THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0620

DANIEL RO, Plaintiff,
v.
FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGEE OF TRUSTEES OF DARTMOUTH COLLEGE, Defendant;

AND

SEBASTIAN LIM, Plaintiff,
v.
FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGEE OF TRUSTEES OF DARTMOUTH COLLEGE, Defendant.

MANDATORY APPEAL FROM ORDER OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT FACTORY MUTUAL INSURANCE COMPANY

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1. Are Dartmouth College's student policies, in particular the Open Flame Policy, "an express… provision that negates the presumption that the [Plaintiffs are] coinsureds of [Dartmouth College] for purposes of any fire insurance coverage" as provided in Cambridge Mut. Fire Ins. Co. v. Crete, 150 NH 673 (2004)? Appx. III at 21-26.

2. Did the Plaintiffs hold a possessory interest and right to control Dartmouth College residence hall rooms and right to exclude others in the same manner as a residential tenant that they would be considered coinsureds under Dartmouth College's fire insurance policy and preclude the Defendant, Factory Mutual Insurance Company, from pursuing its subrogation claim? Appx. III at 14-21.

3. Were the Plaintiffs licensees and provided with a revocable personal privilege to occupy Dartmouth College residence halls and, therefore, the anti-subrogation rule adopted in Cambridge Mut. Fire Ins. Co. v. Crete, 150 NH 673 (2004), does not apply to Defendant's subrogation claim? Appx. III at 17.

STATEMENT OF THE CASE AND MATERIAL FACTS

Factory Mutual Insurance Company ("Factory Mutual" or "Defendant"), an insurance company authorized to issue policies of insurance within the State of New Hampshire, issued a policy of insurance to the Trustees of Dartmouth College. Appx. III at 31-130.[1]

At all relevant times, Plaintiffs Sebastian Lim and Daniel Ro were students enrolled at Dartmouth College ("Dartmouth" or "College"). Appx. I at 9, 22. In September 2016, Plaintiff Sebastian Lim was a resident of Morton Hall residence hall and Plaintiff Daniel Ro was a resident of the Smith Hall residence hall, both of which are located on the Dartmouth College campus. Appx. I at 22 and 162. As a condition precedent to residing on Dartmouth College's campus, the Plaintiffs were required to review the Dartmouth College Student Handbook ("Student Handbook") and attest that they understood and accepted the terms of the policies therein.

The Student Handbook contains several policies prohibiting students from possessing charcoal grills in residence halls, lighting any item with an open flame, being present or placing items on any roof connected to any campus building and causing damage to Dartmouth College property.

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[1] Citations to the record are made as follows:
"Add." refers to the Addendum included with this brief;
"Appx." refers to Appendix;
"MH" refers to the transcript of motion hearing held on September 4, 2019.

For instance, the Open Flame in Residence Halls Policy ("Open Flame Policy"), prohibits students from "lighting and burning of candles, incense, or any other item with an open flame" in residence halls. Appx. III at 189-190. Violation of this Policy can "result in a $100 fine, **assessment of the cost of any repairs associated with damage caused by the open flame,** and/or disciplinary action which may include immediate removal from the residential facility." Id. (emphasis added).

The Roofs and Fire Escapes Policy, provides that "[s]tudents who are present on the roof, portico, fire escape, or any other architectural feature not designed for recreational or functional use will be subject to fines of $100 each, **assessments for any damage**, and possible disciplinary action if the student presence is not caused by a valid emergency." Appx. III at 196. (emphasis added). This Policy also prohibits the placing of "any items on a roof, portico, fire escape, or similar locations." Id.

In addition, the College's Room Care and Furnishings Policy prohibits the possession of "[e]lectric, propane gas or charcoal grills" in residence halls, including Morton Hall. Appx. III at 201. Violation of the Policy "can subject the occupant(s) of the room to a $50 fine and possible disciplinary action." Appx. III at 200.

The Student Handbook further provides in the Damage and Vandalism Policy, that "[r]esidents who are found responsible for damage will be liable for any damage and/or loss to a residential facility or its furnishings and may face disciplinary action through the Residential Life judicial process" and "[w]henever possible, **repair or replacement costs will be assessed to the individual(s) responsible**." Appx. III at 193-194 (emphasis added).

The Office of Residential Life Judicial Process and Sanctions Policy, as set forth in the Student Handbook, makes clear that "**[r]esidents who cause damage or vandalize College property will typically be expected to pay restitution**." Appx. III at 230 (emphasis added). Similarly, the Committee on Standards at Dartmouth College may assess restitution, among other sanctions, against a student found to be in violation of student policies. Appx. III at 205.

Plaintiffs Sebastian Lim and Daniel Ro represented that they read, understood and accepted the terms of the Student Handbook by electronic submission on March 28, 2016 and May 2, 2016, respectively. Appx. III at 183-184, 186-187. Thus, the Plaintiffs were well aware that they were strictly forbidden from possessing, let alone using, charcoal grills while in Dartmouth College residence halls; using an open flame; accessing any building roofs and causing damage to

Dartmouth College property. Plaintiffs also knew that violating these policies could result in any number of sanctions, including but not limited to, assessment of damages incurred as a result of their misconduct.

Notwithstanding their keen awareness, around 10:00 p.m. on or about September 31, 2016, the Plaintiffs entered room 401 in Morton Hall with the intent of grilling hamburgers on a charcoal grill. Appx. III at 161. In a complete disregard to the Student Handbook, the Plaintiffs set up a charcoal grill on a small section of the roof immediately outside the dorm room window. Id. Plaintiffs then attempted to light the charcoal grill using a charcoal chimney and lighting paper on fire. Id. During that time, another student in Morton Hall knocked on the door to room 401 and inquired if the Plaintiffs smelled a burning paper odor. Id. Plaintiff Lim denied having knowledge of the source of the smell. Id. The student advised the Plaintiffs that she contacted a residential advisor that would likely be visiting to investigate. Id. Shortly thereafter a residential advisor made a similar inquiry to Plaintiff Lim, who, once again, lied about having knowledge of the source of the smell. Id. Before cooking on the grill, Plaintiffs abandoned their plan to cook hamburgers, poured water on the charcoal that they had ignited, abandoned the grill on the roof, and left Morton Hall. Id.

At 12:05 a.m. on October 1, 2016, the Hanover Fire Department received an alarm of a fire at Morton Hall. Appx. III at 169. From the time that Plaintiffs abandoned the grill to the time the Fire Department arrived, the fire spread across the roof, above the fire sprinkler system, and caused substantial damage to Morton Hall. Appx. III at 175-178. The Fire Department fought the fire for over four hours. Appx. III at 169. The immense amount of water used to fight the fire caused significant damage throughout the building. Appx. III at 175-176. As a result of the fire the Plaintiffs caused at Morton Hall, Factory Mutual paid its insured, the Trustees of Dartmouth College, $4,544,313.55. Appx. I at 10, 22.

During the investigation into the cause of the Morton Hall fire, the Plaintiffs made separate statements to the Hanover Police Department, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the New Hampshire State Fire Marshall admitting that they were responsible for the fire. Appx. III at 163. As a result of them knowingly violating numerous school policies and causing a fire that resulted in substantial damage to the College, Plaintiffs were expelled from the College. Following their expulsion, Plaintiffs petitioned the College to allow them to remain enrolled. Appx. III at 181. In doing so, Plaintiffs admitted to the "horrible mistake" they made, agreed "to accept the

consequences" of their actions, and publicly apologized for "caus[ing] the Morton Fire." Id.

Following its $4,544,313.55 payment to the Trustees of Dartmouth College for the damage resulting from the Morton Hall fire, Factory Mutual sought recovery of its claim payment from the Plaintiffs' liability insurers. Appx. I at 9, 22. Notwithstanding the Plaintiffs' aforementioned admissions, Plaintiffs filed separate petitions under R.S.A. 491:22 seeking declaratory judgment that they are coinsureds under the insurance policy Factory Mutual issued to the Trustees of Dartmouth College and, therefore, that Factory Mutual's claims for recovery are barred by the anti-subrogation rule, as adopted in Cambridge Mutual Fire Insurance Company v. Crete, 150 NH 673 (2004). Appx. I at 9, 21. Factory Mutual asserted counterclaims of negligence and breach of contract against the Plaintiffs in connection with the damage to Morton Hall. Appx. at 42-47, 58-63.

Proceedings on Factory Mutual's counterclaims were stayed pending a determination on the Plaintiffs' petitions. The parties filed motions for summary judgment asserting their positions relative to the Plaintiffs' petitions, specifically whether the anti-subrogation rule adopted in Crete applied to Factory Mutual's claim. A motion hearing was held on September 4, 2019. On October 1, 2019, the Superior Court allowed Plaintiffs' motions for summary judgment and denied

Factory Mutual's motion, finding the Plaintiffs held a possessory interest and control over their residence hall rooms and are coinsureds under the insurance policy issued to the Trustees of Dartmouth College. Add. at 58. The Superior Court also held the policies contained within the Student Handbook cannot be construed as an agreement to exclude the Plaintiffs from the College's insurance policy. Id. Factory Mutual filed the present appeal concerning that Order.

SUMMARY OF ARGUMENT

Dartmouth College student policies provide "express agreement[s] or provision[s] that negate[] the presumption that [the Plaintiffs are] coinsured[s] of the [College] for purposes of any fire insurance coverage on the leased premises." Cambridge Mut. Fire Ins. Co. v. Crete, 150 NH 673 (2004). Specifically, the Open Flame in Residence Halls Policy provides that violations "may result in… assessment of the cost of any repairs associated with damage caused by the open flame…" Appx. III at 190. This Policy, as well as the numerous other policies throughout the Student Handbook, unmistakably allocates liability for fire damage caused by policy violations to the Plaintiffs. Plaintiffs expressly agreed to abide by said policies and take responsibility for any damages – including costs to repair fire damage – resulting from their violations of the same. By agreeing to take responsibility for any damage caused by their misconduct, Plaintiffs did not, and could not, reasonably believe they were coinsureds under Dartmouth College's insurance policies. Notwithstanding the plain terms of Dartmouth College's student policies, all of which Plaintiffs agreed to abide by, the Superior Court applied the anti-subrogation rule in such a way to essentially render the terms of those policies meaningless. This interpretation by the court was in error, as an objective view of the agreement between the Plaintiffs and Dartmouth

College makes the opposite abundantly clear: that is, that the Plaintiffs were not coinsureds under Dartmouth College's insurance policies, but instead, would be solely responsible for any damages caused by their violations of College policies. The holding of the Superior Court should, therefore, be reversed.

The reasoning in Crete is equally inapplicable to the Plaintiffs as college students residing in a college residence hall because the manner of occupancy is distinguishable from that of a residential tenant. Different from a residential tenant, the residence hall rooms Dartmouth College offers to enrolled students is a revocable privilege conditioned upon the students maintaining minimum academic standards, abiding by student policies, and paying room and board fees. Unlike that of a residential tenant, Plaintiffs lack the ability to exclude others from their assigned rooms. Their use of residence hall rooms is also subject to restrictions that are not present in a residential tenant setting, such as limiting the frequency and duration of visitors and prohibiting possession of certain items. In addition, unlike a residential tenant, Plaintiffs can be reassigned to different rooms at the sole discretion of Dartmouth College. Moreover, Plaintiffs, having no ability to control Dartmouth College property or exclude others from their assigned rooms, do not hold any possessory or other insurable interest in the residence hall

which would support holding they are coinsureds under the Factory Mutual's insurance policy. This is particularly true of Plaintiff Ro, who did not reside in Morton Hall at the time of the fire. This alone requires reversal of the Superior Court's Order.

Finally, the basic principles of equity that are the foundation of this Court's reasoning in Crete favor Factory Mutual's claim. When agreeing to issue an insurance policy to the Trustees of Dartmouth College, Factory Mutual understood that the student policies prohibited possession of charcoal grills and use of candles or other open flames in residence halls. Factory Mutual also understood that the policies held the students responsible and provided the College with recovery of damages if damage was to occur. Similarly, before Plaintiffs were assigned rooms in Dartmouth College's residence halls, they affirmed that they read and understood these student policies – including that they would be responsible for damage caused by use of an open flame. Thus, when engaging in a course of conduct that violated several student policies and caused substantial damage to Morton Hall, they did so understanding that Dartmouth College could seek restitution for damage they caused. The interests of equity and justice require Plaintiffs to provide restitution and justify reversal of the Superior Court's Order.

ARGUMENT

I. Dartmouth College's Student Handbook is an Express Agreement that Places Responsibility for Fire Damage Caused by Policy Violations on the Plaintiffs.

i. The Student Handbook is a contract, to which Plaintiffs agreed, that allocates liability for fire damage to the Plaintiffs.

As a lease is a contract between a landlord and tenant, the Dartmouth College Student Handbook is a binding contract between the Plaintiffs and Dartmouth College. Gamble v. Univ. Sys. of New Hampshire, 136 N.H. 9, 12 (1992) (agreement between student and college is governed by contract principles); Walker v. President & Fellows of Harvard Coll., 840 F.3d 57, 61 (1st Cir. 2016) (court accepts assumption that a student handbook sets of the terms of a contract between the student and institution). Indeed, the Student Handbook itself makes it clear that it is a legally binding contract:

> *College residence policies (residential life/ undergraduate-housing/housing-policies) and terms become legally binding when either you receive your room assignment notification or you are notified verbally of your assignment by a*

Residential Life official, unless you cancel the assignment in writing. Appx. III at 235.

Furthermore, in exchange for their occupancy at Dartmouth College residence halls, the Plaintiffs agreed to comply with the policies set forth in the Student Handbook. Appx. III at 183-187. The Student Handbook made it clear that violation of the policies contained therein could result in expulsion, suspension, fine and/or restitution, among other sanctions. Appx. III at 205-207. Upon submitting their electronic signatures and receiving their room assignment, the students became bound by the Student Handbook and agreed to abide by the policies contained therein. Thus, the Student Handbook is a legally binding agreement between Dartmouth College and the Plaintiffs that should be interpreted and applied to its full force and effect. As set forth below, the plain, unambiguous terms of the Student Handbook holds Plaintiffs responsible for fire damage caused by violations thereof, including the damage to Morton Hall.

ii. <u>The Open Flame in Residence Halls Policy expressly allocates liability for fire damage to the Plaintiffs.</u>

In <u>Cambridge Mut. Fire Ins. Co. v. Crete</u>, 150 N.H. 673, 675 (N.H. 2004), this Court adopted the "rule for residential

leases" set forth in Sutton v. Jondahl, 532 P.2d 478 (Okla.Ct.App. 1975), which provides that an insurer has no right of subrogation against a residential tenant whose negligence causes fire damage to leased property, absent a lease provision placing liability on a tenant for the fire damage. Crete, 150 N.H. at 675. The Court recognized that "[i]t is permissible under the Sutton doctrine, however, for a landlord and tenant to enter into an express agreement or lease provision that would place responsibility for fire damage upon the tenant." Crete at 676. The Student Handbook is such an agreement.

This Court applies an objective standard of interpretation of contractual terms; placing a reasonable person in the position of the parties and interpreting a disputed term according to what a reasonable person would expect it to mean under the circumstances. Gamble, 136 N.H. at 13 (citing Goodwin Railroad, Inc. v. State, 128 N.H. 595, 602 (1986)); N.A.P.P. Realty Trust v. CC Enterprises, 147 N.H. 137, 140 (2001). "In applying the objective standard, a court should examine the contract as a whole, the circumstances surrounding execution and the object intended by the agreement, while keeping in mind the goal of giving effect to the intention of the parties." Foundation for Seacoast Health v. HCA Health Servs. of New Hampshire, Inc., 157 N.H. 487, 501 (2008), citing N.A.P.P. Realty Trust, 147 N.H. at 141.

The Open Flame Policy contained in the Student Handbook prohibits the "burning of candles, incense, or any other item with an open flame… in residence halls," and expressly provides that "violations may result in … **assessment of the cost of any repairs associated with damage caused by the open flame**…" Appx. III at 189-190 (emphasis added). This Policy makes it abundantly clear that Plaintiffs can be held liable for damage resulting from violating the Policy, including damages resulting from negligently caused fires when burning an item with an open flame.

In Crete, the insurer argued that the lease between its insured and the defendant allocated liability to the defendant for any fire damage caused by his negligence. Crete, 150 N.H. at 676. The relevant paragraph of the lease read:

> Tenant must take good care of the Leased Premises and all equipment and fixtures contained therein. Tenant 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. If Tenant fails to make a needed repair or replacement, Landlord may do it and add the expenses to the rent. Id.

This Court found that the above provision did not sufficiently place responsibility of negligently caused fire damage upon the tenant. Id. Unlike here, the provision "does not address the specific issue of the tenant's liability for fire damages caused by the tenant's negligence; thus, it is not an express agreement or provision that negates the presumption that the tenant is a coinsured of the landlord for purposes of any fire insurance coverage on the leased premises." Id. Plaintiffs' reliance on the Massachusetts Superior Court case of Endicott College v. Mahoney, No. 00-589C, 2001 WL 1173303 (Mass. Super. Oct. 3, 2001) does nothing to change this result. Rather, the relevant student policy in Endicott provided that "the student resident will be 'directly and financially responsible for keeping the room and its furnishings clean and free from damage' and that he or she 'agrees to pay charges when assessed for room damages....'" Id. at 2. Similar to Crete, the Endicott trial court found that these provisions lacked "language specifically establishing fire damage liability, [and that] the Agreement does not by itself, impose fire damage liability on defendant." Id. Neither the lease in Crete nor the student policy in Endicott specifically addressed liability for fire damage. In contrast, here, the Open Flame Policy expressly "address[es] the specific issue of the [Plaintiffs'] liability for fire damages caused by the [Plaintiffs'] negligence." Appx. III at 189-190. Accordingly, the

Student Handbook, which directly prohibits using any form of an open flame in residence halls, and addresses the specific issue of the Plaintiffs' liability for fire damages caused by their negligence, unequivocally and expressly provides that Plaintiffs can be responsible for the costs of repair resulting from the same. Holding otherwise, as the Superior Court has done, strips Dartmouth's policies from having any force or effect and greatly expands the holding declared in Crete by requiring that a policy include something more than addressing liability for fire damage, without providing any guidance as to what.

iii. Plaintiffs could not reasonably believe that they would not be responsible for the cost of the fire damage caused by violating the Open Flame Policy.

The Student Handbook states that Plaintiffs may be assessed damages caused by an open flame, expressly allocating liability to students violating the policies therein. The Superior Court placed particular emphasis on the Open Flame Policy's use of the word "may" rather than "shall". Add. at 60-61. The court reasoned that by stating the Plaintiffs "may" be assessed damage caused by an open flame, there was no "explicit" agreement that the Plaintiffs are not considered coinsureds under Dartmouth College's insurance policies. The court recognized the Open Flame Policy provides

that Plaintiffs may be assessed the cost of repairing damage caused by an open flame and circumstances exists where they would be liable for such damages. Nevertheless, the court held Plaintiffs are coinsureds under Dartmouth College's insurance policy because the Policy does not expressly list out the situations when students would be liable. This reasoning runs afoul to the plain language of the Policy, is inconsistent with this Court's holding in Crete and contradicts the well-established meaning, interpretation, and use of the word "may."

By holding the Plaintiffs may not be held liable for the damage to Morton Hall, the Superior Court has altered the express language of the Open Flame policy to say "may not" rather than "may." The word "may" in place of the word "shall" has generally been recognized by courts as an indication of discretion or permission. Appeal of Peirce, 122 N.H. 762, 765 (1982); Simpson Dev. Corp. v. Herrmann, 155 Vt. 332, 334 (1990); O'Rourke v. Lunde, 197 Vt. 360, 366 (2014); Com. v. Dalton, 467 Mass. 555, 558 (2014). By using the word "may" in its Open Flame Policy, Dartmouth College reserved the right to impose the sanctions of "a $100 fine, assessment of the cost of any repairs associated with damage caused by the open flame, and/or disciplinary action…" Appx. III at 190. Assessment of the cost of repair is one of the many sanctions the Policy provides. The express retention of

discretion more than provides Plaintiffs with notice of the fact that they can be held responsible for the costs of repairing fire damage, in addition to other sanctions when they violate the Policy. This discretion does nothing to alter the Policy's express allocation of liability to the Plaintiffs, but instead, unequivocally places responsibility for costs associated with fire damage on the Plaintiffs. This language effectively negates any presumption under Crete that the Plaintiffs are coinsureds under Dartmouth College's insurance policies. The Plaintiffs cannot, on one hand, be assessed the cost of repairing fire damage and, on the other hand, be a coinsured under Dartmouth College's insurance policy.

Through its claim payment, Factory Mutual obtained the subrogated right of Dartmouth College to seek restitution from the Plaintiffs violating the Student Handbook and causing damage to Morton Hall. Wolters v. Am. Republic Ins. Co., 149 N.H. 599, 601 (2003). The Superior Court's Order denying Factory Mutual's right under the Open Flame Policy should, therefore, be reversed.

iv. Various other policies within the Student Handbook make clear that the Plaintiffs could be responsible for any damage resulting from violations thereof.

In addition to the Open Flame Policy, several other policies within the Student Handbook make it clear that

Plaintiffs can be responsible for damages resulting from the violations thereof. To begin, the Room Care and Furnishings Policy prohibits possession of a charcoal grill in a resident hall. Appx. III at 199-201. The Roofs and Fire Escapes Policy prohibits students from accessing or utilizing any roofs connected to campus buildings. Appx. III at 196. Each of these policies, in addition to the aforementioned Open Flame Policy, sets forth the possible sanctions that can result from violations, including assessments for any damage caused. Appx. III at 190, 196, 200. Notably, Dartmouth College's Damage and Vandalism Policy provides that students "assume any and all liability for damage or claims that result from their own negligence, as well as any negligence of visitors or guests." Appx. III at 193. The Damage and Vandalism Policy also states, "[w]henever possible, repair or replacement costs will be assessed to the individual(s) responsible." Appx. III at 194.

In addition to the sanctions stated within each individual policy, the Student Handbook also includes separate clauses that set forth the possible sanctions for policy violations. For example, the Judicial Process and Sanctions Policy enumerates sanctions that are normally issued. Appx. III at 230. Included among the sanctions is: "Restitution: Residents who cause damage or vandalize College property will typically be expected to pay restitution."

Id. In the Committee on Standards Conduct Sanctions Policy, students are informed that they can be subject to "[f]ines of up to $100 … in addition to the costs of restitution[.]" Appx. III at 205.

At numerous times throughout the Student Handbook, which the Plaintiffs certified they read and understood, Plaintiffs were unequivocally informed of their accountability for fire damage they cause by their own negligence and violations of student policies. An objective review of the Student Handbook makes it clear that the Plaintiffs would be held liable for negligently caused fire damage when violating those policies and any alleged belief to the contrary is disingenuous at best.

v. Plaintiffs acknowledge that the Student Handbook makes them responsible for all damages resulting from their misconduct.

What is more, Plaintiffs have admitted that they should be held responsible for any damages resulting from their misconduct. Plaintiffs were expelled from Dartmouth College as a result of causing the Morton Hall fire. Following their expulsion, the Plaintiffs started a petition seeking readmission to the College. Appx. III at 181. In doing so, Plaintiffs recognized they "made a horrible mistake and are willing to accept the consequences." Id. At this time, Plaintiffs were well aware that the consequences for

possessing a charcoal grill in a residence hall, placing it on a roof, using an open flame, and causing significant damage to Dartmouth College's property included payment of restitution of the cost of repair.

The purpose of subrogation is "to place the responsibility where it ultimately should rest by compelling payment by the one who 'in good conscience ought to pay it.'" Sec. Fence Co. v. Manchester Fed. Sav. & Loan Ass'n, 101 N.H. 190, 192 (1957) (quoting Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 171 (1954)). Responsibility for the Morton Hall fire properly rests upon the Plaintiffs due to their violations of several Dartmouth College policies that provide for recovery of costs of repair.

The Superior Court's Order should be reversed to give Dartmouth College policies the same force and effect as they are plainly understood and to become consisnt with the allocation of liability for fire damage set forth in Crete. By preventing Factory Mutual to pursue its subrogation claim, the student policies are inconsequential after violations occur and Plaintiffs' liability insurers obtain a windfall judgment.

II. The Superior Court Adopted a More Stringent Standard of an Express Provision Allocating Liability for Fire Damage than Permitted Under Crete.

Plaintiffs argued before the Superior Court that the language of the Open Flame Policy does not explicitly state

that students are not considered coinsureds under Dartmouth College's fire insurance policy and does not instruct students to obtain fire insurance for residence halls. Appx. II at 17; IV at 11-12. During the hearing on the parties' motions for summary judgment, Plaintiffs' counsel argued that Crete required the Open Flame Policy to specifically address the issue of insurance. MH at 9. This is a narrow application of Crete that is neither supported by the Sutton decision, nor this Court's application of the Sutton decision. This Honorable Court stated, "[a]bsent **an express agreement in a residential lease that places liability upon the tenant** for the tenant's own negligence in causing a fire, however, the tenant is considered a coinsured and is not obligated to subrogate the landlord's insurer." Crete, 150 N.H. at 676 (citing Sutton, 532 P.2d at 482) (emphasis added).

If an agreement states a tenant is not considered a coinsured under the landlord's fire insurance policy or explicitly requires a tenant to obtain fire insurance for the leased premises, then it has satisfied allocation of liability for fire damage identified in Crete. These statements, however, are not exclusive. Placing liability for fire damage upon a tenant can be achieved using other terms and phrases that reasonably advise a tenant that they may have liability for negligently caused fires and are not covered under the landlord's insurance policy. As set forth above, Dartmouth

College's numerous student policies achieve this purpose and negate any presumption that the Plaintiffs are insured under the College's fire insurance policy. Furthermore, under the facts of this case, it does not logically follow that Dartmouth College would expressly state a student is not a coinsured under its fire insurance policy because they have no insurable interest in College property.

In seeking coinsured status under Dartmouth College's insurance policy, Plaintiffs rely upon a webpage from the College's Risk and Control Services Department which details the property insurance that is maintained by the college. MH at 5 & 10. To be clear, the webpage cited by the Plaintiffs is not a policy of Dartmouth College and not contained within the Student Handbook. The page is for informational purposes only and does not contain terms of the agreement between the Plaintiffs and Dartmouth College. The page is also only a single reference to risk management on Dartmouth College's website. The College also provides information concerning risk assessment and control activities, including establishing policies and procedures to address risks to Dartmouth College's mission, like the Open Flame Policy. The Risk and Controls Insurance information does not alter the agreement between the Plaintiffs and Dartmouth College, which effectively allocates liability for the Morton Hall fire to the Plaintiffs.

The Superior Court's Order denying Factory Mutual's right of subrogation imposes something more than an express agreement allocating liability for fire damage to the Plaintiffs, as this Court permitted in Crete. In truth, permitting Factory Mutual's subrogation claim against the Plaintiffs is consistent with the Crete decision because the Student Handbook provides the allocation of liability. For these reasons, this Honorable Court should reverse the Superior Court's Order and allow Factory Mutual's counterclaims against the Plaintiffs to proceed.

III. The Anti-Subrogation Rule Adopted in Crete is Inapplicable to College Residence Halls Because Students Do Not Hold Insurable Interest in, but Only have a License to Occupy, College Residence Halls.

i. Plaintiffs did not hold any insurable interest covered under Factory Mutual's insurance policy and, therefore, the Sutton Doctrine does not apply.

When adopting the Sutton Doctrine in New Hampshire, this Honorable Court cited the reasoning that "[b]asic 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." Crete, 150 NH at 675 (quoting Sutton 532 P.2d at 482). The Sutton court's determination that a tenant is considered a coinsured of a landlord was "derived from a recognition of a relational reality, namely, **that both landlord and tenant have an insurable interest in the rented premises—**the former owns the fee and the latter has a possessory interest." Sutton, 532 P.2d at 481 (emphasis added). Absent an insurable interest, the equitable principles underlying the anti-subrogation doctrine do not exist.

Here, Plaintiffs held no interest in Morton Hall or Dartmouth College property in which to insure. This Court has defined an insurable interest "[a]ny interest of pecuniary benefit from the existence of the property insured or of pecuniary loss from its destruction is sufficient." Daeris, Inc. v. Hartford Fire Ins. Co., 105 N.H. 117, 119 (1963) (quoting Clark v. Aetna Insurance Co., 87 N.H. 353, 354 (1935)). Plaintiffs' occupancy of Morton Hall was incidental to their enrollment in undergraduate studies at Dartmouth College. They derived no pecuniary benefit from the continued existence of Morton Hall. Further, Plaintiffs experienced no loss from its destruction. The students displaced by the Morton Hall fire were relocated to other student housing or properties leased by Dartmouth College. To the extent Plaintiffs suffered any loss, such loss arises from their negligent conduct and violation of student policies, not their

relationship to the property of Dartmouth College. This loss is covered by Plaintiffs' general liability policies for losses attributable to their negligence. Dartmouth College's insurance policy, on the other hand, provides coverage for real property, personal property, and business interruption losses. The Plaintiffs hold no insurable interest that is covered under the College's policy and, therefore, cannot be considered coinsureds under that policy.

ii. The Sutton Doctrine is also inapplicable because Plaintiffs did not hold a possessory interest in Morton Hall.

The particular insurable interest identified by this Court in Crete, and by the Sutton court, was a possessory interest in residential property. A possessory interest allows one the right to occupy or control a plot of land or space, but it does not encompass ownership of that land or space. A possessory interest in property includes the right to exclude others. Bell v. Town of Wells, 557 A.2d 168, 178 (Me.1989) ("If a possessory interest in real property has any meaning at all it must include the general right to exclude others."). Under a typical residential landlord-tenant lease "[n]o landlord shall willfully enter into the premises of the tenant without prior consent, other than to make emergency repairs." See R.S.A. 540-A:3, IV. It is this possessory interest that forms the basis of a tenant's expectation to be insured under a landlord's fire

insurance policy and, thus, considered a coinsured under that policy.

As illustrated by Dartmouth College's Student Handbook, Plaintiffs lack any possessory interest in Morton Hall or any other College property. Dartmouth College's Room Entry by College Employees Policy permits Dartmouth College to "enter and to inspect any student room at any time without permission or consent of the room occupants." Appx. III at 210-211. The Changing a Room Assignment Policy prohibits students from reassigning, transferring or subletting their assigned dormitory room to any other person or entity. Appx. III at 213-214. Dartmouth College retains the sole right to re-designate dormitory room capacity, fill vacancies in any partially occupied room, and move students to different dormitory room. Id. Having no ability to exclude others from their assigned rooms or prevent Dartmouth College from transferring them to different rooms altogether, Plaintiffs' occupancy is fundamentally different from that of a residential tenant.

Plaintiff Ro, assigned to a room in Smith Hall, relied upon Dartmouth College's ability to transfer him to a different room or residence hall as a basis for claiming he is coinsured with respect to any residence hall on campus. Appx. II at 22-23. Ro argues that he is a co-insured with respect to any building covered by Dartmouth College's insurance policy

because of his ability to be transferred to various rooms on campus. Id. This position, adopted by the Superior Court, is contrary to the reasoning in Crete and provides expansive immunity to a college student causing a fire on Dartmouth College's campus. Dartmouth College insures numerous properties under the insurance policy issued by Factory Mutual. Appx. II at 150-159. The buildings insured include residence halls and academic, athletic, and administrative buildings on the main campus. There are also many insured buildings in the Towns of Etna and West Lebanon that are not connected to the main campus. Id. If the Plaintiffs' position is adopted and the Superior Court's Order is not reversed, students residing in residence halls would be completely immune from liability for negligently caused fires, no matter how egregious, in any of these properties. This overreaching application of Sutton is not supported by the Court's reasoning in Crete. Instead, allowing Factory Mutual's subrogation claims to proceed recognizes the logical bounds of the Sutton reasoning to buildings where the Defendant holds an insurable interest.

When allowing Plaintiffs' motions for summary judgment, the Superior Court incorrectly held that the Plaintiffs had a right to exclude others from their assigned residence hall rooms and that Dartmouth staff provided advance notice before entering a dormitory. Add. at 59. This

holding is contrary to the record. Rather, the Room Entry by College Employees Policy specifically allows college employees to enter student rooms without notice or consent of the students. Appx. III at 210. There is nothing within the record to even suggest advance notice is required. Moreover, under the Changing a Room Assignment Policy, Plaintiffs are unable to exclude other students that are transferred into their rooms by Dartmouth College. Appx. III at 214-215. Dartmouth College also reserves the right move Plaintiffs to a different residence hall room or remove them from College housing when it believes it is in the College's best interests to do so. Id.

Plaintiffs' occupancy at Dartmouth College is also limited by rules and regulations that are not seen in residential landlord-tenant lease agreements, further demonstrating the difference between their tenancy and that of a residential tenant. Not only does the College have the sole discretion to enter and reassign the students' rooms, it can limit the frequency and duration students may have visitors or guests in their residence hall rooms. Appx. III at 222. Students may not have guests for more than three days and two nights during a two-week period. Id. The College also restricts the personal property students may bring into a residence hall vis-a-vi its Room Care and Furnishings Policy, which prohibits possession of certain items such as space

heaters, cooking appliances, certain lamps, charcoal and propane grills, and lighting of candles, incense or other items with an open flame. Appx. III 199-236. The College also has the right to govern the conduct of students while residing in its halls. Unlike a residential lease agreement, the Residential Behavior Policy closely governs the conduct of students and their guests in residence halls and makes continued occupancy of Dartmouth College residence halls conditional upon compliance with the College's Standards of Conduct. Appx. III at 218-219. In addition, unlike a residential tenant, the manner in which students can decorate their rooms is also regulated by the College via its Room Decorations Policy. Appx. III at 226-227. Finally, the Open Flame Policy prohibits lighting of candles, incense or other items with an open flame in residence halls. Appx. III at 189-190. The policies appurtenant to residence hall assignments demonstrate Dartmouth College maintained control and possession of its property in a manner fundamentally different from a residential tenancy.

"In any lease, along with the tenant's possessory interest, the law implies a covenant of quiet enjoyment, which obligates the landlord to refrain from interferences with the tenant's possession during the tenancy." Echo Consulting Servs., Inc. v. N. Conway Bank, 140 N.H. 566, 568 (1995). This right to quiet enjoyment is not possessed by the Plaintiffs

as occupants of Dartmouth College owned student housing and further distinguishes their occupancy from that of a residential tenant.

Dartmouth College's student policies reveal that Plaintiffs lacked control over their assigned residence hall room in the same manner of a residential tenant. Despite this, the Superior Court incorrectly held the Plaintiffs controlled their residence hall rooms in substantially the same manner as a residential tenant. Add. at 59. The court erroneously reasoned the Plaintiffs had a possessory interest in the residence hall room because they could inhabit the room, store their personal belongings, invite guests, use utilities and decorate. Add. at 59. However, the factors relied upon by the Superior Court in finding a possessory interest fails to recognize that the Plaintiffs' occupancy is closely controlled by Dartmouth College. These factors are also not determinative of holding a possessory interest and are observed even when no possessory interest is present.

The Plaintiffs' interest, if any, is akin to that of hotel guests, which have been recognized to not have a possessory interest in the property. Several jurisdictions have recognized the distinction between a tenant and a hotel guest on the basis that a tenant "acquires an interest in the real estate and has the exclusive possession of the leased premises, whereas the guest acquires no estate and has mere

use without the actual or exclusive possession." Young v. Harrison, 284 F.3d 863, 868 (8th Cir. 2002) (citing Coggins v. Gregorio, 97 F.2d 948, 950 (10th Cir.1938)); Marden v. Radford, 229 Mo.App. 789, 84 S.W.2d 947, 955 (1935); Green v. Shoemaker & Co., 111 Md. 69, 73 A. 688 (1909); Linwood Park Co. v. VanDusen, 63 Ohio St. 183, 58 N.E. 576, 581 (1900); White v. Maynard, 111 Mass. 250, 1872 WL 9054 (1872). Holding that a hotel guest was not considered a tenant, the New York Supreme Court stated "[w]hen one contracts with the keeper of a hotel or boarding-house for rooms and board, whether for a week or a year, the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate." Young, 284 F.3d at 868 (citing Wilson v. Martin, 17 Conn. 142, 1845 WL 441 (1845)). The same can be said of the Plaintiffs, who acquired no interest in Dartmouth College property. The Superior Court's Order fails to recognize this lack of interest and incorrectly applied the anti-subrogation rule to Factory Mutual's subrogation claim.

Plaintiffs place significant emphasis on the Endicott College case from the trial court in Massachusetts for applying the anti-subrogation rule to a college student. Notwithstanding the distinguishable student policy discussed above, the Endicott College decision fails to address the issue of possessory interest, which was the pinnacle to this Court's

holding in Crete. Endicott College v. Mahoney, No. 00-589C, 2001 WL 1173303 (Mass. Super. Oct. 3, 2001).

The occupancy and conduct in Dartmouth College residence halls is so closely regulated that it substantially differs from the occupancy of a residential tenancy. Particularly, having no right to exclude others from their assigned residence hall room and being subject to reassignment at the discretion of Dartmouth College, Plaintiffs hold no possessory interest in college property. Without a possessory interest, Plaintiffs have no basis to claim they are implied coinsureds under Factory Mutual's insurance policy and, thus, the antisubrogation rule in Crete does not apply.

iii. Plaintiffs were provided with nothing more than a license to occupy Dartmouth College residence halls and, therefore, Factory Mutual is entitled to subrogation.

The Superior Court erroneously found that the Plaintiffs held a status similar to the of a residential tenant. In reality, Plaintiffs held nothing more than a license to occupy the campus – a license which could be revoked by Dartmouth College at any point in time. This Court held that a license to occupy is "a transient or impermanent interest which does not constitute an interest in land." LSP Ass'n v. Gilford, 142 N.H. 369, 376 (1997) (citing Quality Discount Market Corp. v.

Laconia Planning Bd., 132 N.H. 734, 739 (1990)). It "is merely a revocable personal privilege to perform an act on another individual's property." Id. The ultimate distinguishing characteristic of a lease from a license agreement is that the landlord surrenders exclusive possession of the premises to the tenant for a specific term or period. That is not what Dartmouth College provided to the Plaintiffs.

Here, the agreement between Dartmouth College and the Plaintiffs to reside in the College's residence halls was nothing more than a license to occupy. As set forth above, Dartmouth College did not convey, and Plaintiffs did not receive, any interest in land. Instead, like all other Dartmouth College students, Plaintiffs were permitted to occupy dormitory rooms under numerous conditions, including that they are enrolled in an academic program, maintain minimum academic standards, abide by the Standards of Conduct, and pay the necessary tuition and fees. Failure to comply with these conditions could result in the immediate revocation of the Plaintiffs' license to occupy, as opposed to the eviction process.

Furthermore, as set forth above, Plaintiffs were required to abide by several housing policies that controlled their conduct while on campus and living in the residence halls. Dartmouth College allowed students to sleep and study in

residence halls subject to the various conditions to do so. It would be hard-pressed to find facts more indicative of a licensor-licensee relationship, as opposed to a landlord-tenant relationship.

In sum, the Plaintiffs' occupancy of the College residence halls was merely incidental to their academic studies. They were provided with an "impermanent interest" and "personal privilege" to occupy Dartmouth College's residence halls. The benefits derived from this privilege are not insured under Factory Mutual's insurance policy. Consequently, the Superior Court Order applying the anti-subrogation rule to Factory Mutual's claim against the Plaintiffs is contrary to the underlying reasoning of adopting the Sutton Doctrine in Crete.

IV. The Principles of Equity this Court Identified in Crete Require that Plaintiffs be Held Financially Responsible for their Misconduct.

i. The specific equitable factors recognized by this Court in Crete support Factory Mutual's claim.

The purpose of subrogation is "to place the responsibility where it ultimately should rest by compelling payment by the one who 'in good conscience ought to pay it.'" Sec. Fence Co. v. Manchester Fed. Sav. & Loan Ass'n, 101 N.H. 190, 192 (1957) (quoting Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 171 (1954)). Responsibility for the

Morton Hall fire properly rests upon the Plaintiffs due to their violations of several Dartmouth College policies that provide for recovery of costs of repair.

When adopting Sutton, the equitable factors identified by this Honorable Court in favor of applying the anti-subrogation rule included: (1) the expectations of tenants that a landlord will procure fire insurance to protect their interest in property, (2) an insurer's expectations when issuing a policy that fire damage may result from the negligence of a tenant of a rental property and it may adjust the policy premium accordingly, (3) a tenant's lease payments contributing to the insurance premium payment, and (4) economic waste that results if residential tenants are required to carry insurance for the entire building, "regardless of the extent of their possessory interest or lack of knowledge necessary to procure adequate coverage." Crete at 675.

Evaluating these factors in context of the present case supports Factory Mutual's claim against the Plaintiffs. First, while it is true the Plaintiffs could expect Dartmouth College to procure insurance to protect its property from fire damage, the presumption that such insurance would be to their benefit is contrary to reading the terms of the student policies, as detailed in the preceding sections. Second, unlike the insurer of leased residential property, Factory Mutual understood it was insuring a college dormitory without

cooking facilities and was closely regulated by college policies. In undergoing an insurance assessment, Factory Mutual had the very real benefit of a comprehensive code of conduct that serves to substantially limit the risk of a fire loss by students and that provides for restitution if damage was attributable to a breach of the Student Handbook. The College substantially limited the risk of student-caused fired by requiring the absence of ignition sources, such as open flames and candles, as well as the absence of potential conductors, including cooking facilities, appliances and charcoal grills. Even if violations of these policies were foreseeable, Factory Mutual knew that the sanctions set out in those policies, including full restitution of damages, could be imposed.

The third factor also weighs in favor of Factory Mutual. While student payments for tuition, fees, and housing may, albeit minimally, contribute to payment for Dartmouth College's insurance policies, this is distinguishable from payment of property insurance by a landlord. As an institution for higher education, there are myriad of expenses unrelated to housing for which students' tuition and fees help pay, including, among others, the salaries of faculty, administrators and staff; maintenance of academic and athletic buildings; operation of dining halls; advertisement to prospective students; operation and maintenance of libraries and research centers. Conversely, expenses of a residential

landlord relate only to the leasing and maintenance of residential property, and therefore, a residential tenant's rent directly contributes to the landlord obtaining fire insurance coverage. The nexus between tuition and fees paid by Plaintiffs is tenuously linked to insurance premium payments made by Dartmouth College to Factory Mutual. This is a far cry from the substantially more direct payment from a residential tenant to his/her landlord's property insurance.

Fourth and finally, no economic waste will result in finding the Plaintiffs are not coinsureds under Dartmouth College's insurance policies because students are likely already insured under general liability policies, as the Plaintiffs are. As young adults living in among thousands of other young adults in a close community, the potential risks of personal liability are endless. Under these circumstances, it is prudent for college students to have personal liability insurance to protect against the growing risks of entering into adult life, including negligently causing fires when violating college policies. The Plaintiffs have availed themselves of such coverage and liability for the Morton Hall fire is appropriately assigned to those policies, not Dartmouth College's policy.

In the case of Phoenix Ins. Co. v. Stamell, 21 A.D.3d 118 (2005), the New York Appellate Division addressed the very issue present in this case. In Stamell, the insurer of a

college sought to recover damages caused by a student that negligently caused a fire with a candle in her dorm room. Id. at 119. In allowing the college's insurer to seek recovery from the student's liability insurer, the Stamell court recognized that a windfall would result in favor of the student's liability insurer if the college's insurer was barred from recovery. Id. at 127. Similarly, if Factory Mutual is not entitled to recover its claim payment resulting from fire damage negligently caused by the Plaintiffs, Plaintiffs' liability insurers will experience a windfall and Factory Mutual will be denied restitution provided under its subrogee's policies.

ii. Crete was not intended to permit a college student that negligently causes a fire when violating several student policies to escape liability.

This Honorable Court recognized the "equity and fundamental justice" of subrogation requires a residential tenant be recognized as a coinsured under the landlord's fire insurance policy, absent an express agreement or provision allocating liability to the tenant. Crete, 150 N.H. 675-676. The reasoning is based upon the expectations of the tenant, landlord and insurer. Absent an express provision placing liability for fire damage upon a tenant, equity favors a tenant that causes a fire in their leased premises due to some unintentional act, such as improperly disposing of smoking materials or failing to monitor food cooking on a stove. The

insurer of a leased property can expect to pay for fire damage negligently caused by a tenant.

The same cannot be said when comprehensive policies exist that substantially limit the risk of fire within the insured property and a fire is negligently caused by violations of those policies. Dartmouth College's Student Handbook sets forth a code of conduct to protect the property interests of the College and the safety of other students in the residence halls. When the Plaintiffs chose to bring a charcoal grill into Morton Hall in violation of the Room Furnishings Policy, equity began to favor Factory Mutual's claim. As they placed the grill on the combustible roof outside the window in violation of the Roofs and Fire Escapes Policy, the balance of equities continued to shift in favor of Factory Mutual. As soon as Plaintiffs attempted to light the grill, first by burning paper and then by using a charcoal chimney, in violation of the Open Flame Policy, the Plaintiffs left no doubt that the sanctions available within the Student Handbook are proper and justified. Plaintiffs even recognized they were violating the College's policies and lied about their conduct to an inquiring student and residential advisor.

It was not until the fire was discovered and firefighters worked to extinguish the flames that the Plaintiffs fully disclosed their actions. Plaintiffs publicly took responsibility for their mistakes and accepted the consequences that follow.

Unfortunately, their liability insurers do not share that sentiment and have sought to avoid payment of the very risk they accepted when insuring the Plaintiffs. Instead, they seek to strip Dartmouth College's Student Handbook of its clear meaning and deny Factory Mutual the rights set forth therein.

Under the circumstances of the Morton Hall fire, caused by the Plaintiffs' numerous policy violations, equity and fundamental justice demand that Factory Mutual may assert is subrogation claim against the Plaintiffs.

CONCLUSION

WHEREFORE, Defendant, Factory Mutual Insurance Company, respectfully requests this Honorable Court find that the Plaintiffs are not implied coinsureds under Dartmouth College's insurance policy, reverse the Order by the Superior Court and remand this matter to the Merrimack County Superior Court for proceedings on Defendant's counterclaims.

ORAL ARGUMENT

Defendant, Factory Mutual Insurance Company, respectfully requests oral argument before the full New Hampshire Supreme Court as the issues present in this case relate directly to the Court's reasoning in Cambridge Mut. Fire Ins. Co. v. Crete, 150 NH 673 (2004) and have reaching implications to New Hampshire colleges and universities and their insurers.

CERTIFICATION

I, Matthew R. Passeri, Esq., certify that the written decision being appealed is appended hereto and that the foregoing brief complies with the word limit set forth in Supreme Court Rule 16(11), using 8,874 words.

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CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. Supp. R. 18, I hereby certify that the copy of the foregoing was served on the following counsel of record, all of whom will receive the foregoing via electronic service:

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DECISION BEING APPEALED

The State of New Hampshire

MERRIMACK COUNTY **SUPERIOR COURT**

DANIEL RO
and
SEBASTIAN LIM

v.

FACTORY MUTUAL INSURANCE CO. as subrogee of
TRUSTEES OF DARTMOUTH COLLEGE

Docket No.: 217-2018-CV-00494 and
217-2018-CV-00534

ORDER

The Plaintiffs, Daniel Ro and Sebastian Lim, petition for a declaratory judgment ruling that the Plaintiffs are implied co-insureds under the fire insurance policy secured by the Trustees of Dartmouth College from Defendant Factory Mutual Insurance Company. The Defendant counterclaims for negligence and breach of contract. The Court has granted the Plaintiffs' motion to stay the counterclaims pending resolution of the petition for declaratory judgment. The Plaintiffs move for summary judgment. The Defendant objects and, in turn, moves for summary judgment. The Plaintiffs object. For the following reasons, the Plaintiffs' motion for summary judgment is GRANTED and the Defendant's motion for summary judgment is DENIED.

I. Background

In the fall of 2016, the Plaintiffs were students of Dartmouth College. (Pet. Decl. J. Against Factory Mutual Ins. Co. ("Lim Compl.") ¶ 5.); (Daniel Ro's Compl. Decl. J. ("Ro Compl.") ¶ 2.) They each paid tuition as well as room and board to study and live on campus. (Lim Compl. ¶ 9.); (Ro Compl. ¶ 16.) The Plaintiffs resided in separate

dormitories. Mr. Ro was assigned to Smith Hall and Mr. Lim was assigned to Morton Hall. (Def.'s Countercl. Against Lim ("Def.'s Countercl.") ¶ 1.); (Lim Compl. ¶ 5.) On or about October 1, 2016, Mr. Ro visited Mr. Lim at his dormitory in Morton Hall, and the Plaintiffs set up a charcoal grill on a platform outside a window of Mr. Lim's 4th floor dormitory. (Def.'s Countercl. ¶ 4.)

One of the Plaintiffs lit the grill, which resulted in a noticeable smell of smoke. (Id. ¶ 5.) Unbeknownst to the Plaintiffs, heat produced by the grill ignited the platform, and fire spread to the roof. (Id. ¶¶ 7-8.) A student in an adjoining room asked the Plaintiffs about a smell of burning paper, but the Plaintiffs denied their knowledge of the source of the odor. (Id. ¶ 5.) Dartmouth employees were alerted to the smell of smoke, approached the Plaintiffs, and the Plaintiffs again denied knowing where the smell came from. (Id. ¶ 6.) When the fire was later discovered, Mr. Ro admitted to using a charcoal grill on the roof. (Id. ¶ 12.)

Firefighters employed a substantial amount of water in their struggle to put out the fire. (Id. ¶ 10.) All four floors of the building suffered water damage. (Id. ¶ 11.) In order to restore the dorm to its prior condition, the Defendant paid Dartmouth $4,544,313.55 toward restoration costs. (Lim Compl. ¶ 7.); (Ro Compl. ¶ 14.) Dartmouth had previously contracted for fire insurance with the Defendant, which brought a subrogation claim against the Plaintiffs for that amount. (Lim Compl. ¶ 8.); Ro Compl. ¶ 1.) Shortly after an investigation into the incident, Dartmouth expelled the Plaintiffs. (Def.'s Countercl. ¶ 20.)

Before being assigned a room on campus, the Plaintiffs were each required to sign a document acknowledging their receipt and understanding of Dartmouth College's Student Handbook ("the Handbook"). (Id. ¶ 13.) The Handbook contained a

Room Care and Furnishings Policy that prohibits the possession of charcoal grills in student housing. (Def.'s Mem. L. in Supp. Mot. Summ. J. ("Def.'s Mem."), Exh. L.) It also contained an Open Flames in Residence Halls Policy ("the Open Flames Policy") that prohibits the lighting and burning of any item with an open flame in residence halls, adding that policy violations "may" result in liability for fire damage. (Ro Compl. ¶ 17, Exhibit 1 (emphasis added).) The Handbook contained a Roofs and Fire Escapes Policy as well, which prohibited placing items on, and use of, "the roof, portico, fire escape, or any other architectural feature not designed for recreational or functional use," except in cases of emergency. (Def.'s Mem., Exh. K.) Finally, the Handbook allocated responsibility to students for claims arising from damage to college property. In particular, the Damage and Vandalism Policy stated that student residents "assume any and all liability for damage or claims that result from their own negligence, as well as any negligence of visitors or guests." (Ro Compl., Exh. 2.) The accompanying Judicial Process and Sanctions Policy stated that residents who damage or vandalize Dartmouth property "will typically be expected to pay restitution." (Def.'s Mem., Exh. S.)

II. Legal Standard

The propriety of awarding equitable relief rests in the sound discretion of this Court and is to be exercised according to the circumstances and exigencies of each case. Gutbier v. Hannaford Bros. Co., 150 N.H. 540, 541 (2004). Declaratory judgment is a broadly construed equitable remedy designed to make a controversy over a legal or equitable right justiciable at an earlier stage than otherwise permitted at law or equity. Beaudoin v. State, 113 N.H. 559, 562 (1973). It is designed in part to prevent uncertainty and misunderstanding in the parties' assertions of rights. Id. "Any person claiming a present legal or equitable right or title" may bring a petition in

Superior Court for declaratory judgment against "any person claiming adversely to such right or title." RSA 491:22. In a petition for declaratory judgment to determine coverage under an insurance policy, the burden of proof "shall be upon the insurer." RSA 491:22-a. Where declaratory judgment is brought in an action to determine coverage and the insured prevails over the insurer, "court costs and reasonable attorneys' fees" shall be awarded to the insured. RSA 491:22-b.

The parties contest the availability of equitable relief by filing competing motions for summary judgment. To prevail on a motion for summary judgment, a party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. To defeat summary judgment, the non-moving party "must put forth contradictory evidence under oath sufficient to indicate that a genuine issue of material fact exists." Brown v. Concord Group Ins. Co., 163 N.H. 522, 527 (2012). "A fact is material if it affects the outcome of the litigation under the applicable substantive law." Lynn v. Wentworth by the Sea Master Ass'n, 169 N.H. 77, 87 (2016). In scrutinizing a motion, the Court considers the evidence in the light most favorable to the nonmoving party. Grady v. Jones Lang Lasalle Constr. Co., 171 N.H. 203, 206 (2018).

III. Analysis

The question presented to the Court is whether an insurer can bring a subrogation claim for fire damage negligently committed by an on campus college student. The doctrine of subrogation is an equitable doctrine designed to allocate responsibility for a debt owed to the one who "in good conscience ought to pay it." Wolters v. Am. Republic Ins. Co., 149 N.H. 599, 601. In order for equitable subrogation to apply, all of the following conditions must be met: (1) the subrogee

cannot have acted as a volunteer; (2) the subrogee must have paid a debt upon which it was not primarily liable; (3) the subrogee must have paid the entire debt; and (4) subrogation may not work any injustice to the rights of others. Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 27 (2007).

The basic equity and fundamental justice upon which the equitable doctrine of subrogation is established require that "when fire insurance is provided for a dwelling, it protects the insurable interests of all joint owners." Cambridge Mut. Fire Ins. Co. v. Crete, 150 N.H. 673, 675 (citing Sutton v. Jondahl, 532 P.2d 478, 482 (Okla. Ct. App. 1975)). The Sutton Doctrine, which New Hampshire adopted in Crete, recognizes that a tenant's possessory interest in a dwelling insured against fire is an "insurable interest" protected against claims of subrogation, absent a tenant's express agreement to the contrary. Id. The Crete Court based its reasoning on the following factors: (1) a reasonable residential tenant expects that the landlord has fire insurance to protect the rental property, (2) a reasonable insurance company expects to provide coverage for fire damage that may result from the actions of a tenant, (3) it is likely that the tenant pays a portion of the insurance policy's premium through the rent, and (4) were the tenant not a co-insured under the policy, there would be multiple fire insurance policies covering the same building, resulting in economic waste. Id.

a) The Defendant's motion for summary judgment

i. The Nature of the Plaintiffs' Possessory Interest

The Court first considers whether the Plaintiffs held an insurable possessory interest in Morton Hall. The Defendant contends that the Sutton Doctrine does not apply because the Plaintiffs were licensees of Morton Hall, not tenants. As licensees, they held an impermanent personal privilege rather than a possessory insurable

interest in Morton Hall. In addition, the Defendant argues that to hold that Mr. Ro, who was assigned to Smith Hall, had a possessory interest in Morton Hall would be tantamount to holding that a college student could escape personal liability for negligently causing a fire in any building on campus, including nonresidential buildings such as libraries or athletic facilities.

Generally, a possessory interest in land is defined as the "present right to control property, including the right to exclude others, by a person who is not necessarily the owner." Possessory interest, BLACK'S LAW DICTIONARY (10th ed. 2014). The right to exclude others, however, need not be absolute. In fact, a person has a possessory interest where he or she (1) has "a physical relationship to the land of a kind which gives a certain degree of control over the land" and (2) "an intent so to exercise such control as to exclude other members of society in general from present occupation of the land." RESTATEMENT (FIRST) OF PROPERTY § 7 (AM. LAW INST. 1936). Alternatively, a person has a possessory interest in land where the interest is "substantially identical" to one arising where the prior two elements are satisfied. Id. The physical relation and degree of control needed varies "according to the nature of the interests that may be involved." Id., cmt. b. Additionally, the "right to exclude" refers to preventing others from "physical occupation of the land" in question. Id.

The Court finds that the Plaintiffs did have a possessory interest in their respective dormitories. First, the Plaintiffs had a right to control their dormitories in substantially the same way a tenant has a right to control leased premises. RESTATEMENT (FIRST) OF PROPERTY § 7 (AM. LAW INST. 1936) (a possessory interest requires "a certain degree of control" over land); Crete, 150 N.H. 673, 675 (holding that a tenant has a possessory interest sufficient to be shielded from subrogation pursuant

to the Sutton doctrine). The Plaintiffs could inhabit and reside in their dormitories, store their personal property inside, invite guests, make use of utilities, and decorate to their liking. The Room Care and Furnishings Policy referred to on campus students as "residents" and to their assigned dormitories as "living unit[s]." (Lim's Obj. to Def.'s Mot. Summ. J. at 7.) It also used possessives such as "his" or "her," indicating personal control. (Id.). While the Plaintiffs' residence was contingent upon conditions such as enrollment at Dartmouth and maintaining academic standards, a tenant's interest is also limited by the conditions of a rental agreement. Second, though unlike a tenant the Plaintiffs could not enforce an implied covenant of quiet enjoyment to exclude Dartmouth staff from their property, in practice they could exercise their control so as to exclude others in a manner "substantially identical" to that of a tenant. RESTATEMENT (FIRST) OF PROPERTY § 7 (AM. LAW INST. 1936) (a possessory interest must involve control and an intent to "exclude other members of society in general" or a "substantially identical" interest in land). In fact, without their invitation, "members of society in general" lack the swipe access and keys necessary to enter a student's dormitory. Id. The Room Entry by College Employees Policy provided them the means to exclude students who entered their dormitories and to have them removed from Dartmouth residences. (Lim's Obj. to Def.'s Mot. Summ. J. at 7.) Despite retaining the right to enter, even Dartmouth staff provided advance notice before entering a dormitory. (Hr'g.). Therefore, the Plaintiffs had a right to control and exclude others from their dormitories in a manner "substantially identical" to that of tenants over leased property.

To the extent Mr. Lim's possessory interest in Morton Hall is insurable, so is Mr. Ro's. Mr. 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. In Crete, the Court held the tenant was a co-insured despite causing fire damage to dwellings in the building other than his own. Crete, 150 N.H. at 674. As with the tenant in Crete, Mr. Ro's negligence allegedly caused fire damage to another dwelling in the same complex of Dartmouth residence halls. Were Mr. Ro's possessory interest restricted to his assigned room, students in Mr. Ro's position would be required, much like the tenant in Crete would have been, to "carry fire insurance for the entire building" and to do so "regardless of the extent of their possessory interest or lack of knowledge." Id. at 675. Such a situation would result in economic waste, rendering Mr. Ro's insurable interest in Morton Hall also "substantially identical" to the insurable interest of a tenant in other units within a residential complex. Id.

ii. Effect of Dartmouth's Liability Policies

The Court next considers whether the Plaintiffs explicitly agreed to assume liability for any fire damage they negligently caused to school dormitories as on campus residents. The Defendant contends the Plaintiffs' acknowledgement of the policies in the Handbook constituted an express agreement by the Plaintiffs to take on responsibility for fire damage. The Defendant highlights that, unlike the inadequate lease provision in Crete, the Open Flames Policy specifically mentions personal liability for fire damage. The Plaintiffs reply that the Handbook cannot constitute an express agreement because the only portion of the Handbook that specifies student liability for fire damage is the Open Flames Policy and that policy states merely that students "may," not "shall," be held responsible for fire damage. (Pet. Decl. J. Against Factory Mutual Ins. Co., Exh. B (emphasis added).)

A resident with an insurable interest protected by the Sutton doctrine is not

subject to claims of subrogation absent an "express agreement" by the resident to the contrary. Crete, 150 N.H. at 675. The Court considers whether the residential agreement "explicitly" states that the resident is not a co-insured under "any fire insurance policy obtained" by the owner of the residence and whether it requires the resident "to obtain his or her own fire insurance" for the premises. Id. at 676. The owner's insurance cannot subrogate against the resident "for any damages paid as a result of his negligently causing a fire" unless the agreement limits the benefit of fire insurance to the owner. Id.

The agreement before the Court is not an "express agreement" within the meaning of the Sutton doctrine. The Open Flames Policy is the only document in the Handbook that specifically mentions liability for fire damage. Far short of stating the Plaintiffs are not co-insureds under "any fire insurance policy obtained" by Dartmouth, the policy states that students "may" be liable for damage caused by prohibited uses of an open flame. The word "may" does not necessarily imply "may not." See Saxton v. Fed. Hous. Fin. Agency, 901 F.3d 954, 958 ("Not every statutory 'may' is coupled with an implied 'may not.'"). However, by using "may" rather than "shall," the Handbook implies that circumstances exist under which the students would be liable but fails to expressly list those situations. Accordingly, their signed acknowledgment of the policy and subsequent decision to live on campus cannot be construed as an explicit agreement by the Plaintiffs to be excluded from the benefit of Dartmouth's fire insurance policy in this instance.

b) The Plaintiffs' motion for summary judgment

i. Applicability of the Sutton doctrine

The Plaintiffs contend that the Court should apply the same rationale employed

in Crete, using the persuasive authority of Endicott to prohibit subrogation against students in dormitories. See Endicott College v. Mahoney, No. 00-589C, 2001 WL 1173303 (Mass. Super. Ct. Oct. 3, 2001). The Defendant suggests that even if the Court were to apply reasoning from an unpublished opinion in another jurisdiction, Endicott does not clearly support application of the Sutton doctrine under these circumstances. Instead, the Defendant contends that it has an equitable right to bring a subrogation claim against the Plaintiffs.

This Court finds 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. Although not binding, the reasoning of Endicott is helpful to the extent that it facilitates analysis of the four factors elaborated in Crete. Crete, 150 N.H. at 675. First, as with tenants, on campus college students have a reasonable expectation that the institutions they attend will provide fire insurance sufficient to protect their entire residential housing complexes. Endicott, at *4. Second, a reasonable fire insurance provider who contracts with an institution of higher learning to provide coverage for fire damage to dormitories expects that damage may result from the actions of a student resident. See Id. Third, it is likely that on campus college students contribute to a portion of the insurance policy's premium through tuition and room and board payments. Id at *3. Finally, were on-campus college students not co-insureds under their institutions' insurance policies, students would be expected to carry multiple insurance policies to cover each housing complex, resulting in economic waste. Crete, 150 N.H. at 675. To the extent fire insurance policies do not recognize the possessory interests of on campus college students in

their dormitories, students would be forced to resort to liability insurance products to avoid personal liability in case of fire, producing an equally economically wasteful result. Id. Accordingly, the Defendant may not proceed with its counter claims against the Plaintiffs.

ii. Attorneys' Fees and Costs Incurred

Lastly, the Plaintiffs request attorneys' fees and the costs of litigating the request for declaratory judgment in Superior Court. (Pet. Decl. J. Against Factory Mutual Ins. Co. at 6.) Because this is an action for declaratory judgment brought pursuant to RSA 491:22 to determine insurance coverage, the Court finds the Plaintiffs are statutorily entitled to "court costs and reasonable attorneys' fees." RSA 491:22-b. Accordingly, the Court orders the Defendant to reimburse the Plaintiffs for the reasonable value of their attorneys' fees and for all court costs incurred in bringing the declaratory judgment action. The Plaintiffs shall submit affidavit(s) setting out the fees and costs they seek within 14 days of this decision. The Defendant will then have 14 days to submit any written objection.

IV. Conclusion

For the foregoing reasons, the Plaintiffs' motion for summary judgment is GRANTED and the Defendant's motion for summary judgment is DENIED. The sole remaining issue is the question of attorneys' fees and costs, which will be addressed as set out above.

So Ordered.

DATED: 10/1/19

JOHN C. KISSINGER
Presiding Justice

THE STATE OF NEW HAMPSHIRE
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NOTICE OF DECISION

File Copy

Case Name: **Daniel Ro v Factory Mutual Insurance Company as Subrogee of Trustees of Dartmouth College**
Case Number: **217-2018-CV-00494** ***217-2018-CV-00534***

Enclosed please find a copy of the court's order of October 01, 2019 relative to:

ORDER

October 02, 2019

Catherine J. Ruffle
Clerk of Court

(485)

C: Debbie Lorusso Makris, ESQ; Matthew R. Passeri, ESQ; John B. Schulte, ESQ