification Provision" or "Provision") (A193-94.) The Provision is one lengthy, run-on sentence. The Superior Court determined the Provision shielded Defendant Gallo from liability but did not rule on whether the Provision similarly shielded the LLC. (*See* Dec. Order at 2, 5.)

"The law disfavors contractual provisions releasing a party from the consequences of its own fault or wrong." *Slowe v. Pike Creek Court Club, Inc.*, 2008 Del. Super. LEXIS 377, at *6 (Del. Super. Dec. 4, 2008); *accord Koutoufaris*, 604 A.2d at 402. Therefore, "Delaware courts construe indemnity agreements strictly against the indemnitee, and do not permit enforcement of broad or ambiguous indemnity provisions." *Fountain v. Colonial Chevrolet Co.*, 1988 Del. Super. LEXIS 126, at *31 (Apr. 13, 1988); *accord Hollingsworth v. Chrysler Corp.*, 208 A.2d 61, 64 (Del. Super. Feb. 25, 1965). In addition to construing

indemnification agreements strictly against the indemnitee, any ambiguity in a contract should be construed against the contract's drafter. *Kaiser Aluminum Corp. v. Matheson,* 681 A.2d 392, 398 (Del. 1996); *Fountain,* 1988 Del. Super. LEXIS 126, at *31. The Court did not address any of Plaintiffs' arguments about the Indemnification Provision, all of which involved its ambiguity.

a. The Superior Court Did Not Address Plaintiffs' Argument the Indemnification Provision was Ambiguous.

The Superior Court acknowledged Plaintiffs argued the Indemnification Provision was ambiguous but specifically stated it was not going to address that issue. (Dec. Order at 2, 5.) The Court then held the Provision shielded Gallo from all liability without even finding the Provision was ***not*** ambiguous to justify its ruling. It simply made no ruling on the ambiguity issue but found the Provision to apply to Gallo. This, alone, requires reversal. *Wit Capital Group, Inc. v. Benning*, 2005 Del. LEXIS 536, at *13-14 (Del. June 20, 2005), *rev'd on other grounds*, 897 A.2d 172 (Del. 2006) (reversing and remanding where the "trial court's opinion and its rulings . . . are insufficient to enable this Court meaningfully to review whether, given the appellants' claims of error, those rulings are correct").

b. The Indemnification Provision is Not "Crystal Clear" and Must Be Construed Against the Defendants.

"[A] contract provision waiving prospective negligence 'must be crystal clear and unequivocal' to insulate a party from liability for possible future

negligence." *Riverbend Cmty.*, 55 A.3d at 336. It must be clear "the contracting party intended to indemnify the indemnitee for indemnitee's own negligence." *Fountain*, 1988 Del. Super. LEXIS 126, at *31. The Indemnification Provision is far from "crystal clear."

Where the release language lacks any reference to "negligence" or any alternative terminology and where the release language fails to state it covers acts of negligence committed by the indemnitee, the release is not "crystal clear" sufficient to release the indemnitee from liability. *Slowe*, 2008 Del. Super. LEXIS 377, at *9-10. In *Slowe*, the plaintiff signed a "hold harmless" agreement when signing up for a gym guest pass and was subsequently injured in the gym's pool. *Id.* at *2. As provided in the opinion in *Slowe*, that liability waiver read:

> I agree that I am voluntarily participating in activities and use of the facilities and premises (including the parking lot) and assume all risk of injury, illness, damage or loss to me or my property that may result in any loss or theft of any personal property. I further agree that I shall hold this club, its shareholders, directors, employer's representatives and agents harmless from any and all loss, claims, injury, damages or liability sustained by me.

Slowe, 2008 Del. Super. LEXIS 377, at *2. Because the *Slowe* waiver did not indicate the parties "contemplated that the waiver would cover acts of negligence committed by" the gym itself and because the waiver did not utilize the word "negligence" or any similar phrase (i.e., "released for its own fault or wrongdoing"), the waiver was not "crystal clear" and was not enforceable. *Id.* at

*9-10. The *Slowe* Court specifically stated "[t]he waiver's reference to 'any and all' injuries, without any reference to injuries caused by . . . [the gym], is insufficient" to show the parties contemplated releasing defendant from its own negligent conduct. *Id.* at *10.

The Indemnification Provision is similar to the waiver in *Slowe*. First, as with the waiver in *Slowe*, the Provision's language does not explicitly reference "negligence" or any similar phrase, such as "fault" or "wrongdoing." Second, the Provision's language does not expressly contemplate releasing Gallo for its own negligent conduct. Indeed, it uses the broad phrase "any and all" damage found to be insufficient to operate as a waiver in *Slowe*. Beyond this vague phrase, there is no mention of whose conduct is to be released (except for the negligence of the LLC, discussed *infra*). Thus, under *Slowe*, the Provision should have been held invalid to absolve either Defendant of negligence.

Defendants-Below relied on *Evans v. Feelin' Good, Inc.* 1991 Del. Super. LEXIS 38 (Del. Super. Feb. 1, 1991) for the proposition the word "negligence" is not required for the Provision to be effective. But the release language in *Evans* was not contained in *Evans*' opinion. *See Slowe*, 2008 Del. Super. LEXIS 377, at *7. As noted in *Slowe*, without the specific language at issue in *Evans*, comparison is difficult. *Id.* Moreover, the statement of law set forth in *Riverbend Cmty*, by this Court regarding the requirements of waiver of prospective negligence post-

dates the *Evans* Superior Court decision by 21 years. In light of the more recent, more detailed, and well-reasoned decision in *Slowe* and in light of the policy of construing indemnification provisions strictly against the indemnitee seeking to be relieved of future negligence, this Court should reverse the grant of summary judgment for Gallo regarding the Indemnification Provision.

c. The Indemnification Provision is Ambiguous and Any Ambiguity Should be Construed Against Its Drafter, Gallo.

The Indemnification Provision was ostensibly drafted by Defendant Gallo. Because Prudential Gallo, REALTORS' logo appears on the first page of the Residential Lodging Agreement and Gallo's name appears throughout the document, Plaintiffs were entitled, at a bare minimum, to the inference Gallo drafted the Provision. (*See* A193-94; *Cruz*, 2010 Del. Super. LEXIS 515, at *5.) Again, however, the Superior Court did not give Plaintiffs' the benefit of this reasonable inference from the evidence; this alone warrants reversal.

Further, the Indemnification Provision can be read in multiple ways. First, it could be read that both Defendants are released except when, as between the two Defendants, only the LLC (the owner) is negligent. Second, it could be read that both Defendants are released except when, of all potential tortfeasors, including Plaintiffs' comparative negligence, only the LLC is negligent. Third, it could be read that neither Defendant is released when the injury is caused solely by the negligence of the LLC. Fourth, it could be read that only Gallo is released when

the injury is caused solely by the negligence of the LLC. Fifth (the Superior Court's apparent interpretation), it could be read that only Gallo is released when the injury is caused exclusively by the negligence of someone other than Gallo. (*See* Dec. Order at 5.) The existence of at least five plausible readings of the Provision demonstrates ambiguity, and the Provision must be construed against Gallo as both the indemnitee and the Provision's drafter. *Brehm v. Eisner*, 906 A.2d 27, 69 n.118 (Del. 2006) (internal citations omitted) ("ambiguity exists 'when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'"); *Kaiser Aluminum*, 681 A.2d at 398; *Hollingsworth*, 208 A.2d at 64 ("[i]t is clear . . . that Delaware Courts have looked with disfavor upon contracts to indemnify a person against his own negligence and that doubtful or ambiguous language is construed against such interpretation"). Because of the multitude of possible interpretations, the Provision, which was drafted without the benefit of negotiation with Mrs. Helm, should be construed in favor of Plaintiffs, and the Indemnification Provision should provide no protection to either Defendant. *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010); *cf. Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Inc.*, 1993 Del. Super. LEXIS 494, at *8 (Del. Super. July 2, 1993) (construe ambiguous contracts against the preference of the drafter).

d. Any Interpretation of the Indemnification Provision That Allows Plaintiff's Negligence to Negate the Exception to Full Indemnification Violates Delaware's Public Policy Regarding Comparative Negligence.

Any interpretation of the phrase "except to the extent caused by the sole negligence of Owner" in the Provision that allows that exception to be negated by Plaintiffs' negligence amounts to a reinstatement of the old doctrine of contributory negligence. This violates Delaware public policy as demonstrated by the enactment of 10 Del. C. § 8132, the comparative negligence statute. *Koutoufaris*, 604 A.2d at 398. As explained above, the Provision could be read such that both Defendants are released except when, of all potential tortfeasors, including the plaintiff's comparative negligence, only the LLC is negligent. The LLC advocated this latter position at the trial court. Under the LLC's proposed reading, however, Plaintiffs essentially agreed to reinstate the doctrine of contributory negligence as against the LLC.

As noted by the Supreme Court in *Koutoufaris*, the legislature enacted the comparative fault statute "to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct on a case-by-case basis." 604 A.2d at 398. Such a doubtful and broad reading violates public policy and should be construed against releasing the LLC (or either Defendant) from liability. *Fountain*, 1988 Del. Super. LEXIS 126, at *31; *Hollingsworth*, 208 A.2d at 64. The Superior Court's conclusion to the contrary should be reversed.

C. The Superior Court Erred in Granting Summary Judgment to Defendants on Plaintiffs' Breach of Contract Claim.

1. Question Presented

Did the Superior Court commit reversible error when it closed Plaintiffs' case that still contained a breach of contract claim where summary judgment was granted on the grounds of tort defenses? (A115-18; A133-35; A310; A344.)

2. Scope of Review

As noted above, the Supreme Court reviews grants of summary judgment *de novo*, "viewing the facts in the light most favorable to the nonmoving party" in light of the requirements of Rule 56 of the Rules of Civil Procedure. *Riverbend Cmty.*, 55 A.3d at 334. It also "review[s] contract interpretation *de novo*." *Id.*

3. Merits of the Argument

After summary judgment was granted, Plaintiffs' entire case was marked as closed notwithstanding Plaintiffs' Amended Complaint containing a claim for breach of contract. (A19-27.) The Court's apparent dismissal of the contract claim was raised in Plaintiffs' Motion for Reargument, and the Court responded

> Plaintiff failed to establish that the damages sustained as a result of Plaintiff's fall were the result of any rental agreement by Gallo, who was acting only as the rental agent for the owner, the LLC. Summary judgment is appropriate in this case where the LLC did not breach any terms of the contract, and the Plaintiff accepted the property "as is."

(Feb. Order at 5-6.)

The contract claim was briefed in the context of Gallo's argument it should be awarded summary judgment as it was only acting as agent for the LLC. The Residential Lodging Agreement provided the Property would be cleaned prior to the Plaintiffs' arrival. (A193-94; A160-61.) Representatives of both Defendants testified that sticky floors and rugs smelling of urine do not rise to the level of cleanliness expected when guests, such as Plaintiffs, arrive. (*See* A158; A169; A152.) Thus, there is no dispute the contract was breached by a Defendant.

a. The Superior Court Erred in Finding the "As Is" Clause of the Residential Lodging Agreement Warranted Entry of Summary Judgment and It Failed to Explain Its Reasoning.

The Superior Court's grant of summary judgment seemed largely dependent upon the "as is" clause of the Residential Lodging Agreement. But the fact Mrs. Helm signed the contract acknowledging her inspection of the Property and accepting it "as is," site unseen, months prior to arrival is irrelevant to the instant action. (A194.) The next sentence of Paragraph 4(c) of the Residential Lodging Agreement states that if Plaintiffs did not inspect the Property, they were waiving their rights to "withhold rent for any alleged deficiency in the premises" and/or "claim that the property has been misrepresented to . . . her." (*Id.*) Plaintiffs are not asserting either the right to withhold rent or to claim the Property was somehow misrepresented. Paragraph's 4(c) reference to accepting the Property "as is" is irrelevant to the instant action. By relying on the "as is" language to grant

summary judgment, the Superior Court either erred by applying the "as is" clause when it should not have or by disregarding Plaintiffs' argument entirely. Because there is no explanation, this Court cannot meaningfully review the trial court's ruling on the issue. *Wit Capital Group*, 2005 Del. LEXIS 536, at *13-14. This Court should reverse the Superior Court's grant of summary judgment.

b. The Superior Court Previously Ruled Issues of Fact Precluded a Finding, As a Matter of Law, on Whether Gallo Was Acting Only as an Agent for the LLC.

In its December Order, the Court stated "[b]ecause of the presence of a substantial issue of material fact relative to the extent of Gallo's control over the property, Summary Judgment cannot be granted on that assertion of shielding from liability." (Dec. Order at 2.) The Court reiterated its position later in the Opinion, when it noted the facts regarding the agency issued were argued "from three perspectives" and held the agency issue was not one to be determined through summary judgment. (*Id.* at 4-5.) But in its February Order, the Court held Plaintiffs' breach of contract claim was dismissed on summary judgment because the LLC did not breach the Residential Lodging Agreement. (Feb. Order at 5-6.) In so ruling, the Court stated Gallo "was acting only as the rental agent for the [LLC]." (*Id.* at 5.) The disputed facts on the issue of Gallo's agency did not change between the time of the Court's December Order and its February Order.

The Court provided no reason why it changed position on the agency issue and should be reversed. *Wit Capital Group*, 2005 Del. LEXIS 536, at *13-14.

c. The Superior Court Erred in Granting Defendants Summary Judgment on the Breach of Contract Claim When Undisputed Facts Showed the Residential Lodging Agreement was Breached by At Least One of the Defendants.

Finally, there is no dispute the Residential Lodging Agreement was breached by someone affiliated with one or both of the Defendants. (A193-94; A160-61; *see* A158; A169; A152.) One of the two Defendants is liable for the breach. Even if Gallo was only an agent (which cannot be determined due to disputed material facts), the Court's conclusion Gallo could not be liable for the breach of contract is legally incorrect. Mrs. Helm signed the Residential Lodging Agreement with Gallo, who was acting for an undisclosed principal. For a principal to be "disclosed," the fact that the agent was working on behalf of the principal and the identity of the principal must be known to the other contracting party at the time of the transaction. *See D'Aquila v. Tilghman*, 2001 Del. C.P. LEXIS 74, at *4 (Del. C.P. Jan. 5, 2001) (*citing* Restatement, Agency § 4 (1958)). While the Residential Lodging Agreement stated Gallo was acting as an agent, the identity of the "Owner" was never disclosed in the Residential Lodging Agreement. (*See* A193-94.) As Gallo was an agent for an undisclosed principal, Gallo remains liable on the contract. *Ayers v. Quillen*, 2004 Del. Super. LEXIS 443, at *5 (Del. Super. June 30, 2004) (*citing* Restatement (Second) of Agency § 322 (1958)).

If Gallo was not liable on the contract, the LLC must be. As noted above, the Superior Court ignored the undisputed fact that the contract was breached for the failure to provide Plaintiffs with a clean vacation home rental. (A193-94; A160-61; *see* A158; A169; A152.) The Superior Court therefore erred with respect to the summary judgment standard as the LLC was not entitled to judgment as a matter of law on the contract claim even assuming *arguendo* that Gallo was not liable for the breach. R. Civ. P. 56(c).

V. CONCLUSION

For the reasons stated above and those stated in oral argument (if any), Plaintiffs-Below/Appellant respectfully request this Court reverse the Superior Court's grant of summary judgment in favor of Defendants and remand the case for a trial by jury.

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Date: 5/20/14