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

REPLY BRIEF OF DEFENDANT FACTORY MUTUAL INSURANCE COMPANY

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Attorney Passeri will argue the case.

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ARGUMENT

I. DARTMOUTH COLLEGE'S STUDENT HANDBOOK PROPERLY ALLOCATED LIABILITY FOR THE MORTON HALL FIRE TO THE PLAINTIFFS, AS PERMITTED UNDER CRETE.

Plaintiffs argue that Dartmouth College's Student Handbook did not effectively allocate liability to the Plaintiffs because it did not require the Plaintiffs to procure insurance to cover damages they cause when violating student policies, including the Open Flame in Residence Halls Policy. This argument seeks to create a requirement of strict construction in order to negate the application of the anti-subrogation rule and is not supported by this Court's reasoning in Cambridge Mut. Fire Ins. Co. v. Crete, 150 NH 673 (2004). In contrast, if the Superior Court Order is reversed and Factory Mutual's subrogation claim against the Plaintiffs is allowed to proceed, this Court maintains and affirms the express "allocation of liability" allowed in Crete and the terms of the Student Handbook.

In seeking this Court to adopt a rule of strict construction, Plaintiffs rely exclusively upon decisions from other jurisdictions, such as Nebraska, that require a lease to specifically address the issue of subrogation. Unlike Nebraska and similar states that require strict construction, this Court stated the lease term must "address the specific issue of the tenant's liability for fire damages caused by the tenant's

negligence." Crete, 150 N.H. at 676. Plaintiffs incorrectly claim that Factory Mutual does not cite case law supporting the position that an allocation of liability for fire damage can be made without any reference to insurance. Contrary to Plaintiffs' contention, Factory Mutual's position is supported entirely by this Court's decision in Crete. When adopting the anti-subrogation rule stated in Sutton v. Jondahl, 532 P.2d 478 (Okla.Ct.App.1975), this Court recognized subrogation was permissible when there was an "express agreement or lease provision that would place responsibility for fire damage upon the tenant." Crete, 150 N.H. at 676. The express agreement need not expressly state that the tenant is not a coinsured under the landlord's policy, or that the tenant must obtain his or her own insurance for the property. Id. Instead, the agreement need only "address the specific issue of the tenant's liability for fire damages caused by the tenant's negligence." Id. As argued within Factory Mutual's appeal brief, the Student Handbook, particularly the Open Flame in Residence Halls Policy, did exactly that by expressly allocating liability to the Plaintiffs for damage caused by them violating the school policies. The Open Flame in Residence Halls Policy states "violations may 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." Appx. III at

190. Clearly, the Open Flame in Residence Halls Policy, as well as various other policies within the Student Handbook, made an express allocation of liability required by Crete. Plaintiffs, therefore, remain liable for the damage they caused in violating these policies.

After ignoring the numerous policies set forth in the Student Handbook and the express allocation of liability for damage that they provide, Plaintiffs, through their liability insurance carriers, now argue that Dartmouth College cannot reasonably expect that students will read the Student Handbook as requiring that they procure sufficient insurance to cover the catastrophic loss that occurred in this case. This argument lacks merit because Plaintiffs could reasonably foresee that they would be responsible for damage caused by their violations of Dartmouth College's Student Handbook. Indeed, Dartmouth College's Student Handbook prohibits possession of charcoal grills, and their use, in residence halls. Appx. III at 201. The Student Handbook Damage and Vandalism Policy prohibits causing damage to college property and that "[w]henever possible, repair or replacement costs will be assessed to the individual(s) responsible." Appx. III at 193-194. The Student Handbook also prohibits students from being present on roofs or placing objects, such as charcoal grills, on building roofs. Appx. III at 196. As discussed in the Parties' briefs, the Open Flame in Residence Halls Policy

expressly prohibits use of candles or any other open flame within a residence hall. Appx. III at 189-190. These individual policies list potential sanctions for violations, such as responsibility for the cost of repair resulting damage, and also refer to possible disciplinary action that may be imposed. Id. The Office of Residential Life Judicial Process and Sanctions Policy enumerates the "disciplinary action" that may follow a policy violation and provides the unequivocal consequence that students causing damage to Dartmouth College property "will typically be expected to pay restitution." Appx. III at 230. Plaintiffs neglect to address these unambiguous terms of the Student Handbook allocating liability for the Morton Hall fire.

In Crete, this Honorable Court made it clear that when an express provision allocates liability to the tenant for fire damage, like the Student Handbook, the tenant cannot also reasonably expect to be considered a coinsured under the landlord's insurance policy. Similarly, the insurer of property controlled by a comprehensive code of conduct can reasonably rely upon the sanctions contained in that code of conduct and expect that it will have recourse in recovering damages caused by the tenant's violations. Here, the numerous student policies, when violated, clearly place liability for resulting damages, including fire damage, squarely upon the Plaintiffs. It follows that Dartmouth College, Factory Mutual, and the Plaintiffs could all reasonably expect the Plaintiffs would be

required to pay for the cost of repairing Morton Hall due to policy violations.

Plaintiffs avoid addressing the full and complete Student Handbook as the operative terms of their occupancy of student housing. Instead, they focus only on the Open Flame in Residence Halls Policy, claim it is ineffective because it does not direct the Plaintiffs to obtain insurance, and ask this Court to ignore the remainder of the Student Handbook that consistently states that students will be expected to pay for damage caused by policy violations. This Court recognized a contract, such as the Student Handbook, should be examined in its entirety and with the goal of honoring the intent of the parties. See Foundation for Seacoast Health v. HCA Health Servs. of New Hampshire, Inc., 157 N.H. 487, 501 (2008). When viewing the Student Handbook in its entirety and in terms of the expectations of the parties, liability for the Morton Hall fire clearly rests upon the Plaintiffs.

As this Court has identified, 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)). Courts in other jurisdictions have similarly permitted insurer subrogation claims when the equitable factors, such as those present here,

support placing liability upon the responsible party. See e.g. Hartford Fire Ins. Co. v. Warner, 91 Conn. App. 685, 692 (2005) (subrogation for fire damage to an adjoining duplex was permitted against the tenant because equitable factors barring subrogation were not present); Phoenix Ins. Co. v. Stamell, 21 A.D.3d 118 (N.Y. App. Div. 2005) (insurer of college permitted to subrogate against student that caused fire damage using a candle in violation of student policies); Wasko v. Manella, 269 Conn. 527, 546–47 (2004) (subrogation allowed against houseguest as current liability insurance coverage will protect against liability, and there is no need to obtain the additional policies). States applying the anti-subrogation rule of Sutton, either on a case-by-case basis or as fully adopted, like New Hampshire, weigh the relevant equitable factors to determine its application. See e.g. Tri-Par Investments, L.L.C. v. Sousa, 268 Neb. 119, 126 (2004); DiLullo v. Joseph, 259 Conn. 847, 854 (2002); and Cascade Trailer Court v. Beeson, 50 Wash. App. 678, 686 (1988). Even the Sutton court recognized, "[t]he principle of subrogation was begotten of a union between equity and her beloved—the natural justice of placing the burden of bearing a loss where it Ought to be. Being so sired this child of justice is without the form of a rigid rule of law. On the contrary it is a fluid concept depending upon the particular facts and circumstances of a given case for its applicability." Sutton, 532 P.2d at 481–82.

When adopting the reasoning of Sutton, this Court recognized the reasonable expectations of a residential tenant that a landlord has fire insurance to protect leased property and the expectations of the insurance company to pay for negligently caused fires at a leased property as a basis for applying the antisubrogation rule. Crete, 150 N.H. at 675. These expectations change when there is an express agreement, such as the Student Handbook, placing liability upon the tenant, as do the equities in applying the Sutton doctrine. It cannot reasonably be disputed that the comprehensive policies governing student conduct at Dartmouth College effectively provided notice to the Plaintiffs that failure to abide by those policies could subject them to payment of the cost of repairing resulting damages. Permitting Factory Mutual's subrogation claim against the Plaintiffs is consistent with the expectations of the parties and, thus, the equitable factors on which Crete is based. This Court should, therefore, hold true to the sentiments in Crete and allow Factory Mutual's subrogation claim against the Plaintiffs to proceed. Not only will doing so maintain the purpose of Dartmouth College's student policies, but also ensure a just result when those policies are flagrantly disregarded. Furthermore, the interests of equity and justice support Factory Mutual's subrogation claim because it is consistent with the allocation of liability contained in the Student

Handbook and avoids a windfall for the Plaintiffs' liability insurers.

CONCLUSION

WHEREFORE, Defendant, Factory Mutual Insurance Company, respectfully respects 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.

CERTIFICATION

I, Matthew R. Passeri, Esq., certify that the written decision being appealed is appended hereto and that the foregoing reply brief complies with the word limit set forth in Supreme Court Rule 16(11), using 1,651 words.

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Date: May 27, 2020

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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