STATE OF NEW HAMPSHIRE
SUPREME COURT

2019-0620

DANIEL RO
Plaintiff/Appellee

v.

FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGEE OF TRUSTEES OF DARTMOUTH COLLEGE
Defendant/Appellant

AND

SEBASTIAN LIM
Plaintiff/Appellee

v.

FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGGE OF TRUSTEES OF DARTMOUTH COLLEGE
Defendant/Appellant

MANDATORY APPEAL FROM ORDER OF THE MERRIMACK COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

BRIEF ON BEHALF OF PLAINTIFF/APPELLEE DANIEL RO

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Statutes:

Caselaw:

Miscellaneous Authorities:

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT CORRECTLY APPLIED THE SUTTON DOCTRINE STANDARD AS ADOPTED BY THIS COURT IN *CRETE* WHEN IT RULED THAT THE DARTMOUTH COLLEGE POLICIES DID NOT NEGATE THE PRESUMPTION THAT THE PLAINTIFFS WERE CO-INSUREDS UNDER THE FACTORY MUTUAL POLICY?

II. WHETHER THE TRIAL COURT CORRECTLY RULED THAT STUDENTS RESIDING IN DARTMOUTH COLLEGE RESIDENCE HALLS HAVE A SUFFICIENT POSSESSORY INTEREST UNDER THE SUTTON DOCTRINE SUCH THAT THEY ARE COINSUREDS UNDER THE COLLEGE'S FIRE INSURANCE POLICY?

RELEVANT STATUTES

491:22 Declaratory Judgments

I. Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive. …

491:22-a . Liability Coverage; Burden of Proof

In any petition under RSA 491:22 to determine the coverage of a liability insurance policy, the burden of proof concerning the coverage shall be upon the insurer whether he institutes the petition or whether the claimant asserting the coverage institutes the petition.

491:22-b. Insurance Actions; Costs and Attorney's Fees

In any action to determine coverage of an insurance policy pursuant to RSA 491:22, if the insured prevails in such action, he shall receive court costs and reasonable attorneys' fees from the insurer.

STATEMENT OF THE CASE

This is an appeal from the October 1, 2019 Order of the Merrimack County Superior Court (J. Kissinger) granting summary judgment in favor of the plaintiffs/appellees, Daniel Ro and Sebastian Lim, and denying the cross-motions for summary judgment filed by defendant/appellant, Factory Mutual Insurance Company, as Subrogee of Trustees of Dartmouth College. This Court should rule that the trial court correctly applied the "Sutton Doctrine" to this subrogation action and affirm the decision for the reasons set forth below.

This subrogation action arises out of an accidental fire that occurred in a Dartmouth College undergraduate residence hall. Plaintiffs Daniel Ro ("Ro") and Sebastian Lim ("Lim") were both undergraduate students residing on campus at the time of the incident. The fire was caused by the plaintiffs' use of a charcoal grill to cook hamburgers on the roof of the residence hall in which Lim resided. The building sustained extensive fire and water damage as a result of the incident.

At the time of the fire the residence hall was insured for fire damage under a policy issued by Factory Mutual Insurance Company ("Factory Mutual") to the Trustees of Dartmouth College. Factory Mutual paid over $4.5 million for the damage and sought subrogation against the plaintiffs.

Ro and Lim filed separate declaratory judgment actions against Factory Mutual in Merrimack County Superior Court seeking a determination that they were co-insureds under the policy issued by Factory Mutual to Dartmouth College pursuant to the Sutton Doctrine's anti-subrogation rule as adopted by this Court in Cambridge Mutual Fire Ins. Co. v. Crete, 150 N.H. 673, 846 A.2d 521 (2004). [App. Vol. I at 9-20; App. Vol. I at 21-32] The plaintiffs sought a ruling that Factory Mutual was, therefore, precluded from seeking subrogation for the amounts paid under the policy and also requested an award of attorney's fees and costs incurred in the pursuit of the declaratory judgment action. [App. Vol. I at 14; App. Vol. I at 26]

Factory Mutual filed an Answer and Counterclaims based on negligence and breach of contract against the plaintiffs in both declaratory judgment actions. [App. Vol. I at 1-41; App. Vol. I at 42-47; App. Vol. I at 48-57; App. Vol. I at 58-63]

Both plaintiffs filed Motions for Summary Judgment with a supporting Memorandum of Law based on the Sutton Doctrine. [App. Vol. II at 4-171; Vol. IV at 3-165]

Factory Mutual filed an Objection to both Motions for Summary Judgment. [Vol. V at 4-19; Vol. V at 60-100] Factory Mutual also filed a Cross Motion for Summary Judgment against both plaintiffs. [Vol. III at 4-236]

Ro filed an Objection to Defendant's Cross Motion for Summary Judgment and Reply to Defendant's Objection to Plaintiff's Motion for Summary Judgment with Incorporated Memorandum of Law. [App. Vol. V at 20-31] Factory Mutual submitted a Reply to Ro's Objection. [App. Vol. V at 32-41]

Lim also filed an Objection to Factory Mutual's Cross Motion for Summary Judgment. [App. Vol. V at 42-59]

On September 4, 2019, the trial court conducted a hearing to enable the parties to present oral argument on all pending motions for summary judgment.

On October 1, 2019, the trial court issued its Order denying Factory Mutual's Motion for Summary Judgment and granting summary judgment in favor of Ro and Lim. [Add. p. 52-64][1] The court ruled that both plaintiffs had a sufficient possessory interest because they had a right to control analogous to a tenant's right to control leased premises and, therefore, they were co-insureds under the policy issued by Factory Mutual to insure the dormitories. [Add. p. 58-59] The court found that although Ro did not reside in Morton Hall, he had an insurable interest just as a tenant in a multi-unit apartment building has with respect to damage to other units beyond the occupied unit. [Add. at 59-60] The

[1] "Add." references the Addendum to Brief of Defendant/Appellant Factory Mutual.

court also ruled that the Dartmouth College student policies did not contain the type of express agreement to assume liability for fire damage required under *Crete* because the policies did not expressly state that the students were not co-insureds under the college's insurance policy and did not require the students to procure their own fire insurance for the dormitories. [Add. at 60-61] Finally, the court ruled that "the expectations and equitable considerations that motivated the New Hampshire Supreme Court in Crete to adopt the Sutton doctrine in the context of tenant-landlord lease agreements apply with equal force in the context of on campus housing agreements with college students." [Add. at 61-63] As a result, Factory Mutual was precluded from seeking subrogation against the plaintiffs by application of the Sutton Doctrine. [Add. p. 63] Since the plaintiffs were prevailing parties, the court granted their request for attorney's fees and costs pursuant to RSA 491:22-b. [Add. p. 63]

Factory Mutual appealed the trial court's decision.

STATEMENT OF FACTS

During the 2016-2017 academic year, Ro and Lim were undergraduate students at Dartmouth College. Ro was a full-time residential student at Dartmouth College who had been assigned to Smith Hall, an undergraduate student dormitory located on the Dartmouth College campus. Lim was also a full-time residential student who had been assigned to Morton Hall, another undergraduate student dormitory located on the campus. More than 3,000 undergraduates live in campus residence halls which are grouped into "clusters" throughout the Dartmouth College campus.[2] These dormitories, including Smith Hall and Morton Hall, were all insured under a single policy issued by Factory Mutual.

As residential students, Ro and Lim were responsible for paying for directly billed expenses consisting of tuition, fees, housing and food. The "Room Care and

[2] https://home.dartmouth.edu/life-community/residential-life/undergraduate-housing

Furnishing" Policy issued by Dartmouth College's Office of Residential Life refers to the fees charged for dormitory rooms as "rent." [App. Vol. II at 26] The fees charged for housing are the same for each student regardless of the dormitory to which they are assigned.[3]

While many students stay in the same dormitory room throughout the academic year, Dartmouth College Office of Residential Life has promulgated a number of policies addressing the ability of students to ask for a change in room assignment, to seek a "room swap" or to request to be "pulled in" to the room of a fellow student. [App. Vol. II at 167-170; App. Vol. II at 171-174]

Students who reside in the dormitories "are encouraged to decorate their assigned rooms in order to make their residential community feel like home." [App. Vol. III at 226-227]

Dartmouth College reserves a limited right to enter student rooms without permission or consent for certain specified reasons, such as providing emergency services or general maintenance work, to make safety or condition inspections or to investigate probable violations of College regulations. [App. Vol. III at. 210-211] In the event of an entry made for maintenance or repair purposes, a note must be left in the room stating that the College employee was in the room for an "official reason", a telephone number must be provided so that the student can call to inquire about the entry and the student's door must be locked after the work is completed. [App. Vol. III at 210]. A student who enters the room of another student without permission is subject to disciplinary action. [App. Vol. III at 210]

There were a number of other student policies in place during the 2016-2017 academic year, none of which informed the students that they were expected to procure fire insurance policies covering the dormitories.

The Dartmouth College Office of Residential Life issued a "Damage and Vandalism" Policy Statement addressing "Damage or Loss of Personal and

[3] According to the Dartmouth College website, the cost of housing alone for the 2019-2020 academic year is $9,879. This means that Dartmouth College students will pay close to $30 million dollars for housing alone this academic year. https://admissions.dartmouth.edu/afford/cost-attendance

College Property". [App. Vol. II at 30-31] That policy states that "[t]he College does not assume responsibility or carry insurance for the loss of *personal property* within any of its residences due to vandalism, theft, fire, wind, flood, accidents, or other catastrophes." [App. Vol. II at 30] The policy provides that "[r]esidents of College housing are expected to provide adequate insurance coverage for all *personal property*." [App. Vol. II at 30] Although the "Damage and Vandalism" policy provides that "[r]esidents assume any and all liability for damage or claims that result from their own negligence, as well as any negligence of visitors or guests" and "[r]esidents are liable for any damage and/or loss to a room, its furnishings, or any other part of the residence hall or environs", these sections of the policy do not specifically address loss due to fire and are silent as to insurance coverage for such losses. [App. Vol. II at 30]

The Division of Student Affairs "Policy Statement" applicable to "Insurance" and included within the Dartmouth College Student Handbook only addresses insurance coverage for personal property, automobile liability and foreign travel.[4] [App. Vol. II at 32-34] The provisions applicable to "Personal Property" state that "Dartmouth College is not responsible for the loss or damage of students' personal property" and that "[s]tudents may have coverage available to them through their family's insurance program, or may elect to purchase their own personal insurance." [App. Vol. II at 32] The policy does not inform students of the need to maintain insurance coverage for damage to property other than their own personal belongings.

The Office of Residential Life policy regarding "Open Flame in Residence Halls" prohibits the use of open flames in dormitories. [App. Vol. II at 35-37]. This policy provides for a variety of potential ramifications, one or more of which "*may* result" from a violation of the open flame policy. [App. Vol. II at 36] The list of possible ramifications includes "a $100 fine, assessment of the cost of any repairs associated with damage caused by the open flame, and/*or* disciplinary

[4] https://student-affairs.dartmouth.edu/policy/insurance

action which may include immediate removal from the residential facility." [App. Vol. II at 36] This policy does not make any one of the ramifications mandatory nor does it advise students to procure fire insurance coverage.

The "Office of Residential Life" policy governing "Residential Behavior" provides that students who engage in "Endangering Behavior" will "*typically* result" in one or more potential outcomes, including "removal from residence halls, disciplinary action (including cost or repair and/or cleaning) and/*or* criminal charges." [App. Vol. II at 38-40] The policy goes on to provide that certain fire safety violations (arson, tampering or damaging fire safety equipment, blocking egress, improper use of fire estate, failing to evacuate) will automatically result in a $100 fine. [App. Vol. II at 39] Other than the $100 fine, none of the outcomes are automatic or mandatory. Nor does the policy inform students of the need to insure the dormitory against fire damage.

The Office of Residential Life "Judicial Process and Sanctions" policies list a number of sanctions that may be issued "separately or in combination" in response to student violations of the College Residence Policies and Terms. [App. Vol. II at 41-43] These possible sanctions include warnings, probation, removal from housing, fines, restitution, educational sanctions and parental notification. [App. Vol. II at 42] None of these policies make reimbursement for damages mandatory or address insurance coverage for fire damage.

In addition, consistent with the "Damage and Vandalism" Policy Statement addressing "Damage or Loss of Personal and College Property" and the Division of Student Affairs "Policy Statement" applicable to "Insurance" addressed above, Dartmouth College's "Risk and Internal Controls Services" specifically addresses insurance coverage and provides that Dartmouth College insures against loss for fire damage to Dartmouth College property and excludes coverage for damage to personal property belonging to students, faculty and staff:

> **Property Insurance**
>
> The College insures College-owned property through an "All Risk" blanket policy. Perils covered include fire, flood, wind and other lesser perils. …
>
> **Personal Property Exclusion**
>
> It is important to understand that the College's fire, crime, equipment floater and data processing insurance policies protect only College-owned property. The personal property of students, faculty and staff in College buildings is not covered under the College Insurance programs. It is strongly recommended that individuals who have their own personal property (including art, rugs, books, computers, etc.) in their offices, studios, labs, dorm rooms, etc., purchase their own insurance to cover these items, or assume the risks which are inherent. Homeowner's or renter's insurance may provide the necessary protection, but any coverage should be verified from the individual's insurance provider.

[App. Vol. II at 67] This information is publicly available to students on the Dartmouth College website.[5]

The Mutual Corporation Non-Assessable Insurance Policy issued by Factory Mutual to Dartmouth College insured against property damage to all real property in which Dartmouth College had an insurable interest, including both Smith Hall and Morton Hall. [App. Vol. II at 71-166] Specifically excluded from coverage under the policy is "personal property of students." [App. Vol. II at 84-85]

On the day leading up to the fire, Ro and Lim were at Morton Hall, a four-story, multi-unit dormitory. [App. Vol. III at 161] The young men set up a small charcoal grill on a platform outside of Lim's fourth floor dormitory room in order to cook hamburgers. [App. Vol. III at 161-162] Prior to leaving Lim's room, they poured water on the grill and believed that charcoals were extinguished. [App. Vol. III at 161-162] During the early morning hours of October 1, 2016, a fire

[5] https://www.dartmouth.edu/rmi/rmsinsurance/property.html

broke out in Morton Hall. The building sustained extensive fire and water damage as a result. Both young men cooperated in the investigation conducted by the State Fire Marshal and Hanover Police Department. [App. Vol. III at 158-167, 169-178] The investigation resulted in a finding that the fire was accidental and that it was initiated by an unattended charcoal grill. [App. Vol. II at 44-53]

Factory Mutual paid $4,544,313.55 under its policy for the damages caused by the fire and the efforts to extinguish it. [App. Vol. I at 63]

Despite the deep remorse expressed by the young men for their mistake and the support of many students who signed a petition opposing expulsion as too harsh a sanction for what was determined to have been an accident, Ro and Lim were both expelled from Dartmouth College as a result of the incident. [App. Vol. II at 54-64, 65-66]

SUMMARY OF ARGUMENT

The pivotal issue in this case is the trial court's application of the anti-subrogation rule known as the "Sutton Doctrine" as adopted by this Court in Cambridge Mutual Fire Ins. Co. v. Crete, 150 N.H. 673, 846 A.2d 521 (2004). Significantly, in *Crete* this Court adopted the majority rule Sutton doctrine (which presumes the tenant to be a co-insured on the landlord's policy absent an express agreement to the contrary) rather than the less predictable case-by-case approach adopted by a minority of jurisdictions (under which there is no presumption that the tenant is an implied co-insured and courts look instead to the lease as a whole). The *Sutton* doctrine's anti-subrogation rule applies in the absence of an express delegation of the obligation to procure fire insurance coverage to the tenant.

The Dartmouth College policies do not inform students that they are expected to procure property insurance coverage for either fire or water damage to the buildings they occupied. To the contrary, students are only advised to insure their own personal property while Dartmouth College assumed responsibility for insuring all of the residential buildings. The trial court correctly ruled that absent

such an express allocation of insurance obligations the students were presumed to be co-insureds and the anti-subrogation doctrine applied.

Keeping in mind the sound reasoning behind the Sutton doctrine which is premised on allocation of the responsibility to procure insurance coverage for property loss, this Court should affirm the trial court's ruling that Ro and Lim were co-insureds under the Factory Mutual policy while they were residential students at Dartmouth College. The policy that favors avoiding the economic waste that results when multiple parties are forced to procure insurance for the same property applies with equal force to the residential college-student context.

In addition, the trial court's ruling that Ro was a co-insured with respect to Morton Hall, an issue that was not preserved in the Notice of Appeal, was entirely consistent with the application of the *Sutton* doctrine to preclude subrogation against tenants for damage to multiunit buildings beyond the occupied unit in which tenants have a possessory interest.

The burden of proof in this declaratory judgment action lies with Factory Mutual. Factory Mutual has not met its burden of proving that Ro is not entitled to coverage as a co-insured under the Factory Mutual policy, therefore, the trial court's decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

A. Summary Judgment Standard

This Court "will affirm a trial court's grant of summary judgment if, considering the evidence and all inferences properly drawn therefrom in the light most favorable to the non-movant, [the Court's] review of that evidence discloses no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Coyles v. Battles, 147 N.H. 98, 100, 782 A.2d 902 (2001). The Court must "review the trial court's application of the law to the facts *de novo*." Id.

B. Burden Of Proof

In a declaratory judgment action to determine the coverage of an insurance policy, the burden of proof is always on the insurer, regardless of which party brings the petition. Santos v. Metropolitan Property & Casualty Ins. Co., 171 N.H. 682, 685, 201 A.3d 1243, 1246-1247 (2019); RSA 491:22-a.

II. THE TRIAL COURT CORRECTLY APPLIED THE SUTTON DOCTRINE STANDARD AS ADOPTED BY THIS COURT IN *CRETE* WHEN IT RULED THAT THE DARTMOUTH COLLEGE POLICIES DID NOT NEGATE THE PRESUMPTION THAT THE PLAINTIFFS WERE CO-INSUREDS UNDER THE FACTORY MUTUAL POLICY

A. The Sutton Doctrine Is Premised On The Allocation Of Responsibility To Procure Insurance Coverage Against Property Loss

Courts asked to decide whether a tenant is its landlord's co-insured apply one of three tests: (1) the *Sutton* approach, (2) the anti-*Sutton* approach, and (3) the case-by-case approach. 13 *New Appleman on Insurance Law Library Edition* § 163.07 (2019). *See, also,* Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d

883, 887-889 (Tenn. App. 2007) (explaining the anti-Sutton, case-by-case and pro-Sutton approaches).

The *Sutton* approach, which this Court adopted in *Crete,* "is the most common of the doctrines and the modern approach." 13 *New Appleman on Insurance Law Library Edition* § 163.07 (2019). Under the *Sutton* approach absent a clearly expressed agreement to the contrary, a tenant is presumed to be a co-insured under the landlord's fire insurance policy and, therefore, the insurer cannot bring a subrogation action against the tenant for a fire loss, even if caused by the tenant's negligence. Williams, Insurance Law Annual Article: Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity And Her Beloved, 55 Drake L. Rev. 541, 567 (Winter 2007). The purpose of this default rule is to ensure greater predictability by bestowing co-insured status on the tenant unless the lease clearly and unambiguously informs the tenant of the obligation to procure insurance coverage against loss typically covered under the landlord's policy:

> Without the Sutton rule as a default, there are no legal certainties or opportunities for parties to plan in advance against liabilities. The results could be cataclysmic for tenants because they could become liable for millions of dollars in fire damage to their leased premises. This issue boils down to who should bear the burden of the loss: the landlord, tenant, or insurer. Courts should not view situations involving tenants and insurers in isolation because the rulings they make impact thousands of similarly situated tenants. As such, equity requires that subrogation not be permitted absent an agreement stating otherwise.

Id. at 596. In order "[t]o rebut the presumption, the lease must expressly require the tenant to obtain fire insurance on the realty." Beveridge v. Savage, 285 Neb. 991, 996, 830 N.W.2d 482, 487 (Neb. 2013). *See, also,* N. River Ins. Co. v. Snyder, 2001 U.S. Dist. LEXIS 17633, * 11, 2001 WL 1335865 (D. Me. Oct. 31, 2001) ("Under *Sutton* it is the absence of an express agreement between the landlord and the tenant to the effect that the tenant will *not* be considered a co-insured of the landlord under any policy obtained by the landlord to cover the

property at issue that is determinative"), *aff'd* 2003 U.S. Dist. LEXIS 4640, 2003 WL 1826311 (D. Me. Mar. 26, 2003); GNS Partnership v. Fullmer, 873 P.2d 1157, 1164 (Utah App. Ct. 1994) ("a landlord is presumed to carry insurance for the tenant's benefit when the rental agreement is silent concerning responsibility for maintaining fire insurance").

Under the less predictable case-by-case approach followed by a minority of jurisdictions, courts "look at the lease as a whole, along with any other relevant and admissible evidence, to determine whether it was reasonably anticipated by the landlord and tenant that the tenant would be liable to a subrogation claim by the landlord's insurer in the event of tenant's negligence." 55 Drake L. Rev. at 564. This Court implicitly rejected that approach when it adopted the *Sutton* doctrine in *Crete*.

The trial court in this case correctly applied the Sutton doctrine standard when it ruled that the absence of an agreement to shift responsibility for procuring insurance coverage on the dormitories to students entitled the plaintiffs to co-insured status under the Factory Mutual policy. It was the absence of such an express insurance allocation agreement in a residential lease that gave rise to the Sutton doctrine.

In Sutton v. Jondahl, 1975 OK CIV APP 2, 532 P.2d 478, 482 (Okla. Ct. App. 1975), the tenant's son caused fire damage to the leased premises while playing with a chemistry set. The landlord's fire insurance carrier sought to subrogate against the tenant for amounts paid under the policy insuring the premises. The Court noted that although subrogation was designed to place the burden of bearing a loss "where it ought to be," it is not a "rigid rule of law" but instead is "a fluid concept depending upon the particular facts and circumstances of a given case for its applicability." Id. at 482. The Court ruled that subrogation was not available to the insurer because the tenant was a co-insured of the landlord absent an express agreement to the contrary. Id. According to the Court, such an

agreement would be one based on allocation of the responsibility to procure insurance coverage for the premises:

> The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise. Certainly, it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy.

Id. The Court explained that "basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary." Id. As a result, the Court concluded that "[t]he company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it." Id. Thus, the Sutton doctrine was born out of principles of insurance allocation responsibilities between the landlord and tenant rather than mere assignment of liability for damage to the tenant.

In *Crete*, this Court, noting that the majority of jurisdictions apply the Sutton doctrine, found the reasoning behind the decision in *Sutton* to be persuasive and adopted an "identical rule" for residential leases in New Hampshire. Cambridge Mutual Fire Ins. Co. v. Crete, 150 N.H. at 675. Defendant Crete negligently caused a fire when his cigarette ignited the mattress in an apartment he leased from Cambridge Mutual's insureds. Id. at 674. The fire caused extensive damage to the building in which the apartment was located. Id. Cambridge Mutual paid for the covered losses under the landlord's fire insurance policy and

then brought a subrogation action against Crete. Id. Crete argued that there was no basis for legal relief because, under the "Sutton doctrine", a tenant is considered a coinsured of a landlord with respect to fire damage to leased residential premises. Id. at 675, *citing* Sutton v. Jondahl, 532 P.2d at 482.

As in *Sutton*, this Court emphasized the allocation of insurance coverage as the motivating force behind the anti-subrogation doctrine, explaining:

> A reasonable residential tenant expects that the landlord has fire insurance to protect the rental property, just as a reasonable insurance company expects to provide coverage for fire damage that may result from the actions of a tenant of the insured. *See Sutton*, 532 P.2d at 482. The insurance company reasonably expects to pay for negligently caused fires, and takes into account that the insured property will be rented to tenants, adjusting their rates accordingly.

Id. at 675. This Court also recognized that the cost to insure the leased premises is a business expense associated with rental properties and is taken into consideration when establishing the amount to charge for rent. Id. As a result, the tenant pays a portion of the premium through the rent and for this reason should be deemed a co-insured on the policy. Id.

This Court also pointed out that absent the anti-subrogation doctrine tenants would be "placed in the untenable position of having to carry fire insurance for the entire building in which they rent, regardless of the extent of their possessory interest or lack of knowledge necessary to procure adequate coverage." Id. This would result in "multiple insurance policies covering the same building, resulting in economic waste." Id.

Thus, as in *Sutton*, this Court's decision to join the majority of jurisdictions and adopt the anti-subrogation rule was based on allocation of risk through procurement of insurance coverage. As a result, the limited exception carved out for express agreements must be read in the context of the fundamental reasoning behind the adoption of the Sutton doctrine. This Court explained that under this exception, "a landlord and tenant may enter into an express agreement or lease

provision that would place responsibility for fire damage upon the tenant" by, for example, requiring the tenant to carry fire insurance or specifying that the landlord's insurance would not cover the tenant in the event of a fire caused by the tenant's negligence. Id. at 676. The lease provision stating that "[t]enant is responsible and liable for all repairs, replacements and damages caused by or required as a result of any acts or neglect of the Tenant, Occupants, invitees or guests" did not "explicitly state that the tenant is *not* considered a coinsured of the landlord under any fire insurance policy obtained by the landlord" nor did it "explicitly require the tenant to obtain his or her own fire insurance for the leased premises." Id. The Court's statement that the lease provision did not "address the specific issue of the tenant's liability for fire damage caused by the tenant's negligence" must be read in the context of the entire decision which was based on the Sutton doctrine allocation of risk through insurance coverage. Id.

Factory Mutual's position that the applicability of the Sutton doctrine hinges on the presence or absence of the word "fire" in a lease agreement ignores the rationale behind the doctrine as expressed in both *Sutton* and *Crete*. In fact, Factory Mutual does not cite to any legal authority for the proposition that the Sutton doctrine is inapplicable based solely on a lease that purports to place responsibility for fire damage on the tenant but neglects to address allocation of insurance coverage. In the absence of a provision expressly informing the tenant that he or she was responsible for procuring insurance coverage for the entire building and that any fire damage caused by the tenant would not be covered under the landlord's policy, the typical tenant would not know to procure such coverage. Instead, the tenant would be personally exposed to potentially significant uninsured liability to a property insurer that had specifically assumed the risk for which it charged premiums calculated to reflect the risk assumed, the cost of which are passed on to the tenant through rent. It is precisely this situation that the Sutton doctrine is intended to avoid.

In the absence of express language allocating insurance obligations, tenants are co-insureds of the property owner and, therefore, any liability they may have for negligently caused fire damage is covered by the landlord's fire insurance policy. The trial court correctly applied the Sutton doctrine standard when it found that the Dartmouth College policies did not negate the presumption that students are co-insureds due to the absence of an express agreement to the contrary.

B. The Dartmouth College Policies Do Not Shift Responsibility For Procuring Fire Insurance Coverage To The Students And Therefore Do Not Constitute The Type of Express Agreement Required To Preclude Application Of The Sutton Doctrine

Factory Mutual argues that the Dartmouth College Student Handbook is a legally binding contract between the plaintiffs and Dartmouth College. *Appellant's Brief*, p. 19, *citing* Gamble v. The University System Of New Hampshire, 136 N.H. 9, 12, 610 A.2d 357 (1992); Walker v. President & Fellows of Harvard College, 840 F.3d 57, 61 (1st Cir. 2016). In *Gamble*, the parties agreed that the "School Catalog" setting forth the tuition rate for the year was "primarily governed by contract principles." Gamble v. The University System Of New Hampshire, 136 N.H. at 12. However, this Court recognized that "[t]he relationship between a university and its students is distinctive" and that "a strict doctrinal approach is inappropriate." Id. According to this Court, although the language must initially be examined "under the basic tenets of contract law, the parties' unique relationship must also be considered." Id. The Court noted that it "must look to all the documents which constitute the agreement and determine the reasonable expectations of the parties" and that it "'will, where possible, avoid construing the contract in a manner that leads to harsh and unreasonable results or places one party at the mercy of the other.'" Id. at 14, *quoting* Thiem v. Thomas, 119 N.H. 598, 604, 406 A.2d 115, 119 (1979).

In *Walker*, the Court assumed without deciding that the student Handbook constituted a contract, but ruled that the provisions of the Handbook must be

interpreted in accordance with the "standard of reasonable expectation." Walker v. President & Fellows of Harvard College, 840 F.3d at 61. "Under this reasonable expectation standard, courts ask, in interpreting the contractual terms, 'what meaning the party making the manifestation, the university, should reasonably expect the other party [, the student,] to give it.'" Id. at 61, *quoting* Schaer v. Brandeis Univ., 432 Mass. 474, 735 N.E.2d 373, 378 (2000). *See, also,* Doe v. Brown Univ., 327 F.Supp.3d 397, 415 (D.R.I. 2018) (the terms of the contractual relationship between a student and university typically include language in the student handbook which must be interpreted in accordance with the parties' reasonable expectations, giving the terms the meaning that the university reasonably should expect the student to take from them).

Dartmouth College could not reasonably expect that students would read the student policies as requiring that 3,000 undergraduate students procure sufficient insurance to cover the type of catastrophic fire damage loss to a multi-million-dollar dormitory building as occurred in this case. Such a construction is unreasonable since it would result in "multiple insurance policies covering the same building, resulting in economic waste." Cambridge Mutual Fire Ins. Co. v. Crete, 150 N.H. at 675.[6] In fact, none of the Dartmouth College policies inform students that they are expected to procure fire insurance coverage for fire damage to residence halls. To the contrary, the policies applicable to insurance clearly reflect Dartmouth College's understanding that students are only responsible for insuring their own personal property.

For example, the Division of Student Affairs "Policy Statement" on "Insurance" which is included within the Student Handbook only addresses insurance coverage for personal property, automobile liability and foreign travel.

[6] For this reason, many construction contracts, such as standard AIA contracts, contain provisions expressly allocating the responsibility for maintaining insurance coverage for fire damage accompanied by waiver of subrogation provisions under which the parties waive all rights against each other for damages caused by fire or other causes of loss to the extent those losses are covered by property insurance required by the contract. *See*, Chadwick v. CSI, Ltd., 137 N.H. 515, 629 A.2d 820 (1993).

[App. Vol. II at 32-34] This policy states that "[s]tudents may have coverage available to them through their family's insurance program, or may elect to purchase their own personal insurance." [App. Vol. II at 32] The policy does not inform students of the need to maintain insurance coverage for damage to property other than their own personal belongings.

The Dartmouth College Office of Residential Life "Damage and Vandalism" Policy Statement addressing "Damage or Loss of Personal and College Property" states that "[t]he College does not assume responsibility or carry insurance for the loss of *personal property* within any of its residences due to vandalism, theft, fire, wind, flood, accidents, or other catastrophes" and that "[r]esidents of College housing are expected to provide adequate insurance coverage for all *personal property*." [App. Vol. II at 30-31] No mention is made of the need to procure insurance coverage for real property owned by Dartmouth College. Dartmouth College expressly assumed the obligation to "maintain its residences in good repair." [Vol. III at 201]

The student policies upon which Factory Mutual relies contain no references to insurance coverage for fire damage to the buildings. The lack of any reference to the need to procure insurance coverage is dispositive under *Crete*.

Furthermore, even under the inapplicable "case-by-case" approach the policies addressing student responsibility for damage to the buildings would not be sufficient because they only list reimbursement of the cost of damage as one of many possible sanctions that "may" – not "will" or "shall" - be imposed. Nor do the policies contain a specific reference to water damage such as occurred here. Construing the policies in accordance with the students' "reasonable expectations" and avoiding "construing the contract in a manner that leads to harsh and unreasonable results", the student policies do not adequately inform students of their potential exposure to the extent of liability which Factory Mutual seeks to impose on the plaintiffs in this case.

III. THE TRIAL COURT CORRECTLY RULED THAT STUDENTS RESIDING IN DARTMOUTH COLLEGE RESIDENCE HALLS HAVE A SUFFICIENT POSSESSORY INTEREST UNDER THE SUTTON DOCTRINE SUCH THAT THEY ARE COINSUREDS UNDER THE COLLEGE'S FIRE INSURANCE POLICY

A. The Possessory Interest Held By Students Residing In College Dormitories Is Analogous To The Possessory Interest Of Tenants Under A Lease Agreement

Factory Mutual's claim that the Sutton doctrine does not apply because students lack an "insurable interest" in college dormitories is based on semantics rather than the practicalities on which that doctrine was founded. In *Crete* this Court was persuaded by the reasoning that "when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners *including the possessory interests of a tenant* absent an express agreement by the latter to the contrary." Cambridge Mutual Fire Ins. Co. v. Crete, 150 N.H. at 675, *quoting* Sutton v. Jondahl, 532 P.2d at 482 (emphasis added). *See, also,* Lexington Ins. Co. v. Raboin, 712 A.2d 1011, 1015-1016 (Del. Super. 1998) (a clear majority of courts regard the parties as co-insured as a matter of law due in part to their respective insurable interests in the property – the landlord's interest in the fee and the tenant's possessory interest). Thus, a *possessory interest* analogous to that of an occupying tenant is sufficient to invoke the application of the anti-subrogation doctrine. Factory Mutual's position that in order for the Sutton doctrine to apply the plaintiffs must have held an "insurable interest" in the form of a pecuniary interest in the insured property beyond a mere possessory interest is simply not supported by the language or holding in *Crete*.

The rationale behind this Court's adoption of the Sutton doctrine clearly applies with equal force to college students residing in dormitories. Colleges

expect to have to insure their dormitory buildings against fire loss, insurers recognize that dormitories will be occupied by students and adjust their premiums accordingly, and colleges pass the cost of insurance coverage on to students by charging them the equivalent of rent as part of the "room and board" fees included in their tuition bills. It is not economical or feasible to require each student to insure against fire loss to a multi-million-dollar dormitory building.

This was precisely the rationale behind the decision in Endicott College v. Mahoney, Essex County Super. Ct., No. CA 00-589C, 2001 Mass. Super. LEXIS 401 (Oct. 3, 2001). As in this case, the defendant was a college student who was alleged to have negligently caused a fire in a college dormitory. Id. at *2. Travelers paid the first-party claim filed by Endicott College and then brought a subrogation action against the student. Id. at *1. The student moved for summary judgment arguing that he was an implied co-insured of the college. Id. at *2-3. Travelers argued that the "implied co-insureds" rule did not apply because no landlord-tenant relationship existed between the defendant and the college. Id. at *3. However, the court ruled that it was unnecessary to determine whether a college-student relationship constitutes a landlord-tenant relationship because it found that "the reasoning behind the co-insureds rule's application to the landlord-tenant context applies with equal force to this college student-resident relationship." Id. at *4. In particular, the court found that "[w]ith respect to the issue of fire liability … there are many similarities between the expectations, statutory rights, and obligations of a resident of a college dormitory and a residential tenant." Id. at *5. Like Dartmouth College, Endicott College recommended to students that they obtain insurance for their own personal property but did not require or even recommend that they obtain fire insurance coverage. Id. at *10.

The *Endicott* court concluded that "[t]he absence of a requirement to obtain fire insurance accompanied by an explicit recommendation regarding personal property insurance, coupled with the overly general liability clauses, create a

reasonable expectation on the part of students of non-liability for fire damage." Id. The absence of a policy expressly placing responsibility on students for fire loss was not the determining factor in that case. In fact, the court specifically ruled that equitable principles further support the conclusion that subrogation not be available to the insurance carrier because a student who enters into a residency agreement and makes tuition payments - a portion of which may be applied to insurance premiums - has "a *possessory interest* to reside in his dormitory for the duration of the academic year" and, therefore, should be considered a co-insured of the college. Id. at *11, *citing* Sutton v. Jondahl, 532 P.2d at 482 [emphasis added]. Furthermore, like tenants, college students have a reasonable expectation that, due to their contractual relationship with the college, the college's insurance policy will inure to their benefit. Id. at *12. The court concluded:

> The lack of a requirement by Endicott, that defendant obtain his own fire insurance, when read in conjunction with Endicott's explicit recommendation that defendant obtain personal property insurance, as well as Endicott not excluding defendant's tuition from its insurance policy premiums, creates a reasonable expectation on the part of defendant that he is a co-insured with Endicott.

Id. at *13. Since the student was an implied co-insured of the college, subrogation was not allowed and the court granted summary judgment in his favor. *See, also,* Federal Ins. Co. v. Commerce Ins. Co., 597 F.3d 68 (1st Cir. 2010) (viewing "Residence and Care Agreement" as a residential lease and applying Sutton doctrine to preclude subrogation against retirement community resident for fire damage).

In this case the trial court correctly ruled that students at Dartmouth College have a sufficient possessory interest so as to qualify as co-insureds under the Sutton doctrine.[7] Student occupancy of a dormitory is in many respects like a

[7] Interestingly, Factory Mutual argues that the Dartmouth College Student Handbook is analogous to a lease. *Appellant's Brief,* p. 19.

tenancy and entirely different from that of a hotel guest who typically lives out of a suitcase and stays for a limited number of reserved days.

Upon entering into a rooming contract with Dartmouth College, residential students agree to pay over $9,000 and in exchange are entitled to reside in a college residence hall for the entire academic year. [App. Vol. II at 171] In fact, the "Room Care and Furnishings" policy refers to board charges as "rent" and refers to students as "residents." [App. Vol. IV at 40] Anyone who has experienced college "move-in day" can attest to vast amount of personal belongings that students haul to campus on an annual basis. They bring clothing for the year and store it in closets and bureaus. They are allowed to leave their belongings in their rooms while away on breaks. Dartmouth College students are encouraged to decorate their rooms to make them feel like home. [App. Vol. III at 226-227] They are permitted to have guests in their rooms on a short-term basis. [App. Vol. III at 222-224]

College policies also protect the privacy rights of students in the occupancy of their rooms. Student rooms are separately locked and accessible only by a swipe card issued to the occupants. Other students are prohibited from entering their rooms without permission. [App. Vol. III at 210] College representatives are authorized to enter student rooms only for emergency or maintenance purposes accompanied by a note explaining the reason for the entry, or to make safety or condition inspections or to investigate probable violations of College regulations. [App. Vol. III at. 210-211] As Factory Mutual concedes, landlords also have the right to enter leased premises in order to make emergency repairs. *Appellant's Brief,* p. 34, *citing* RSA 540-A:3, III. Furthermore, the limitations placed on use of dormitory rooms, such as limiting the number of occupants, prohibiting permanent alterations, barring open flames, etc. are not at all unlike the type of restrictions landlords typically include in residential lease agreements.

Most importantly, however, the practicalities underpinning the Sutton doctrine – honoring the reasonable expectations of the parties regarding insurance

allocation and avoiding duplication of insurance coverage and economic waste - present the most compelling reason for the doctrine's application in the student-college context. Students contribute to insurance premiums through annual fees charged by the college for rooming and, as a result, have a reasonable expectation that the college will procure adequate fire insurance coverage to protect against catastrophic loss. It would be economically wasteful to require thousands of students to insure against fire loss to multi-million-dollar residence halls. Insurers such as Factory Mutual charge premiums that reflect the risk of insuring multiple buildings occupied by hundreds of 18-22-year-olds. Where, as in this case, the college specifically recommends to students that they insure their personal belongings and is silent as to coverage for damage to real property, it is irrational to presume that students would have any other expectation.

B. The Sutton Doctrine Applies To Preclude Subrogation Against College Students Living In Any Dormitory Owned And Insured By Dartmouth College

This Court should not consider Factory Mutual's argument that Ro is not a co-insured based on the fact that he did not reside in Morton Hall because that issue was not raised in Factory Mutual's Notice of Appeal and, therefore, was not properly preserved for appellate review. "An argument that is not raised in a party's notice of appeal is not preserved for appellate review." State v. Blackmer, 149 N.H. 47, 49, 816 A.2d 1014, 1016 (2003). This Court "will not review any issue addressed in the defendant's brief that [it] did not also raise in [its] notice of appeal." Id. Without waiving this objection, Ro will present his substantive arguments below in the event that the Court decides to address the question notwithstanding the preservation issue.

In ruling that Ro was a co-insured with respect to Morton Hall, the trial court correctly found that Ro's "possessory interest in Morton Hall is analogous to that of a tenant who rents one unit in a residential complex but causes fire damage to another unit in the complex." [Add. Vol. I at 59-60] In *Crete*, the "fire caused

extensive damage to the building." Cambridge Mut. Fire Ins. Co. v. Crete, 150 N.H. at 674. There is no indication that the damage was limited to the apartment occupied by the tenant or that the tenant was a coinsured only with respect to the portion of the premises that he leased. In fact, this Court noted that failure to adopt the *Sutton* doctrine would result in tenants "having to carry fire insurance for the *entire building* in which they rent, *regardless of the extent of their possessory interest* or lack of knowledge necessary to procure adequate coverage," thereby acknowledging that the tenant's co-insured status extends beyond the occupied unit. Id. at 675 [emphasis added].

Courts in other jurisdictions have consistently held that tenants are co-insureds not only with respect to the unit they occupy, but are also co-insureds as to other areas of multi-unit complexes even though they technically do not have a possessory interest in them. For example, in Buckeye State Mutual Ins. Co. v. Humlicek, 284 Neb. 463, 822 N.W.2d 351 (2012), a tenant in one unit of a duplex caused fire damage to both units due to the negligent disposal of smoking materials in the garage attached to the unit he occupied. Id. at 353. The duplex owner's insurer paid for the damage and then brought a subrogation against the tenant. The insurer argued that the tenant was not a co-insured with respect to the unit that he did not occupy. Id. at 352-353. The Court held that the Sutton anti-subrogation doctrine applied to bar subrogation against a duplex tenant as to both sides of the building. Id. at 357. The Court noted that "[l]ack of privity or lack of possessory interest does not preclude application of the per se rule in other jurisdictions when the fire damage is to another apartment unit in a multiunit building" despite the fact that the tenant of one apartment does not have a possessory interest in the unit leased by another tenant. Id. at 357-358. The Court found that a reasonable duplex tenant would not be on notice of the need to procure sufficient insurance to protect against fire loss to other units. Id. at 359. Absent an express agreement otherwise, insurers have no subrogation rights against tenants who negligently start fires since those tenants are considered

implied co-insureds whose rent presumably includes the cost of insurance. Id. The Court declined to adopt a rule that would protect the tenant from liability for damages to the occupied unit while leaving the tenant open to subrogation for damage to units occupied by others. Id.

See, also, Trinity Universal Ins. Co. of Kansas v. Cook, 276 P.3d 372 (Wash. App. 2012) (rejecting insurer's argument that the tenant was not an insured under the policy for those damaged portions of the building other than the tenant's own apartment for purposes of the anti-subrogation rule); Middlesex Mutual Assurance Co. v. Vaszil, 279 Conn. 28, 34, 900 A.2d 513, 517 (2006) (in the absence of an agreement to the contrary, to hold a tenant of a multiunit building liable in subrogation would be beyond the ordinary expectations of the parties and would amount to economic waste); Dattel Family Ltd. Partnership v. Wintz, 250 S.W.3d 883, 887-889 (Tenn. App. 2007) (applying Sutton doctrine to preclude subrogation against tenant for damage to parts of the apartment building beyond the occupied unit).

Ro's interest in Morton Hall is analogous to the interest of tenants in in multiunit apartment complex for purposes of the co-insured analysis. As a tenant of the complex, if a fire started, for example, in one building and moved on to another building, that tenant would still be a co-insured for the damage to the other building. All students at Dartmouth College enter into the same housing agreement and pay the same housing fee regardless of the residence hall to which they are assigned. Recognizing that students will not necessarily remain in an assigned room for an entire academic year, or even an entire semester, Dartmouth College has promulgated a number of student policies addressing the ability of students to ask for a change in room assignment, to seek a "room swap" or to request to be "pulled in" to the room of a fellow student. [App. Vol. II at 167-170; App. Vol. II at 171-174] This means that students pay a substantial housing fee for the right to reside in *a* dormitory room and not a *specific* room. The yearly housing fee billed to the student covers Dartmouth College's cost to provide living quarters for the

student somewhere on campus, including maintenance, heat, electricity and insurance, regardless of the particular dormitory in which the student happens to reside.

Furthermore, all of the dormitories are insured under a single policy issued by Factory Mutual. This, together with the uniform housing rate charged and the potential for fluidity in room assignments, negates the argument that Ro cannot be deemed a coinsured with respect to a dormitory which he did not occupy at the time of the fire. The trial court correctly ruled that Ro was a co-insured under the Factory Mutual policy just as tenants are co-insureds with respect to areas of a multiunit apartment complex.

IV. EQUITABLE PRINCIPLES DO NOT REQUIRE DISREGARD FOR THE ANTI-SUBROGATION DOCTRINE ADOPTED BY THIS COURT IN *CRETE*

Factory Mutual argues that because Ro and Lim violated the open flame policy and negligently caused the fire and resulting damage, equitable principles require that they should be held financially accountable via this subrogation action. In making this argument, Factory Mutual is implicitly asking this Court to disregard the Sutton doctrine contrary to well-established principles of *stare decisis*. *See*, Jacobs v. Director, Div. of Motor Vehicles, 149 N.H. 502, 504, 823 A.2d 752 (2003) ("The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results").

As the *Sutton* court recognized, although subrogation was designed to place the burden of bearing a loss "where it ought to be," it is not a "rigid rule of law" but instead is "a fluid concept depending upon the particular facts and circumstances of a given case for its applicability." Sutton v. Jondahl, 532 P.2d at 482. Furthermore, the burden of proving entitlement to subrogation is on the

subrogee, Factory Mutual. Wolters v. American Republic Ins. Co., 149 N.H. 599, 601, 827 A.2d 197, 200 (2003).

In virtually every case in which the *Sutton* doctrine is applied to preclude subrogation, including *Crete*, the tenant is alleged to have negligently caused the fire or other damage to the landlord's real property. The issue is not whether the tenant is at fault under common law or the terms of the lease, but whether the landlord's insurer should be allowed to subrogate against the tenant for the insured loss. This question is entirely dependent on whether the tenant – or in this case the students – are co-insureds under the Factory Mutual policy. Since Ro and Lim were co-insureds, subrogation is not permitted regardless of fault.

All courts adopting the Sutton doctrine recognize that tenants, or in this case students, are presumptive co-insureds of the property owner. Since insurers cannot subrogate against their own insureds, subrogation is not allowed in the absence of an express agreement to the contrary. As a result, whether or not the tenants or students also have their own liability coverage is irrelevant to the subrogation issue.[8] In fact, the vast majority of students will not have multimillion dollar insurance policies and in many cases may have no liability coverage at all. As a result, reversal of the trial court's decision will have far-reaching adverse consequences to unsuspecting college students and their parents who are already burdened with the exponentially rising costs of higher education.

In this case, Dartmouth College elected to submit the property damage claims to Factory Mutual and, from the remedies available to it under the student policies, chose to expel Ro and Lim. Dartmouth College paid substantial premiums to Factory Mutual and, presumably, Factory Mutual took into consideration the risk involved when it calculated the premiums. The cost of the

[8] Factory Mutual's reliance on Phoenix Ins. Co. v. Stamell, 21 A.D.3d 118, 796 N.Y.S.2d 772 (2005) is misplaced because the court in that case recognized that the majority of other states have adopted the antisubrogation rule barring insurers of landlords from seeking subrogation from tenants absent an express agreement in the lease to the contrary, but rejected that principle in favor of a rule requiring clear and unequivocal language exempting the student from the consequences of her own negligence. Id. at 778-779. That is not the law in this jurisdiction.

premiums was then passed on to the students through separate housing fees delegated specifically to cover costs associated with their use of the residence halls. Despite the fact that the Sutton doctrine has been the governing law in New Hampshire since 2004, Factory Mutual did not demand that Dartmouth College adopt policies requiring students to insure against catastrophic loss to campus buildings. Having elected to undertake the risk and through its acceptance of substantial premiums, Factory Mutual cannot reasonably take the position that it is inequitable for it to bear the loss.

This Court should be guided by the principles and public policy reasons behind its adoption of the Sutton doctrine in *Crete* and, keeping in mind the feasibilities of insurance allocation in the context of the college-student relationship, affirm the trial court's application of that doctrine to preclude subrogation in this case.

CONCLUSION

For the foregoing reasons the Plaintiff, Daniel Ro, respectfully requests that this Honorable Court:

A. Rule that the trial court correctly applied the "Sutton Doctrine" to this subrogation action;

B. Affirm the October 1, 2019 Order of the Merrimack County Superior Court granting summary judgment in favor of the plaintiffs/appellees, Ro and Lim, and denying the cross-motions for summary judgment filed by defendant/appellant, Factory Mutual;

C. Award attorney's fees and costs reasonably incurred by or on behalf of Ro and Lim in the pursuit of their declaratory judgment action under RSA 491:22-b, inclusive of fees and costs incurred in this appeal;

D. Award attorney's fees and costs to Ro and Lim pursuant to Supreme Court Rule 23; and

E. Grant such other relief as may be just and equitable.

ORAL ARGUMENT

Plaintiff Daniel Ro respectfully requests the opportunity to present a fifteen-minute oral argument before a full panel of the Supreme Court.

CERTIFICATION

I hereby certify that the Brief of Plaintiff/Appellee Daniel Ro complies with the 9,500 word limit set forth in Supreme Court Rule 16(11).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Plaintiff/Appellee will be served electronically on the following counsel of record:

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