IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEE GALLO REALTY, INC.'S ANSWERING BRIEF

GRIFFIN & HACKETT, P.A.

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Dated: June 24, 2014

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NATURE OF PROCEEDINGS

On or about March 7, 2012, Plaintiffs Gail and Scott Helm (hereinafter "Plaintiffs" or "Plaintiff") filed a personal injury action in the Superior Court in Kent County against 206 Massachusetts Avenue, LLC (hereinafter "the LLC") and Gallo Realty, Inc. (hereinafter "Gallo") alleging negligence, breach of contract, and loss of consortium that stemmed from Plaintiff's fall while descending stairs from the second level to the first level of a summer rental property owned by the LLC and rented to Plaintiffs by Gallo. On April 3, 2012, the LLC filed an Answer to the complaint. On June 19, 2012, Gallo filed an Answer to the complaint, raising affirmative defenses of primary assumption of the risk and comparative negligence, and a cross claim against the LLC (which it did not respond to). On March 7, 2013, Plaintiffs filed a Stipulation to Amend Complaint, which had been previously provided to Gallo, and to which Gallo had already filed an amended Answer on September 18, 2012.

Discovery was completed, and on June 14, 2013, Gallo filed a Motion for Summary Judgment, asserting that: 1) it did not exercise control over the property, but was only acting as agent for the LLC; and 2) the indemnification provision of the rental contract shielded Gallo from liability. Briefing on Gallo's motion was completed on July 19, 2013.

The LLC also filed for summary judgment on June 27, 2013, asserting that: 1) Plaintiff primarily assumed the risk of her fall based on her deposition testimony; 2) Plaintiff was more than fifty percent (50%) negligent as a matter of law; and 3) the indemnification provision of the rental contract shielded it from liability. Briefing on the LLC's motion was completed on July 26, 2013.

On September 20, 2013, the Superior Court held oral arguments on both motions and on December 12, 2013, granted Gallo's motion for summary judgment, as well as the LLC's motion for summary judgment. *Helm, et. al. v. 206 Massachusetts Ave, LLC, et. al.*, C.A. No. 12C-03-014 (RBY)(Del. Super. Ct. December 12, 2013 (hereinafter referred to as "Helm I").

In doing so, the Superior Court held that: 1) Plaintiff was more than fifty percent (50%) negligent in causing her injuries as a matter of law; and 2) Plaintiff primarily assumed the risk of her fall as a matter of law.

On December 19, 2013, Plaintiffs filed a Motion for Reargument, asserting that: 1) Superior Court granted summary judgment to Gallo despite the fact that it did not raised the issue of primary assumption of the risk or comparative negligence in its motion; 2) there were material facts in dispute; 3) the court misapplied precedent when it determined that Plaintiff was more negligent than Gallo and/or the LLC as a matter of law; and 4) the court erred in dismissing Count II of Plaintiffs' Complaint alleging breach of contract. Gallo and the LLC filed

timely responses to that motion, and on February 20, 2014, the Superior Court denied Plaintiff's Motion for Reargument. *Helm, et. al. v. 206 Massachusetts Ave, LLC, et. al.*, C.A. No. 12C-03-014 (RBY)(Del. Super. Ct. February 20, 2014 (hereinafter referred to as "Helm II").

Specifically, the court held that although Gallo did not raise the issues of primary assumption of the risk and comparative negligence in its motion, Superior Court Rule 56(c) allows the court to examine "the pleadings, depositions, answers to interrogatories, and admissions on file" to determine whether there is any genuine issue of material fact or if the moving party is entitled to judgment as a matter of law and that Gallo had raised primary assumption of the risk and comparative negligence in the pleadings, and that Gallo had argued these issues at oral argument before the court without objection from Plaintiffs. The court also held that the record supported the finding that Plaintiff fully assumed the risk of descending the stairs in the dark, based upon the undisputed facts that Plaintiff had rented the unit for two years prior and was therefore sufficiently familiar with the handrail and its graspability, and that the record supported the finding that Plaintiff was more than fifty percent (50%) negligent as a matter of law. Lastly, the court held that Plaintiff's breach of contract claim was nothing more than an alternative count to recover for her injuries, Plaintiff's alleged breaches of the contract were not actual terms of the rental contract, and Plaintiff accepted the rental unit "as is."

On March 20, 2014, Plaintiffs filed this appeal of both the lower court's grant of summary judgment to Gallo and the LLC, as well as the court's denial of Plaintiff's Motion for Reargument. On May 20, 2014, Plaintiffs filed their Opening Brief. This is Gallo's Answering Brief.

SUMMARY OF ARGUMENTS

1. Denied. The Superior Court correctly granted summary judgment to Gallo on the issues of primary assumption of risk and comparative negligence as a matter of law, based upon Plaintiff's undisputed deposition admissions that she recognized the danger of descending a dark stairway, appreciated the risk of injury to herself, and could have avoided that risk but did not.

2. Denied. The Superior Court did not grant summary judgment to Gallo based upon on the indemnification provision in the rental contract; it granted summary judgment based upon the finding that Plaintiff primarily assumed the risk of her injuries and/or was more than fifty percent (50%) negligent in the causing of her injuries. However, even if the Court had done so, the provision was sufficiently free of ambiguity to relieve both LLC and Gallo from liability.

3. Denied. The Superior Court correctly granted summary judgment to Gallo regarding Plaintiffs' breach of contract claim as, viewing the evidence in the light most favorable to Plaintiffs: a) there was no evidence that the terms Plaintiffs alleged were breached (failure to clean and failure to provide a safe premises) were terms contained within the rental contract; b) Plaintiffs provided no evidence of any damages resulting from any breach of terms contained within the rental contract; and c) the rental contract provided that the Plaintiffs accepted the rental unit "as is."

STATEMENT OF FACTS

Gallo adopts the Statement of Facts of the LLC's Answering Brief, filed on or about June 19, 2014, and adds the following amplifications thereto:

Although Plaintiffs' Opening Brief suggests that Plaintiff did not fully use the property during her one week stays in the summers of 2008 and 2009, she admitted that during the one week stays over the three year period of 2008-2010, there were no changes in the location of light switches, the carpet on the steps, the stairs or the light in the stairwell, and that during her stays in 2008 and 2009, she went up and down the stairs without incident. (B1, 80:5, 8:18-23.)

Although Plaintiff claims that the rental premises were not clean to her satisfaction on their arrival on July 10, 2010, her sister had cleaned the bathrooms prior to Plaintiffs' arrival and they were aware it was not the tenant's responsibility to clean the premises. (B2). Plaintiff admitted that neither she nor anyone else in her party attempted to contact the rental agent to complain about the cleanliness of the house. (B2, 31:18-24; 32:1-23)

Around midnight on July 10, 2010, Plaintiff decided to go down the stairs from the second to the first level to move bath mats from the washer to the dryer. Prior to descending the stairs, Plaintiff admitted that she could clearly see that it was "very dark" and also realized that the light switch at the top of the stairs (on the second level) did not turn on the ceiling light at the bottom of the steps. (B3,

36:16-24.) She also admitted that before she started to descend the stairs from the second level, she could not see the bottom of the steps or the floor of the landing. (B4, 83:10-19.)

Plaintiff admitted that she "definitely saw a safety issue" prior to descending the stairs, but after observing the dark conditions and appreciating the fact that it created a safety issue and a risk of injury, she did not ask her husband or any of the other family members, all of whom were on the second level where she was standing at the top of the stairs, to go down and move the bath mats from the washer to the dryer or to go down the steps with her. (B4). Moreover, after observing and appreciating the risk of injury, she decided "I can handle this." (B4). Her deposition response to the question as to why she did not ask any of the other members of her party for help after observing a definite safety issue was "why would I put them in jeopardy. It's bad enough one person might. I knew it was unsafe when I looked down there." (B4). It is undisputed that she observed, appreciated, and accepted the risk of injury by descending the stairs because she did not want to put another member of her party "in jeopardy." She admitted that she was willing to "plunge off into darkness." (B5, 91:11-24; 92:1-14).

Plaintiff's explanation for descending the stairs that night instead of waiting until the next morning to move the bath mats to the dryer was that she thought she

was protecting the landlord's property by not allowing the bath mats to remain in the washer until the next morning. (B5).

Plaintiff also claimed that no flashlights were provided in the rental unit. (B4). However, she admitted in her deposition that no one ever looked for a flashlight until after she fell. (B4, 83:20-24; 84:1-4).

In describing her descent down the stairs, Plaintiff said that she held onto the handrail on the left side until she got to the point where she could not see her feet or the steps below her and did not know what step she was on. (B6, 37:12-14; 40:6-15). Plaintiff does not disclose that the handrail on the left was code compliant although her husband admitted that the rail on the left side went all the way down the left side to the landing. (B7, 21:19-24). Realizing her position of peril, instead of calling for help, Plaintiff let go of the code complaint handrail and switched her hand onto the rail of the banister on the outside of the stairs before she plunged off into darkness, using her left foot as a feeler and wearing flexible soled rubber flip flops, which allowed her left foot to roll over the edge of a stair tread she could not see, causing her to fall forward down the remaining steps. (A233; B6, 37:1-24; 38:1-22).

Plaintiff signed the Lodging Agreement (referred to herein as "the rental contract") on March 4, 2010. (A216-217). It contained a provision (4.C) that guests acknowledged that they had personally inspected the property and accepted

it in "as is" condition. (A217). She admitted that she did not conduct an inspection or request to conduct an inspection. (B5).

The Agreement also contained an indemnity clause (4.d) whereby the guests agreed to defend, indemnify and hold Gallo and the LLC harmless from and against any and all damage, loss or expense due to, but not limited to, bodily injury and property damage resulting from their use of the property. (A217).

Although Plaintiff went to Beebe Hospital for treatment on July 11, 2010, she did not report her injury to Gallo or the LLC until the day of check out (July 17, 2010) and then, only when asked by a Gallo employee why she was wearing a leg brace. (B8, 57:7-24; 58:1-24; 59:1-7). Also, on July 17, 2010, she submitted a survey form with a note that a light switch should be installed at the top of the steps on the second level to turn on the light at the bottom of the steps. (B9). The surveys she submitted at the conclusion of her rental periods in 2008 and 2009 did not contain any notes or complaints about the rental premises. (B10-11). Plaintiffs never informed Gallo of any problem relating the safety of the stairs, the handrails, or the lights. (B7, 23:15-20; B1 78:17-23). And, even though she sustained injuries at the rental unit in 2010, she and her family stayed in the rental unit again in 2011 (although renting the unit through Lingo Realtors, and not Gallo), never requesting any issues be repaired or replaced and using the same stair where she had fallen in 2010. (B1, 78:17-24; 79:1-8).

Gallo had served as the listing agent for the rental of the subject premises since 2003. (B12, 51:1-7). Plaintiff acknowledged that the rental contract she signed in 2010 identified Gallo as "agent for owner" and that she was aware when she rented the premises in 2008, 2009, and 2010 that such houses typically belong to someone other than the rental agent. (B5, 89:16-19; A216-217).

Plaintiff admitted that they had been satisfied with the condition of the premises when her family rented it in 2008 and 2009 and that she did not conduct a preoccupancy inspection in 2010. (B5, 90:20-24; 91:1). After falling on the stairs in 2010, Plaintiffs admitted there had been no changes to the stairs, the lights or the light switches during any of those three (3) years (2008-2010). (B1; B7, 23:15-20).

Plaintiff admitted that the fact that the cleanliness of the house on July 10, 2010 was not up to her personal level of satisfaction did not make the premises unsafe. (B13, 95:20-24; 96:1-12).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR BY GRANTING SUMMARY JUDGMENT TO GALLO WHERE PLANTIFF'S UNDISPUTED TESTIMONY SUPPORTED A FINDING THAT SHE PRIMARILY ASSUMED THE RISK OF HER INJURIES AND THAT SHE WAS MORE THAN FIFTY PERCENT (50%) NEGLIGENT AS A MATTER OF LAW.

A. Questions Presented

Whether the Superior Court erred in granting summary judgment to Gallo where Plaintiff's undisputed testimony supported the court's finding of primary assumption of the risk and that Plaintiff was more than fifty percent (50%) negligent as a matter of law? This issue was preserved in the trial court in the Affirmative Defenses asserted in Gallo's pleadings in the lower court, in oral argument on its Motion for Summary Judgment, and in Gallo's Response to Plaintiff's Motion for Reargument.

B. Scope of Review

"This Court's scope of review of the Superior Court's decision to grant or deny summary judgment is *de novo*." Dambro v. Meyer, 974 A.2d 121, 138 (Del. 2009). "Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. If the moving party meets that burden, "the burden shifts to the non-moving party to demonstrate that there are material issues

of fact." *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979). If the non-moving party cannot provide evidence that material issues of fact exist, summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

C. Merits of Argument

The Superior Court did not err in holding that, viewing the facts in a light most favorable to Plaintiffs, Plaintiff's admitted actions that night were a primary assumption of the risk of her injuries and that she was more than fifty percent negligent, and thus, as a matter of law, Gallo is entitled to summary judgment.

In *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874 (Del. Super. Ct. 2005), the court provided a comprehensive history and analysis of the legal concept of assumption of the risk in Delaware and with respect to assumption of the risk in a summary judgment context:

> When a defendant invokes the affirmative defense of primary assumption of the risk, the Court must evaluate the viability of the defense as part of its duty analysis because primary assumption of the risk "obviates the duty owed by the defendant." Stated differently, a finding by the Court that a plaintiff expressly assumed a risk in a manner that would implicate primary assumption of the risk is tantamount to a finding that the defendant owed no duty to the plaintiff. Needless to say, if the defendant establishes that it owed no duty to the plaintiff, *ipso jure*, it has established that it is entitled to summary judgment as a matter of law.

Id. at 880 (citations omitted).

"Delaware historically has divided the concept of assumption of the risk into two distinct doctrines -- primary assumption of the risk and secondary assumption

of the risk." Id. at 881. "Under the current statutory comparative negligence standards, a plaintiff cannot make out a *prima facie* case in negligence when confronted with a well-founded allegation of primary assumption of the risk." Id. at 882. "Primary assumption of the risk, therefore, remains a complete bar to a plaintiff's recovery." Id. The *Storm* court continued by stating that:

> It is settled law that in Delaware, [ ] primary assumption of the risk is implicated when the plaintiff expressly consents "to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. Express consent, however, does not suggest that the plaintiff must utter specific words portraying his intent to consent to the risk. Instead, '[d]epending upon the situation at hand, express consent may be manifested by circumstantial words or conduct.' In all, the resulting effect of a primary assumption of the risk defense ' is that the defendant is relieved of legal duty to the plaintiff; and being under no legal duty, he cannot be charged with negligence.'

Id. at 882 (citations omitted). See also *Fell v. Zimath*, 575 A.2d 267, 267-68 (Del. Super. Ct. 1989).

The issue for this Court to decide is whether it was error for the Superior Court to find, as a matter of law, that Plaintiff committed primary assumption of the risk of her injuries where she admittedly and indisputably, according to her deposition testimony, stated that: 1) before she went down the stairs, she saw and appreciated the fact that it was dark (B6); 2) she was unable to turn on a light at the bottom of the stairs (B6); 3) she saw a safety issue and knew it was unsafe when she looked down there (B4); she nevertheless proceeded down the stairs (B5); 4)

as she proceeded down the stairs, it got darker and darker (B6); 5) when she was approximately two thirds down the stairs, she did not know where she was on the stairs and stopped (B6); and 6) despite not being able to see anything, she continued down the stairs (B6) instead of calling for help (B4) or simply sitting down (B13). Plaintiff, as a matter of law, primarily assumed the risk.

1. Plaintiff expressly consented to the risks of the stairwell.

Plaintiff argues that she cannot have primarily assumed the risk because she did not express her consent to the risks of that stairwell to Gallo (or the LLC). However, expressed consent does not need to be specific words but can be "manifested by circumstantial words or conduct." *Croom v. Pressley*, 1994 WL 466013, 5 (Del. Super. Ct. July 29, 1994).

Brady v. White, 2006 WL 2790914, 2 (Del. Super. Ct. Sept. 27, 2006) illustrates the concept of expressed consent by circumstantial conduct. In *Brady*, the court granted summary judgment against a plaintiff veterinarian based on primary assumption of the risk where the court found that she knew or should have known of a dog's aggressive nature, based on prior encounters with the dog and the dog being wounded, and assumed the risk that the dog would bite her when she opted to treat the dog. There was no expressed consent through specific words; it was expressed consent through conduct or actions.

Throughout the *Brady* opinion, the court discusses "common law assumption of the risk defense," stating that "if the plaintiff knows of the existence of risk, appreciates the danger of it and nevertheless does not avoid it, she will be held to have assumed the risk and may not recover." *Brady*, 2006 WL 2790914 at 2. And in determining whether this is evidence of an assumption of the risk, the standard applied is "a subjective standard peculiar to the plaintiff." Id.

Plaintiffs' attempt to distinguish *Brady* because the plaintiff was "a professional injured in the course of her employment" is not persuasive. The *Brady* court applied common law and analyzed the factors of primary assumption of the risk using the subjective standard of that plaintiff's knowledge as a veterinarian.

Likewise, in this case, the lower court analyzed the factors of primary assumption of the risk using the subjective standard of this Plaintiff's actual knowledge at the time she faced that stairwell. The peculiar facts of the instant case suggest that Plaintiff could be referred to as the informed tenant who knowingly exposed herself to a known risk of injury. And the undisputed facts from Plaintiff's own deposition testimony are that Plaintiff descended stairs that she acknowledged were unsafe and that she knew were a safety issue. (B4). She knew she had options, such as seeking assistance from others, looking for a flashlight, or waiting until morning when the stairwell was lit by the daylight. (B4).

But instead, she proceeded down the stairwell. (B5). When she was two thirds down the stairs, she did not know where she was on the stairs and stopped. (B6). It was so dark she was unable to see anything. (A98-99). However, instead of calling for help or simply sitting down (B4; B13), she proceeded down the rest of the way and fell, injuring herself.

Plaintiffs rely on *Croom v. Pressley*, 1994 WL 466013 (Del. Super. Ct. July 29, 1994) and *Koutoufaris v. Dick*, 604 A.2d 390 (Del. 1992) to assert that Plaintiff did not expressly consent to the risks of the stairwell, and therefore, cannot be found, as a matter of law, to have primarily assumed the risk. This reliance is misplaced as both cases are distinguishable from the instant case.

In *Croom*, where the plaintiff fell off scaffolding at a car race, and he admitted that he appreciated a risk of falling if he wasn't careful, the court held that the plaintiff did not primarily assume the risk as a matter of law, but that the issue was a question of fact for a jury. Plaintiffs liken the instant case to *Croom*.

However, in *Croom*, that plaintiff acknowledged a general risk that is associated with being on scaffolding anytime. In this case, Plaintiff acknowledged a risk that was a specific risk to this particular situation; not one that is always associated with descending stairwells. Thus, the difference between a general risk and a specific risk particular to the situation at hand makes *Croom* not helpful.

Additionally, the appreciations of the risks are different between the *Croom* plaintiff and this Plaintiff. In *Croom*, the plaintiff's testimony was that he appreciated the fact that he might be injured. 1994 WL 466013 at 5 (emphasis added). However, in this case, Plaintiff's testimony was that she appreciated the fact that this was "definitely [ ] a safety issue." (A105, 84:10-12)(emphasis added).

In *Koutoufaris v. Dick*, the other case Plaintiffs rely on, the plaintiff employee was required by her employer to park her vehicle in the rear parking lot where she was assaulted after leaving work. In this case, Plaintiff was not required to descend the stairs at the time she was injured. Her explanation that she was protecting the property of the LLC in doing so fails to acknowledge that she was under no obligation imposed by Gallo to wash the rugs or clean the unit. Her excuse (protecting the landlord's property) does not explain or excuse the fact that she observed, appreciated, and accepted the risk of her injuries rather than wait until morning to move the mats to the dryer. It was her personal preference to dry the bath mats at midnight that led her to assume the risk of injury

Thus, the facts of the instant case are more akin to those in *Brady* than *Croom* or *Koutoufaris*. And like *Brady*, this plaintiff expressly consented to assume the risk with her conduct.

2. The lower court did not err when it also found that Plaintiff was comparatively negligent greater than fifty percent (50%).

The undisputed facts in this case also show that Plaintiff was comparatively negligent greater than fifty percent (50%) and therefore, support the lower court's decision that Gallo is entitled to judgment as a matter of law.

"Under Delaware's comparative negligence law, a plaintiff cannot recover if he acted more negligently than the defendant . . . [and] [a] trial judge, therefore, may grant summary judgment to a defendant after determining that no reasonable juror could find that the plaintiff's negligence did not exceed the defendant's. *Jones v. Crawford*, 1 A.3d 299, 303 (Del. 2010) .

In this case, viewing the facts in a light most favorable to Plaintiffs, no reasonable jury could find that Plaintiff's negligence that evening did not exceed any negligence on the part of Gallo, and the lower court did not commit error in finding so.

Essentially, Plaintiffs' arguments that the lower court erred rest upon its assertion that the lower court relied on *Trievel v. Sabo*, 714 A.2d 742 (Del. 1998) to support its holding that Plaintiff was more negligent, as a matter of law, than Gallo. Plaintiffs assert that *Trievel* involved different facts, and was thus distinguishable from the present case.

However, as stated by the lower court, it relied on *Trievel* only for "the well-established principle that trial judges are not required to submit a matter to a jury

when the trial judge determines that no reasonable jury could find for the plaintiff under the facts presented." *Helm II* at 5.

Plaintiffs also assert error to the lower court's reliance on *Tirevel* because procedurally, it involved a Rule 50 motion for judgment as a matter of law and those standards differ from a Rule 56 motion for summary judgment.

In *Burkhart v. Davis*, 602 A.2d 56 (Del. 1991), this Court, acknowledging that Superior Court Civil Rules are "patterned on the Federal Rules of Civil Procedure," followed the United States Supreme Court's analysis that "[the] standard for granting summary judgment mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." *Burkhart*, 602 A.2d at 59 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, (1986).

In this case, the lower court correctly determined that no reasonable jury could find for Plaintiffs under the undisputed facts that Plaintiff descended stairs that she acknowledged were unsafe and that she knew were a safety issue (B4), knowing she had other options (B4), but proceeding down the stairs anyway (B4), even pausing on her way down the stairs to reassess the situation (B6), acknowledging that it became more and more dark the further down the stairs she got (B6), but nevertheless, continuing down the stairs anyway (B6). Thus, as a matter of law, Plaintiff's negligence exceeded any negligence of Gallo and/or the LLC.

3. The lower court did not ignore disputed material facts.

Plaintiffs argues that the lower court ignored disputed material facts when it granted Gallo and the LLC summary judgment regarding the banister's graspability and the lighting (or lack thereof) in the stairwell.

However, the lower court did not ignore those disputed facts; it viewed those facts in the light most favorable to Plaintiffs (i.e.: that the banister on the right side was indeed ungraspable and the lighting was indeed poor or even nonexistent) and found that Plaintiff knew or should have known, based upon her knowledge of the situation, that she should not have gone down those stairs under conditions that she appreciated as unsafe.

When she did, she expressly relieved Gallo (and the LLC) of any duty and took her chances of injury from a known risk arising from anything Gallo (or the LLC) was alleged by Plaintiff to have done or left undone. In other words, she primarily assumed the risk.

4. The lower court did not improperly weigh evidence and/or fail to view evidence in the light most favorable to Plaintiffs.

Plaintiffs argued that the lower court improperly weighed the evidence in finding Plaintiff primarily assumed the risk. They assert that the lower court erred when it ignored Plaintiff's testimony that the banister was ungraspable. However, the court did not ignore that fact. It held that even with the banister being

ungraspable, she assumed the risk of injury when she went down that stairwell she knew to be unsafe.

They also assert that the court erred when it ignored Plaintiff's testimony that she went down the dark stairwell (to move the rugs to the dryer) to protect property of Gallo and/or the LLC. But there was nothing in the record that Gallo or the LLC had anything to do with Plaintiff's decision to descend that dark stairwell that evening. Plaintiff admitted that she knew it was not her responsibility to clean the unit. (B2). But nevertheless, she voluntarily chose to wash the mats, thus necessitating her going downstairs to put them into the dryer.

The Superior Court correctly considered the facts in the light most favorable to Plaintiffs and correctly concluded that Plaintiff primarily assumed the risk of injury on that stairwell and/or that her actions were more negligent than those of Gallo or the LLC. Therefore, the Superior Court correctly granted summary judgment to Gallo (and the LLC), and this Court should affirm that decision.

II. THE SUPERIOR COURT DID NOT GRANT SUMMARY JUDGMENT TO GALLO BASED UPON THE INDEMNIFICATION PROVISION OF THE RENTAL CONTRACT, BUT EVEN IF IT DID, IT WAS NOT ERROR FOR THE LOWER COURT TO FIND THE PROVISION VALID AND ENFORECEABLE.

A. Question Presented

Whether the Superior Court based summary judgment in favor of Gallo upon the indemnification provision, and if it did, was it an error to enforce the indemnification provision of the rental contract against Plaintiffs to grant Gallo summary judgment? This issue was preserved in the trial court in the Affirmative Defenses asserted in Gallo's pleadings in the lower court, Gallo's Motion for Summary Judgment, Gallo's Reply in Support of its Motion for Summary Judgment, and in Gallo's Response to Plaintiff's Motion for Reargument.

B. Scope of Review

"[T]he interpretation of contract language is a question of law that this Court reviews *de novo* for legal error." *AT&T Corp. v. Lillis*, 953 A.2d 241, 251-52 (Del. 2008).

C. Merits of Argument

1. The lower court did not base its grant of summary judgment to Gallo on the Indemnification Provision of the Rental Contract.

Contrary to Plaintiffs' contentions, the Superior Court did not grant Gallo summary judgment based upon the indemnification provision of the rental contract. In its opinion of December 12, 2013, the court briefly discussed the

indemnification provision in the rental contract, stating "Gallo would appear to be free of responsibility by virtue of the described indemnification." *Helm I* at 5 (emphasis added). The court continued, acknowledging that "Plaintiffs assert though that the described language is to some extent ambiguous. For these purposes, that assertion need not be addressed." Id.

The ambiguity of the language did not need to be addressed because the court was not enforcing the indemnification provision against Plaintiffs to grant Gallo summary judgment. Instead, the court went on to hold that "as a consequence of Plaintiff's superior negligence and primary assumption of the risk, as a matter of law, Defendant's Motion for Summary Judgment is **GRANTED**." *Helm I* at 7. Thus, the appropriateness of summary judgment to Gallo in a dispute over the interpretation of an indemnification provision is not really an issue here.

Plaintiffs' own Motion for Reargument supports this assertion. In their Motion, Plaintiffs stated that "the first Order granted Gallo's Motion for Summary Judgment, and the second Order granted the LLC's Motion for Summary Judgment based on the reasoning of Section III of the Order granting Gallo's Motion for Summary Judgment." (A341). Section III of the Order granting Gallo's Motion for Summary Judgment was "ASSUMPTION OF RISK." See *Helm I* at 5.

The Superior Court's comments on the Indemnification provision are simply *dicta*. They were was not the basis for the court's ruling that Gallo was entitled to

summary judgment. Thus, this Court need not review whether the lower court erred regarding the Indemnification Provision and any ambiguity issues.

2. Even if this Court finds summary judgment for Gallo was based upon the indemnification provision, the lower court did not err as the provision is clear and unambiguous as a matter of law.

Even if this Court finds the Superior Court did base summary judgment to Gallo on the indemnification provision, the court did not err in doing so as the provision is clear and unambiguous as a matter of law.

"A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction." *AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008). A contract is ambiguous "only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." Id.

"Provisions attempting to relieve an indemnitee from the consequences of its own negligence will be scrutinized closely and strictly construed against the party which drafted the protective language." *Laws v. Ayre Leasing, Inc.*, 1995 WL 465334, 2 (Del. Super. Ct. July 31, 1995). "The protective language must be 'crystal clear' and 'unequivocal' to indicate that the parties had a clear intention to provide such protection by focusing attention on the fact that the protection extended to the indemnitee's own negligence. Id. (citations omitted).

In *Rizzo v. John E. Healy and Sons, Inc.*, 1990 WL 18378 (Del. Super. Ct. Feb. 16, 1990), the court examined the precedent set *in James v. Getty Oil Co. (East Operations), Inc.*, 472 A.2d 33 (Del. Super. Ct. 1983) that "merely require[s] that the indemnification language must show that the subject of negligence of the indemnitee was expressly considered in the agreement." *Rizzo* at 2 (citing *James*). The *Rizzo* court found that "[t]he parenthetical phrase, '(excluding the sole negligence of [defendant]),' which appears in the indemnification paragraph . . . does focus attention on negligence of the indemnitee in a manner not unlike that which [has been] . . . found to be sufficient under Delaware law." Id.

And in *Laws v. Ayre Leasing, Inc.*, 1995 WL 465334 (Del. Super. Ct. July 31, 1995), the court, relying on *James* and *Rizzo*, held that the relevant indemnification language "except when caused by or resulting from the sole negligence of [indemnitee]" was valid and enforceable to require indemnification for the indemnitee's own negligence. *Laws* at 2 (emphasis added).

The indemnification provision in this case provided that Plaintiffs agreed to "defend, indemnify, and hold harmless " Gallo and the LLC "from and against any and all damages, loss or liability . . . brought by or in favor of any person or persons . . . for damage . . . not limited to, bodily injury . . .sustained by such person . . . which arises out of . . . guest's use or occupancy of the premises

. . . except to the extent caused by the sole negligence of Owner."

(A217)(emphasis added). Although Plaintiffs argue multiple ways to read the Indemnification Provision in an effort to persuade this Court there is ambiguity in the provision, the provision is sufficiently clear as a matter of law.

Plaintiffs contend that there was not an explicit reference to "negligence" or any similar phrase, and therefore, the provision is not "crystal clear." The Indemnification Provision in this case clearly references negligence, expressly stating that Plaintiffs are required to indemnify for all damages "except to the extent caused by the sole negligence of Owner." (A217).

Plaintiffs also argue that the provision is vague as to whose conduct is to be released. To the contrary; the provision clearly provides that the conduct of Owner and Gallo is to be released, unless that conduct amounts to sole negligence by the Owner, whom Plaintiff admitted she knew was likely not Gallo (B5).

Regardless of Plaintiffs' attempt to contrive this indemnification provision as ambiguous, it is a clear provision that relieves Gallo and the LLC from liability for all damages except those that stem from the sole negligence of the LLC. And, as argued herein, and as found by the lower court, Plaintiffs' alleged damages in this case do not stem from the sole negligence of the LLC, as Plaintiff herself was negligent. Therefore, if the lower court did base summary judgment upon the

indemnification provision, it was not an error to do so. And this Court should affirm that decision.

III. THE SUPERIOR COURT CORRECTLY GRANTED SUMMARY JUDGMENT REGARDING PLAINTIFFS' BREACH OF CONTRACT CLAIM.

A. Question Presented

Whether the Superior Court erred in holding that Plaintiff's breach of contract claim did not survive the court's granting summary judgment to Gallo based on Plaintiff's assumption of the risk and her own negligence which exceeded any negligence by Gallo or the LLC? This issue was preserved in the trial court in the Affirmative Defenses asserted in Gallo's pleadings in the lower court, and in Gallo's Response to Plaintiff's Motion for Reargument.

B. Scope of Review

"This Court's scope of review of the Superior Court's decision to grant or deny summary judgment is *de novo*." *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009). "Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. If the moving party meets that burden, "the burden shifts to the non-moving party to demonstrate that there are material issues of fact." *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979). If the non-moving party cannot provide evidence that material issues of fact exist, summary judgment must be granted. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

C. Merits of Argument

The Superior Court correctly held Plaintiffs' breach of contract claim was merely an alternative theory on which to recover for personal injuries that the court found to be a result of Plaintiff's own negligence.

Plaintiffs' breach of contract claim asserted that Gallo and/or the LLC failed to provide a clean rental unit and failed to provide a safe premises, and that because of these failures, Plaintiff had to clean the rental unit herself, and while doing so, she was injured.

The lower court correctly found that the rental contract itself (A216 - 217) does not include specific terms regarding providing a clean rental unit and a safe premise. (A216-217). It does not. Plaintiffs assert that the rental contract said the unit would be cleaned and it was not. Even if the Court finds that the rental contract does include specific terms regarding providing a clean rental unit, the rental contract does provide a term that states the "Guest has personally inspected the property and accepts the property as is." (A217). Plaintiff's own testimony was that she did not personally inspect the property, and other members of her family took possession of the rental unit prior to her and her husband arriving. (B2; B9). Plaintiff never requested to inspect the property prior to taking possession of it and no one notified Gallo that the unit was not clean. (B2; B5).

Plaintiff also testified that even if the unit was not clean, that did not make the unit "unsafe." (B13).

The breach of contract claim is merely an alternative theory on which to attempt recovery for Plaintiff's injuries caused by her assuming the risk of descending down stairs she knew were a safety issue, without exercising any number of other options available to her that caused her injuries. Thus, the Superior Court did not commit error and this Court should affirm the decision.

CONCLUSION

For the reasons stated herein, Gallo requests this Honorable Court enter an order affirming the Superior Court's order granting its Motion for Summary Judgment.

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