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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' OMNIBUS REPLY BRIEF

Patrick C. Gallagher, Esq.
(DE Bar No. 5170)
Curley & Benton, LLC
250 Beiser Blvd., Suite 250
Dover, DE 19904
(t) 302.674.3333
(f) 302.674.3335
Email: pgallagher@curleybenton.com
Attorney for Plaintiffs Below/Appellants

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I. NATURE OF PROCEEDINGS

Appellant Plaintiffs'-Below's Opening Brief was filed with this Court on May 20, 2014. Appellee Defendant-Below 206 Massachusetts Avenue, LLC ("LLC") filed its Answering Brief on June 19, 2014. Appellee Defendant-Below Gallo Realty, Inc. ("Gallo"), filed its Answering Brief on June 24, 2014. On July 2, 2014, Appellants asked this Court for permission to file one "omnibus" Reply Brief replying to both Appellee's Answering Briefs on or before July 9, 2014. Appellants also asked permission to exceed the 20-page limit for reply briefs by five pages in their "omnibus" Reply Brief. This Court granted that request on July 2, 2014. This is Appellant's Omnibus Reply Brief.

II. 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.[1])

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

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

[1] References to "A___" are references to the Appendix for Appellant's Opening Brief.

Appellants rely on the arguments set forth in their Opening Brief on this point.

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

The "ultimate question" in Plaintiffs' case is whether the Defendants were negligent in providing a banister that was ungraspable when it was foreseeable that people would use that banister to guide them down the stairs in various conditions. The "ultimate question" for Defendants' defense is whether, based upon her stays on the Property in 2008 and 2009 in which she admitted she had never had a problem with the stairs, Plaintiff Gail Helm knew or should have known that the banister was ungraspable and useless in a fall situation.

For reasons previously stated in Appellant's Opening Brief, the Superior Court did not construe the facts in the light most favorable to the Plaintiffs in resolving these questions at summary judgment. Had the Court given the Plaintiffs of all reasonable inferences, summary judgment should have been denied. First, as stated in Appellants' Opening Brief, the Court ignored the disputed facts regarding the graspability of the banister in its first decision and only referred to it once the absence of the issue in the first decision was raised on Reargument. Second, material facts about Plaintiff Gail Helm's knowledge of the bannister were construed against Plaintiffs. Third, the other facts argued by Defendants in their

Answering Briefs should have been considered by a jury in determining the two "ultimate questions" in the case.

Both Defendants and the Superior Court relied upon the mere fact Plaintiffs had rented the Property previously to argue the doctrines of assumption of risk and comparative negligence as a matter of law. (*See e.g.*, LLC's Answering Brief at 3; Gallo's Answering Brief at 10.) But Defendants (and the Superior Court) missed the crux of Plaintiff's argument that Plaintiff Gail Helm had no way of knowing the banister on the right hand side of the stairs (as one descends the stairs) was useless in a fall situation and then subsequently construed facts and inferences about Gail Helm's knowledge (or lack thereof) against Plaintiffs.

Plaintiff Gail Helm testified that in 2008 (two years prior to the year in which she fell), she was hardly at the Property because her granddaughter was about to travel abroad. (A148.) In 2009, she testified that, due to unrelated health problems, she was not up and down the stairs very often. (*Id.*) Most importantly, as the Superior Court's February 20, 2014 Order ("February Order") states, "the parties agreed that Plaintiff used the same staircase, in an unchanged condition, for two weeks, over two prior summers in the past, ***without any incident***." (Feb. Order at 4 (emphasis added).)

The key words are "without any incident." Plaintiff Gail Helm had not fallen on the stairs in previous years; thus she had no way of knowing the bannister

was useless in a fall situation. Graspability (or the lack thereof) is not something that is discovered until one falls. Had she fallen previously and tried to arrest her fall, then Gail Helm would have knowledge of the graspability or non-graspability of the bannister. Gail Helm's knowledge (or lack thereof) of the graspability (or lack thereof) of the bannister is thus a question for the jury. If a jury were to believe Gail Helm's testimony, then it could conclude Gail Helm did not assume the risk of injury and/or was not comparatively negligent because she did not know of the useless banister when making the decision to descend the stairs. The Superior Court therefore necessarily and erroneously construed these facts again the Plaintiffs, the non-moving party, in awarding Defendants' summary judgment.

Furthermore, a jury rather than the Court should have considered whether Gail Helm was unreasonable in wearing flip-flops when she arrived a rented beach house for a week in the summer. (*See e.g.*, Gallo Answering Brief at 12.) A jury could find wearing flip-flops for a beach vacation was entirely reasonable. Likewise, Defendants' arguments that Gail Helm voluntarily chose to wash the rugs are the province of a jury rather than the Court. When her family arrived, the house smelled of urine. (A144.) If she did not want the house to smell like urine for the entire week they were there, something had to be done to eliminate the foul odor (i.e., washing the rugs). Additionally, Paragraph 5(a) of the Residential Lodging Agreement states:

> The Guest agrees to replace or restore any personal property which may be broken, lost, destroyed or damaged, and excepting for usual wear and tear, to repair all damages and injuries to the buildings hereby licensed, resulting from a lack of reasonable care and attention by the Guest or by negligence of the Guest, family and/or other guests.

(A217.) Thus, Plaintiffs were arguably contractually-bound to protect Defendants' rugs, which she was doing. (A56; A148.)

Similarly, Gallo's argument that Gail Helm "knew she had options" when deciding to descend the stairs is a question of fact for the jury to determine whether or not her decision was reasonable. (Gallo Answering Brief at 19.) Next, the LLC attempts to make a mountain out of a molehill when arguing Plaintiffs did not look for a flashlight before Gail Helm descended the steps. (LLC Answering Brief at 13.) While only in hindsight did Plaintiffs look for the flashlight, it would not have mattered as there was no flashlight on the premises. (A148.) Thus, any effort to look for the flashlight prior to the fall would have been futile. Plaintiffs efforts to look for the flashlight and Defendants' failure to provide one, if relevant at all, should be submitted to a jury in its negligence analysis. But the Superior Court usurped the jury's fact-finding role in weighing and assessing the significance of these facts by granting Defendants summary judgment. The Superior Court should be reversed and the case remanded.

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

1. Primary Assumption of Risk

Both Defendants argue the *Brady* decision was not "based on the fact that [the Defendant] was 'a professional injured in the course of her employment'." (LLC Answering Brief at 16; Gallo Answering Brief at 19; *Brady v. White*, 2006 Del. Super. LEXIS 390 (Del. Super. Sept. 27, 2006).) Defendant LLC, in the next sentence, however, states "the ***Court used the Plaintiff's knowledge as a veterinarian to analyze the factors of primary assumption of the risk***… 'the standard to be applied is a subject of standard peculiar to the Plaintiff.'" (*Id.* (emphasis added).) Thus, LLC's second sentence directly contradicts its first statement wherein it denies that *Brady* was based upon the fact that the Plaintiff was a veterinarian. Similarly, Gallo argues "[t]he *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." (Gallo Answering Brief at 19.) This only supports Plaintiff's argument that *Brady* was limited to its facts as it involved "a professional injured in the course of her employment." (*Id.*)

Indeed, the *Brady* Court stated as much:

> "If the plaintiff knows of the existence of risk, appreciates the danger of it and nevertheless does not avoid it, [s]he will be held to have assumed the risk and may not recover . . . " "In determining whether there is

> evidence of an assumption of the risk by plaintiff, the ***standard to be applied is a subjective standard peculiar to the plaintiff***."
>
> * * *
>
> Here, ***the idea is that a veterinarian should generally know that some animals react badly to treatment***, especially if they are wounded. As presented above and discussed below, ***Plaintiff is a professional who works with animals***. Moreover, she undeniably knew, or should have known that Kato was aggressive, a biter and probably wounded. Thus when Plaintiff began examining and treating Kato, she assumed the risk that the dog might bite her, and in the process, Plaintiff relieved Kato's owner of liability for Kato's behavior.

2006 Del. Super. LEXIS 390, at *7-8 (alteration in original) (emphasis added). In the instant matter, Plaintiff Gail Helm had no special knowledge of stairs and/or bannisters. She is not a stair-maker, nor a carpenter, nor an engineer, nor an architect familiar with the design of graspable and non-graspable handrails. Furthermore, the LLC argues Mrs. Helm's "actual" knowledge of the Property "in reaching the conclusion that she knew about the graspability of the handrail." (LLC Answering Brief at 17). Again, however, both Defendants and the Superior Court ignored facts and inferences drawn therefrom that, if believed by a jury, could negate and/or lessen any assumption of the risk and/or comparative negligence the jury may find on behalf of Mrs. Helm. (*See* Section II.3.b, *supra*.) No one asked Gail Helm in deposition if she knew that the handrail was not

graspable. Thus, it is for a jury to determine whether Gail Helm knew if the handrail was grasapable before she descended those steps based upon these facts.

Defendants also unsuccessfully attempt to distinguish *Croom v. Pressley*. 1994 Del. Super. LEXIS 385 (Del. Super. July 29, 1994). The LLC notes the *Croom* Plaintiff "'appreciated a risk of falling off the scaffold if he wasn't careful.'" (LLC Answering Brief at 17 (*quoting Croom*).) Defendant LLC then attempts to distinguish *Croom* on the ground the *Croom* Plaintiff made "an acknowledgement of the general risks associated with climbing a scaffold" as opposed to the specific scaffold off of which he fell. (*Id.*) Gallo similarly claims the plaintiff in *Croom* "acknowledged a general risk that associated with being on scaffolding anytime." (Gallo Answering Brief at 20.) But this misses the clear language from *Croom* that the LLC quoted in part in its Answering Brief: "Croom has admitted in his deposition testimony that he appreciated a risk of falling off ***the*** scaffold if he wasn't careful." 1994 Del. Super. LEXIS at *16 (emphasis added). The quoted and emphasized language from *Croom* clearly shows the *Croom* plaintiff was talking about the risks of the specific scaffolding off of which he fell, which had been built (by a non-professional) in the back of someone's pickup truck at a NASCAR race. *Id.* at *2-3.

Based upon their flawed premise about the facts of *Croom*, Defendants argue Mrs. Helm acknowledged the risk of the particular stairs on which she fell

before she descended them. (LLC Answering Brief at 17; Gallo Answering Brief at 20.) But there is no distinction between *Croom* and the instant matter. Both plaintiffs acknowledged risks attendant to encountering the specific situation he or she faced before he or she carried on in face of that risk. If anything, the instant case is a worse case for the application of assumption of risk because Mrs. Helm had no way of knowing the bannister would be of no use in a fall situation. Thus, this Court should follow the well-reasoned and directly analogous case of *Croom* and remand the case to a jury to determine whether and to what extent Gail Helm assumed the risk and/or was comparatively at fault.

Moreover, Gallo attempts to argue that in *Croom* the plaintiff only appreciated that he "might be injured." (Gallo Answering Brief at 21.) At no point, however, did Gail Helm say she knew she was going to be injured in descending the stairs. Instead, as pointed out by Gallo, she said that she "'definitely [] a safety issue.'" (Gallo Answering Brief at 21.) Recognizing a safety issue is the same as saying someone might be injured. If Gail Helm had been confronted with a situation in which she knew she was going to be injured, she presumably would not have encountered it or there would be no argument that she did not primarily assume the risk. Thus, Gallo's second basis to distinguish *Croom* fails.

2. Secondary Assumption of Risk/Comparative Negligence

Defendants' reliance upon *Baker v. East Coast Properties* is misplaced as those facts are wholly distinct from the facts of the instant situation. 2011 Del. Super. LEXIS 508 (Del. Super. Nov. 15, 2011). The plaintiff in *Baker* rented an apartment from the defendant, which provided "housing specifically for the elderly and those with ambulatory difficulties." *Id.* at *2. The plaintiff was blind and suffered from, *inter alia*, Parkinson's Disease and diabetic neuropathy, both of which affected his ability to walk, and the plaintiff fell down "frequently." *Id.* at *2-3. The plaintiff had been complaining of the landlord coming into his apartment unannounced, so the plaintiff installed an alarm on his front door that would audibly alert him when someone entered the apartment. *Id.* Subsequently, representatives from the landlord entered the apartment without notice and set off the alarm. *Id.* at *3-4. The alarm startled the plaintiff, who was asleep, and he jumped out of bed. *Id.* at *4. His legs collapsed, and the plaintiff fell to the ground injuring himself. *Id.*

The *Baker* Court analyzed the case and granted summary judgment ostensibly on two grounds. First, because it was not foreseeable that the plaintiff would install an alarm and not tell the landlord about it, the Superior Court concluded the plaintiff's act was an intervening and superseding act relieving the defendant of responsibility. *Id.* at *8-12. Second, the Superior Court ruled, as a matter of law, that because the plaintiff knew of his difficulties in moving and that

he fell frequently, his installation of an alarm that would cause him to jump out of bed and forget he could not walk without assistance was more negligent than the act of defendants entering the apartment unannounced. *Id.* at *11-12.

Baker is so factually distinct that it provides no precedential guidance in this case. First, the *Baker* decision gives no suggestion the plaintiff attempted to protect himself from the alarm after he installed it. But Gail Helm testified that when she saw the steps were potentially dangerous, "proceeding with caution was [her] answer to it." (A105.) She then specifically testified how she attempted to navigate the dark stairs. (A146.) Second, unlike the *Baker* plaintiff who installed the cause of his injury, Gail Helm did not design, construct, and/or install the stairs and/or the ungraspable bannister. Third, unlike the *Baker* plaintiff, who was aware that he was blind, had ambulatory problems, and fell down frequently at the time he installed the alarm on the door, Gail Helm had no way to know the bannister she was using to carefully descend the stairs was of no use in a fall situation prior to descending the stairs.

By granting summary judgment on the basis of comparative negligence as a matter of law, the Superior Court necessarily considered and weighed disputed facts, such as the graspability (or lack thereof) of the bannister and Gail Helm's knowledge (or lack thereof) of the bannister's graspability. These are facts a jury should consider in determining whether and to what extent Gail Helm was

negligent in descending the stairs that evening. Finally, and in addition to being factually inapposite, *Baker*, a Superior Court case, is not binding on this Court.

Gallo cites *Jones v. Crawford* for the statement that a trial judge can determine issues of comparative fault as a matter of law. 1 A3d 299 (Del. 2010); Gallo's Answering Brief at 22. But *Jones* is not a case about comparative negligence; it only uses comparative negligence to distinguish its actual point – that comparative causation does not exist in Delaware. 1 A.3d at 303. Of significance here, *Jones*, in reversing and remanding the trial judge's opinion, makes clear that before analyzing whether a defendant's action (or inaction) is a cause of a plaintiff's injury, "[t]he focus should initially be on whether the facts material to a determination that [a defendant] acted . . . negligently in the first instance are in dispute." *Id.* at 303-04. Therefore, by analogy, the Superior Court in this instance skipped the first step of the analysis when it ignored certain facts in dispute about whether Gail Helm and/or the Defendants were even negligent (i.e., graspability of the bannister and Mrs. Helm's knowledge of the same). The case should therefore be reversed and remanded.

Gallo argues this Court followed the United States Supreme Court's lead in statement in *Burkhart v. Davis* that the standard under Rule 56 "mirrors" the standard under Rule 50. (Gallo Answering Brief at 23; 602 A.2d 56 (Del. 1991).) Gallo's objective is to show Plaintiffs' distinction of *Trievel v. Sabo* is ineffective.

But this "mirroring" issue actually shows the Superior Court's error. The U.S. Supreme Court has stated the two rules "mirror" each other, "such that 'the inquiry under each is the same.'" *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150 (2000). The inquiry to which the Court refers is whether there exists a "legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue" under Rule 50 and what a trial court must consider on behalf of the non-moving party. *Id.* at 149. The U.S. Supreme Court clearly states that under either Rule 56 or Rule 50, the trial court "must review the record 'taken as a whole.'" *Id.* Moreover,

> "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidences comes from disinterested witnesses.'"

Id. at 150-51. As already explained more fully in Appellants' Opening Brief and *supra*, the Superior Court did not consider the "record taken as a whole," giving Plaintiffs the benefits of all reasonable inferences, and refrain from weighing evidence. Accordingly, the Superior Court should be reversed.

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

Defendants argue the Superior Court's decisions did not rely on the Indemnification Provision. (LLC Answering Brief at 22-23; Gallo Answering Brief at 27-28.) However, the Superior Court referred to the Provision as barring the claim at least as to Gallo in light of the finding Plaintiff Gail Helm was

comparatively at fault in its December 13, 2013 Order ("Dec. Order"). Thus, it did factor into the decision and was not *dicta*.

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

Appellants rely on the arguments set forth in their Opening Brief on this point.

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

The three cases argued by Defendants for the point that the Indemnification Provision was sufficiently "crystal clear" to relieve one or both Defendants of negligence are inapposite. None of the three cases cited by Defendants involve the release or indemnification of an organizational/institutional defendant by a consumer plaintiff. Rather they all involve the indemnification between two tortfeasors, both of whom were commercial entities, for injuries of plaintiffs. *Laws v. Ayre Leasing*, 1995 Del. Super. LEXIS 303 (Del. Super. July 31, 1995); *Rizzo v. John E. Healy & Sons, Inc.*, 1990 Del. Super. LEXIS 49 (Del. Super. Feb. 16, 1990); *James v. Getty Oil Co. (E. Operations), Inc.*, 472 A.2d 33 (Del. Super. 1983).

In *Laws*, the injured plaintiff sued a commercial landlord for injuries sustained on the job. 1995 Del. Super. LEXIS 303, at *1. The commercial landlord then filed a third-party action against its commercial tenant, the plaintiff's

employer. *Id.* The commercial landlord and commercial tenant then disputed who was responsible for indemnifying whom for the plaintiff's injuries under dual indemnification provisions in the commercial lease. *Id.* at *2. In *Rizzo*, the injured plaintiffs were employees of a construction company. 1990 Del. Super. LEXIS at *1. The plaintiffs sued, *inter alia*, the commercial outfit that leased scaffolding equipment to plaintiffs' employer when they were injured because the scaffolding fell. *Id.* The commercial lessor filed a cross-claim against plaintiffs' employer based upon indemnification language (for plaintiffs' injuries) that was signed when the scaffolding was delivered. *Id.* In *James*, the plaintiffs were injured workers (or the estates of deceased workers) of a maintenance company who were injured/killed while working at an oil refinery. 472 A.2d at 34-35. The maintenance company and the owner of the refinery disputed a provision in the maintenance contract between them regarding who bore the risk of injury and/or death to the maintenance company's workers. *Id.* at 34-35.

Plaintiffs acknowledge that in all three cases, the Superior Court found that language to be clear in excepting from indemnification injuries caused by one party's own negligence. But the instant case does not involve a dispute between two sophisticated commercial entities, who likely had assistance of counsel in connection with the agreements at issue in *Laws*, *Rizzo*, and *James*. This dispute is between a consumer plaintiff, who, for all intents and purposes, was given a rental

agreement on a take-it-or-leave-it basis, and the LLC who regularly rents the Property to multiple families every summer and its agent, Gallo.

Moreover, the indemnification provisions in all three cases are much more clearly drafted than the Indemnification Provision at issue. The provision in *Laws* is considerably shorter (approximately 83 words versus approximately 134 words) than the Indemnification Provision in this instant matter, thereby possessing less verbiage to navigate through to reach an understanding. 1995 Del. Super. LEXIS 303, at *3. The provisions dealing with indemnification in *Rizzo* were actually in two paragraphs in the commercial entities' agreement. 1990 Del. Super. LEXIS 49, at *2-3. The former dealt with the "hold harmless" language, and the latter of addressed indemnification and provided an exception to indemnification for the leasing party's sole negligence. *Id.* at *2-3. By breaking the provisions into two, shorter provisions into two, more understandable paragraphs, the effect of the provision was much clearer. Finally, the provision in *James* used semi-colons between major clauses to remove ambiguity. 472 A.2d at 34. In the case at bar, the Indemnification Provision is a 134-word run-on sentence with indemnification and "hold harmless" language. It contains no punctuation other than commas that are used to separate at least six clauses containing lists of events and contingencies, three clauses involving the words "including, but not limited to," and an add-on

clause at the end that states "except to the extent caused by the sole negligence of Owner." (A193-94.) It is simply not clearly written.

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

The provisions in the three cases cited by Defendants differ in that they all deal with one party being indemnified by a second party. In *Laws*, *Rizzo*, and *James*, the indemnification provisions dealt with which of two potential tortfeasors was indemnified depending upon which of the two potential tortfeasors was negligent in causing injury. *Laws*, 1995 Del. Super. LEXIS 303; *Rizzo*, 1990 Del. Super. LEXIS 49; *James*, 472 A.2d 33. That is not the case before this Court. The Indemnification Provision in the instant case seeks to have Plaintiffs indemnify and hold harmless both Defendants for any type of loss "except to the extent caused by the sole negligence of Owner."

While Plaintiffs concede the word "negligence" appears in the Indemnification Provision, as argued in Appellants' Opening Brief, there are multiple ways of interpreting exactly which Defendant or Defendants are to be indemnified and/or held harmless if the loss is caused by the sole negligence of the LLC. The ambiguity in this Indemnification Provisions is with who gets indemnified and/or held harmless in a situation where the injury was solely caused by the LLC's negligence. Indeed, Gallo appears to argue that the Indemnification provision releases both parties unless the negligence was solely caused by the

LLC, but Gallo does not indicate what happens when LLC is solely negligent. (Gallo Answering Brief at 30.) Because of this ambiguity, the Indemnification Provision must be construed against Defendants as drafters and held invalid.

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.

Defendant LLC misconstrues Plaintiffs' argument that the Indemnification Provision violates public policy. (LLC Answering Brief at 26-27.) It is not necessarily the fact that Defendants seek to exonerate themselves from their potential, future negligence that violates public policy; it is that they have essentially reinstated the doctrine of contributory negligence by contract. As this Court has previously noted, the General Assembly's enactment of comparative fault and abandonment of contributory negligence demonstrates Delaware's "strong public policy against contributory negligence as a complete bar to recovery in negligence actions." *See Sinnott v. Thompson*, 32 A.3d 351, 357 (Del. 2011) (referencing the comparative negligence statute, 10 Del. C. § 8132). If Defendants' proposed interpretation of the Indemnification Provision was accepted, even one percent of negligence by Plaintiff – or even one percent of negligence by Gallo – would mean that Plaintiffs would be left without recourse regardless of how negligently the Defendants, collectively or individually,

behaved. Such an interpretation violates Delaware's public policy and should be rejected by this Court.

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

Finally, with respect to the Plaintiffs' breach of contract claim, Defendant LLC's Answering Brief acknowledges that the damages sought for breach of contract are different from the damages sought for the personal injury suit. (LLC Answering Brief at 29.) While Plaintiffs did assert the same damages to the breach of contract claim, they also added a claim for "'reliance damages in the amount of $3,492.30.'" (*Id.*) Succinctly, Plaintiffs were asking for their money back from renting the Property because it was not clean. The Rental Agreement made at least two references to the unit being cleaned prior to 6:00 p.m. on the day the tenant checked-in. (*See* A216-A217.) Cleaning between guests was therefore clearly

contemplated. Moreover, representatives from both Defendants testified that the condition of the Property when Plaintiffs arrived fell below what was expected. (*See* A158; A169; A152.)

The arguments that the Helm's never contact Defendant Gallo or Defendant LLC to notify them of (1) the cleanliness problem and/or (2) Plaintiff Gail Helm's broken foot are red herrings. (LLC Answering Brief at 29, 32; Gallo Answering Brief at 13, 33.) Such notification was not required by the contract and have nothing to do with any of the legal issues in this case.

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 argument that Plaintiffs accepted the Property "as-is," to the extent that it bars Plaintiffs' breach of contract claim, is meritless. (LLC Answering Brief at 32; Gallo Answering Brief at 33.) The contract states that if the renter does not inspect the Property he or she accepts it "as-is." (A217.) The renter therefore forfeits two distinct remedies, neither of which Plaintiff seeks. The first is that the renter cannot "withhold rent for any alleged deficiency in the premises." (*Id.*) The second is the renter cannot claim the Property was misrepresented. (*Id.*) Plaintiffs did not attempt to withhold rent, nor have they claimed the Property was misrepresented. To the extent that there may be an argument that by agreeing not withhold rent they have waived their claim to damages, Defendant Gallo, and

agent of Defendant LLC, drafted the agreement. (Appellant's Opening Brief at 28-29.) If the Defendants had intended for it to be a waiver of any damages, they could have written the same in the agreement. (*Id.*) Instead, the agreement provides that an aggrieved tenant cannot withhold rent. Withholding implies not paying rent when it becomes due. There is no dispute that plaintiffs paid the rent in full before they arrived at the Property. Thus, an action for damages is separate from the act of withholding rent, and the claim should not been disposed of at 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.

Appellants rely on the arguments set forth in their Opening Brief on this point.

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.

Appellants rely on the arguments set forth in their Opening Brief on this point.

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.

CURLEY & BENTON, LLC

/s/ Patrick C. Gallagher
Patrick C. Gallagher, Esq. (De Bar No. 5170)
250 Beiser Blvd., Ste. 202
Dover, DE 19904
(t) (302) 674-3333
(f) (302) 674-3335
Attorney for Plaintiffs Below/Appellants

Date: 7/9/14