THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0620

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

AND

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

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

BRIEF OF PLAINTIFF-APPELLEE SEBASTIAN LIM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)
CASES

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. Whether the Superior Court erred in finding that Dartmouth College's student policies cannot be construed as an explicit agreement, within the meaning of the Sutton doctrine, by the Plaintiff-Appellees to be excluded from the benefit of Dartmouth's fire insurance policy? See Appellant's Addendum to Brief at 61.

2. Whether the Superior Court erred in finding that the Plaintiff-Appellees did have a possessory interest in their respective dormitories, where the Plaintiff-Appellees had a right to control their dormitories in substantially the same way a tenant has a right to control leased premises, such that the Plaintiff-Appellees would be considered coinsureds under Dartmouth College's fire insurance policy, precluding the Defendant-Appellant, Factory Mutual Insurance Company, from pursuing a subrogation claim against them? See Appellant's Addendum to Brief at 58-59.

3. Were the Plaintiff-Appellees licensees 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 N.H. 673 (2004) does not apply to Defendant-Appellant's subrogation claim?

STATEMENT OF THE CASE

This is a Rule 7 mandatory appeal of the Merrimack Superior Court Decision, dated October 2, 2019.

STATEMENT OF THE FACTS

A summation of the findings of fact as stated by the Merrimack Superior Court in its October 1, 2019 order are as follows. In October of 2016, Mr. Lim was a student resident of Dartmouth College living in Morton Hall. See Appellant's Add. at 53-54. Morton Hall is a four-story, multi-room student dormitory owned and operated by Dartmouth College. See Id. at 54. As a residential student, Lim was responsible for paying certain costs such as tuition, as well as room and board in order to study and live on campus. See Id. at 53.

Before being assigned a room in an on-campus dormitory building as a student-resident of Dartmouth College, Appellees, Mr. Lim and Mr. Ro, were required to sign a document acknowledging that they received and understood Dartmouth College's Student Handbook (hereinafter "Handbook"). Id. at 54. The Handbook contained numerous policies including a Room Care and Furnishings policy (hereinafter, "Room Care Policy"). See Id. at 54-55. The Room Care Policy, *inter alia*, prohibited the possession of charcoal grills in student housing. See Id.

The Handbook also contained an Open Flames in Residence Halls policy (hereinafter "Open Flames Policy"), which prohibited residents from lighting and burning any item with an open flame in a residence hall. The Open Flames Policy stated that violations "may" result in liability for fire damage. See Appellant's Add. At. at 55.

Additionally, the Handbook incorporated a Roofs and Fire Escape policy 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." Id. at 55.

The Handbook was also found to include a section allocating responsibility to students for claims arising from certain damages sustained to college property. Id. at 55.

The Handbook included a Damage and Vandalism Policy (hereinafter "Damage Policy"), which 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." See Id.

To continue, on October 1, 2016, while student residents at Dartmouth College, Appellees, Mr. Lim and Mr. Ro, set up a charcoal grill on a platform outside of Mr. Lim's Morton Hall dormitory window. Id. at 54. At some point thereafter after pouring water on the coals, and unknown to the Appellees, the unattended grill ignited the platform and fire spread to the roof. Id. at 54. As a result of the fire and the fire department's ensuing battle to extinguish it, four floors of the building suffered damage. Id. at 54. After investigating the facts surrounding the fire, Dartmouth expelled the Appellees. See Appellant's Add. At. at at 54. In order to restore the dorm to its prior condition, Appellant, Factory Mutual Insurance Company, paid Dartmouth $4,544,313.55 in restoration costs. Id. at 2.

SUMMARY OF THE ARGUMENT

In 2004, this Supreme Court adopted the *Sutton* Doctrine. See Cambridge Mutual Fire Ins. Co. v. Crete, 150 NH 673 (2004); see also Sutton v. Jondahl, 532 P.2d 478

(Okla. App. Div. 2 1975). The Court in Sutton held that an insurer was not entitled to subrogation against a tenant who negligently started a fire, "because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary." Sutton, 532 P.2d. at 482.

The relationship between Mr. Lim and Dartmouth College is, in essence, identical to that of a tenant in a landlord/tenant relationship. As such, under the *Sutton* Doctrine, Mr. Lim is entitled to be considered an implied co-insured under the Factory Mutual policy which precludes any subrogation action against him. As student-tenant in on-campus college housing, Mr. Lim had a possessory interest in his Dartmouth College dormitory. Moreover, the Dartmouth College Student Policies, whether read together or individually, neither created an express agreement between the Appellee and Dartmouth College excluding him from coverage under the Dartmouth College fire insurance policy nor did they require student-tenants to purchase their own fire insurance for the building. Therefore, the *Sutton* Doctrine, as adopted by this Court, deems Mr. Lim to be a coinsured under Dartmouth's fire insurance policy through Factory Mutual.

As a coinsured under the relevant policy, Dartmouth College and Factory Mutual are barred from bringing any subrogation claims against Mr. Lim as a result of the relevant fire. Lastly, the basic principles of equity and fundamental justice as discussed in Crete support the foregoing conclusions.

STANDARD OF REVIEW

"A moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, 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." Jeffery v. City of Nashua, 163 N.H. 683, 685 (2012) (citing to: RSA 491:8-a, III) (internal quotes omitted). On appeal, the trial court's grant of summary judgment is reviewed by this Honorable Court by consideration of the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. Waterfield v. Meredith Corp., 161 N.H. 707, 709 (2011). If this Court's, "review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law,

[this Court] will affirm the grant of summary judgment." Jeffery, 163 N.H. at 685.

Critically, however, "[t]he adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." Id. at 685-86 (citing to RSA 491:8-a, IV). Where the opponent to a motion for summary judgment fails to contradict the proponent's affidavit or other admissible evidence, the facts as asserted by the proponent will be deemed true for purposes of the motion. Arsenault v. Willis, 117 N.H. 980 (1977); RSA 491:8-a, IV.

ARGUMENT

The Appellant makes three main arguments in support of their appeal. The first argument is that the Dartmouth College student policies somehow created an express agreement between the Appellee and Dartmouth College that placed the responsibility for any fire damage on the Appellee. See Appellant's Brief at 19-32. As noted below, however, those school policies fell well short of constituting an express agreement requiring Mr. Lim to purchase his

own fire insurance policy on his dormitory structure as required under the *Sutton* Doctrine.

The second argument that Appellant asserts is that the Superior Court erred in concluding that the Crete/*Sutton* doctrine applied to the case because the Appellees did not hold a possessory or insurable interest in his dormitory. See Appellant's Brief at 32-41. Here, the Appellant is attempting to persuade this Court that student-residents of a college dormitory are but mere licensees of the college, holding neither possessory nor insurable interests in their own dormitory. See Id. Appellee will address this argument first as, pursuant to the Crete decision, 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. See Crete, 150 NH at 676. In other words, the Court must first affirm that the Appellee held a possessory or insurable interest in their dormitory prior to analyzing the existence of any express agreement.

As for the Appellant's third argument, the Appellant essentially asserts that the Superior Court erred in applying the principles of equity that this Court identified in Crete, when it found that the landlord's insurer could not

subrogate against landlord's tenant for a negligently caused fire. See Appellant's Brief at 43-49.

I. FACTORY MUTUAL CANNOT SUBROGATE AGAINST MR. LIM BECAUSE UNDER THE *SUTTON* DOCTRINE, AS APPLIED IN NEW HAMPSHIRE, MR. LIM WAS CO-INSURED UNDER THE FACTORY MUTUAL POLICY AS A STUDENT-TENANT HAVING A POSSESSORY INTEREST IN HIS ASSIGNED DORMITORY ROOM AND BECAUSE THERE WERE NO EXPRESS PROVISIONS TO THE CONTRARY.

The *Sutton* Doctrine arises from the case of Sutton v. Jondahl, 532 P.2d 478 (Okla. App. Div. 2 1975). In Sutton, a landlords' fire insurance carrier sued a tenant and the tenant's son to recover damages caused by a fire. The court in Sutton held that the insurer was not entitled to subrogate as against the tenant or the tenant's son, "because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary." Id. at 482. The court reasoned that the tenant indirectly paid the fire insurance premium through monthly rental payments and that "[p]rospective tenants ordinarily rely upon the [landlord] to provide fire protection for the realty . . . absent an express agreement otherwise . . . [that would] inure to [their] benefit." Id.

New Hampshire, like a majority of the states that have addressed this issue, adopted the *Sutton* Doctrine in Cambridge Mutual Fire Ins. Co. v. Crete, 150 NH 673 (2004). The majority of jurisdictions agree with the reasoning of the *Sutton* Doctrine 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." Id.; see e.g., Lexington Ins. Co. v. Raboin, 712 A.2d 1011, 1015, n. 17 (Del. Super. Ct. 1998).

In Crete, the defendant/tenant, Thomas Crete, negligently caused a fire when his cigarette ignited the mattress in an apartment which he leased from Cambridge Mutual's insureds, Merle and Tammy Wilbur. See Crete, 150 N.H. at 674. The fire caused extensive damage to the building where the apartment was located. See Id. Cambridge Mutual reimbursed the Wilbur landlords for the covered losses under their fire insurance policy and then brought a subrogation action against the defendant, Crete. See Id. The Crete Court found in favor of the tenant, stating 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 N.H. at 675. The Court continued, stating: "[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 (emphasis added). In assessing what was necessary to constitute an "express agreement" negating the *Sutton* Doctrine, the Court in Crete stated that any agreement between the landlord and the tenant, "must explicitly state that the tenant is not considered a coinsured by the landlord" or must, "explicitly require the tenant to obtain his or her own fire insurance for the leased premises." Id. (emphasis added).

In Crete, the tenant was subject to a lease which stated that the tenant was liable for all repairs, replacements, and damages caused by or required as a result of any negligence of the tenant. See Id. This Court, however, held that the language in the tenant's lease agreement neither explicitly stated that the tenant was not considered a coinsured by the landlord nor did it explicitly require the tenant to obtain his or her own fire insurance for the leased premises. See Crete at 150 N.H. at 676-77.

As such, this Court found the lease language to be insufficient to overcome the presumption under the *Sutton* doctrine that the tenant was a coinsured under the landlord's fire insurance policy. See Id. Thus, under Crete, it is not enough for the agreement to state that the tenant, or in the present instance the student, is responsible for damages caused by negligence including fire damage. The agreement must expressly address the consequence of the *Sutton* doctrine itself, that the tenant is expressly not considered to be a co-insured and may be subject to subrogation for a negligently caused fire, or specifically state that the tenant must obtain fire insurance for the structure. Compare to: Id.

A. Mr. Lim had a sufficient possessory interest in Morton Hall as a residential student-tenant of Dartmouth College to satisfy the Sutton doctrine.

As this Court stated in Crete, "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 N.H. at 675. (emphasis added). Appellant Factory Mutual, in essence, seeks to elevate this reference to a "possessory interest" in Crete beyond the

ordinary meaning of the term and essentially equate it to an ownership interest. Here, as the Superior Court properly found, Mr. Lim's interest in his respective dormitory was substantially the same to that of a tenant in a landlord/tenant relationship. See Appellant's App. at 58-59 order of the Superior Court; see also Restatement (First) of Property §7 (Am. Law. Inst. 1936). Because Mr. Lim had a possessory interest, the Superior Court order finding Mr. Lim to have a possessory interest should be affirmed.

As the Superior Court stated in its decision, a person has a possessory interest in land "where he or she (1) has '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." Addendum to Appellant's Brief at 58 (quoting: Restatement (First) of Property §7 (Am. Law. Inst. 1936)). Alternatively, a person can have possessory interest if he or she can show that the interest is "substantially identical" to "one arising where the prior two elements are satisfied." See Id. (quoting: Restatement (First) of Property §7, cmt. b (Am. Law. Inst. 1936)).

In this case, the Superior Court in its order on the parties cross-motions for summary judgment made several

findings demonstrating that Mr. Lim had a possessory right of control similar to that of a tenant. As the court ruled, Mr. Lim had a right to live in the dormitory, store his personal property there, invite guests, use the utilities, and decorate the room to his liking. See Addendum to Appellant's Brief at 58-59. The Superior Court stated that although the Appellee may not have had the right to completely exclude Dartmouth staff from his dormitory room, "in practice [he] could exercise [his] control so as to exclude others in a manner 'substantially identical' to that of a tenant." Id. For instance, Appellee had the right to exclude other members of society, including other students, from his dormitory by not allowing them to enter without swipe card access and the necessary key to the door of his dormitory. See Addendum to Appellant's Brief at 59; See also Residential Behavior Policy, Appellee's App. At 160 (where fines are imposed for unauthorized entry into student rooms; and Winter and Spring Housing Policy, Appellant's App. Vol. II at 171 (where students who want to have a person-for-person room change during the semester must have consent of "all affected residents".).

In addition, the Superior Court found that the Room Entry by College Employees Policy gave the students the right to exclude students who entered their dormitories and

have them removed from their Dartmouth residence. See Addendum to Appellant's Brief at 59; see also Residential Behavior Policy at Appellant's App. Vol. IV at 158. While Dartmouth staff retained the right to enter, they were required to provide advanced notice before entering a dormitory. See Addendum to Appellant's Brief at 59; see also Room Entry by College Employee, Appellant's App. Vol. III at 209 (Dartmouth College staff reserves the right to enter and to inspect any students room to provide emergency service or general maintenance work, make safety inspections, or investigate violations of rules and a note will be left that College Employee was in the room for the defined official reason.). As the Superior Court ruled, Mr. Lim "had a right to control and exclude others from [his] dormitor[y] in a manner 'substantially identical' to that of tenants over leased property." See Addendum to Appellant's Brief at 59; compare to: Restatement (First) of Property §7 (Am. Law. Inst. 1936). Therefore, the Appellee's living conditions at Dartmouth College were equivalent to that of a rent paying tenant living in a landlord's apartment when examined in accordance with the reasoning and analysis of New Hampshire's adoption of the *Sutton* Doctrine.

In order to exercise these possessory rights, separate and apart from his tuition, Mr. Lim paid room and board while living in a Dartmouth College dormitory. Notably, these one-time fees charged per semester or per year for dormitory rooms are referred to as "rent" in at least one of the Dartmouth policies. See Room Care Policy, Appellee's App. Vol. IV at 41. Furthermore, the Room Care Policy referred to campus students as "residents" and dormitories as "living unit(s)." See Appellee's App. Vol. IV at 42. Based on these policies alone, it is evident that Dartmouth intended or understood the students to be considered tenants of the college "living units", as opposed to mere licensees as the Appellant wishes this Court to find.

Appellant attempts to negate Mr. Lim's possessory interest by noting that Dartmouth College also imposed rules about what items can be stored in the dormitory, and how long and how many guests can be in the student's residence at any given time – arguing that such a policy cannot be compared to a residential tenant's lease. See Appellant's Brief at 37. Appellant, however, cites to no statute or case law that would preclude a landlord from imposing similar requirements in a lease. A landlord/tenant agreement may include similar and/or more stringent provisions, especially if the tenant is sharing an apartment

owned by a landlord with other tenants. As the Superior Court found, these rules simply do not preclude Mr. Lim from having what is in essence a landlord/tenant relationship with Dartmouth.

While not amounting to binding precedent in either Massachusetts or before this Court, the present scenario involving a student resident of a college dormitory facing a subrogation action for fire damage by the college's insurer was addressed in a recent Massachusetts Superior Court case. See Endicott College v Mahoney, Essex County Super. Ct., No. CA 00-589C, 2001 WL 1173303 (Oct. 3, 2001) (Massachusetts Superior court found that the implied co-insured rule also applied to college students, which precludes subrogation by the college's insurer for fire damage). The Endicott decision notes its result was a direct extension of the reasoning of the Massachusetts Supreme Judicial Court in its adoption of the *Sutton* doctrine in Peterson v. Silva, 428 Mass. 751 (1999). Peterson is the same case on which this Court relied in New Hampshire's adoption of the *Sutton* doctrine in Crete. See gen. Crete 150 N.H. at 675-77.

The court in Endicott determined 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. at *10. The court also found that equitable principles support the conclusion that subrogation would not be available to the insurance carrier because students who make tuition payments (a portion of which may be applied to insurance premiums) have a possessory interest to reside in a dormitory for the academic year and, therefore, should be considered co-insureds of the college. See Id. at *11, citing Sutton v. Jondahl, 532 P.2d at 482. The court then concluded that since the student was an implied co-insured of the college, subrogation was not allowed and granted summary judgment in the student's favor. Endicott College, 2001 WL 1173303 at *11.

The Appellant argues that the Appellees did not hold an insurable interest in the Morton Hall dormitory where Mr. Lim lived. See Appellant's Brief at 32-42. In support of Appellant's argument, Appellant cites to Daeris to define "insurable interest" as "[a]ny interest of pecuniary benefit from the existence of 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). Appellant

essentially argues that because a student-resident held no interests of pecuniary benefit / pecuniary loss, that Appellees held no insurable interest in Morton Hall. Daeris, however, is distinguishable from the case at bar.

In Daeris, the plaintiff rented a commercial property and subsequently made improvements to it. Daeris, 105 N.H. at 118-19. The lease agreement stated that all permanent additions and alterations made by the lessee "are considered part of the building and the property of the Lessor." Id. at 118. There was a fire at the commercial property and plaintiff sought compensation from the insurer to be reimbursed for the loss and damage of the improvements made to the property. Id. at 119. The defendant argued that improvements became property of the owner of the premises and therefore the plaintiff had no insurable interest in the improvements. Id. The court found that since the insurance policy did not limit coverage for the plaintiff and the plaintiff "acquired a pecuniary interest" in using the property, the plaintiff was covered by insurance. Id. at 119-20.

It is important to first point out that Daeris was decided long before Sutton or Crete. To the extent that the ruling in Daeris regarding the co-insured status of a residential tenant is inconsistent with the *Sutton Doctrine*, it

would plainly be overturned by this Court's decision in Crete. Second, the Appellant improperly conflates Daeris with the Sutton doctrine. Specifically, he conflates having a pecuniary interest in property with the possessory interest, which is not in any way required under the *Sutton* Doctrine. In Daeris, the commercial tenant was seeking to make a first-party property damage claim against the landlord's insured property. As such, the issue there was really who owned the property which was damaged and whether the landlord's insurer would pay the landlord or the tenant for the damaged property. As such, the Daeris Court stated that a commercial tenant needed a pecuniary interest in property to affirmatively recover under the landlord's insurance policy. As Mr. Lim is not making a claim to recover under the Factory Mutual Policy, the pecuniary interest argument is irrelevant. In contrast, the anti-subrogation rule of the *Sutton* doctrine refers to the tenant's "possessory interest", rather than a pecuniary interest in the property, as the "insurable interest" in a residential lease. Crete, 160 N.H. at 675; Sutton, 532 P.2d at 482 ("both landlord and tenant have an insurable interest in the rented premises – the former owns the fee and the latter has a possessory interest.").

The Appellant also argues that the Superior Court's analysis is in error because Bell v. Town of Wells, 557 A.2d 168, 178 (Me. 1989) states that possessory interest in a property includes the right to exclude others. To begin, and as stated earlier, students at Dartmouth College do have the right to exclude others. This is evident in numerous Dartmouth College policies as discussed above. See gen. Supra. Additionally, Bell arose from an entirely different set of facts and circumstances which further distinguish its finding from the case at hand.

Bell involved the conflict between a public recreational easement to use beach front property and the rights of the actual owners of that beach front property. See gen. Bell, 557 A.2d 168. Bell did not involve the rights nor discuss the extent to which a tenant has a possessory interest in leased residential property. In essence, this case has nothing to materially add in terms of the issue here – whether a student living in a dormitory is substantially similar to a tenant living in an apartment for the purposes of the *Sutton* Doctrine. What follows from Appellant's analysis of a possessory interest can only be interpreted as one which would require Mr. Lim to have not only a possessory interest, but an actual ownership interest in the property.

The very purpose of the *Sutton* doctrine is to allocate the burden of securing fire insurance between the owner of the property as a whole and someone who has a possessory interest in only a portion of that property. In every landlord/tenant situation, the tenant has a possessory interest in a small portion of the overall property – and a limited possessory interest at that. Yet, under the *Sutton* doctrine, the tenant is a co-insured under the fire insurance policy covering the property as a whole. That right to be considered a co-insured extends even to those portions of the property to which the tenant has no possessory interest in whatsoever – such as in a neighboring unit or common areas of the building. Thus, the Superior Court's order should be affirmed.

B. Dartmouth College's Student Policies did not rise to the level of an express agreement explicitly requiring student-tenants to purchase their own fire insurance for the building or explicitly stating that Student-Tenants were NOT coinsured under the Factory Mutual policy, as required by the Sutton Doctrine.

In terms of the analysis required under Crete, Dartmouth College policy that is most on point to this case is found in the Risk and Internal Controls Services policy

(hereinafter "Risk Policy"). However, contrary to the result sought by the Appellant, this Risk Policy directly contradicts the Appellant's assertion on appeal that the student policies somehow rose to the level of an express agreement sufficient to contravene the presumption in Crete that Mr. Lim shall be considered a co-insured under the Dartmouth fire insurance policy with respect to the subrogation rights of the Appellant. See Appellant's App. Vol. IV at 46. This Risk Policy plainly states that Dartmouth College, and not the student residents, will obtain insurance covering against losses incurred to College-owned property, such as Morton Hall – Mr. Lim's student residence. It states in pertinent part: "The College insures College-owned property through an "All Risk" blanket policy. Perils covered include fire . . . . " The Dartmouth Policy excluded coverage for damage to personal property. See Id. As such, the Risk Policy explicitly allocates the burden of obtaining fire insurance as to the dormitory structures themselves to Dartmouth and the burden as to each student is only to obtain insurance on their own personal property. This allocation of the burden of obtaining fire insurance on the building itself is precisely the opposite of what the Crete court states is required to defeat the presumption of co-insurance.

In essence, because Dartmouth College, through Factory Mutual, provided fire insurance to the dwelling building, the fire insurance also "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 N.H. at 675. As stated earlier, "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 N.H. at 675. (emphasis added). The Handbook Policies did not have an "express agreement" that the Appellee is responsible for fire damage or that the Appellee must purchase his own fire insurance to insure the dormitory. Crete, 150 N.H. at 676.

The Superior Court found that the Open Flame Policy was the only document in the Handbook that even mentioned liability for fire damage. See Appellant's Addendum to Brief at 61. The Open Flame Policy stated that a resident's violation of the policy "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." See Appellant's App. Vol. IV at 151-152 (emphasis added). In analyzing the word "may", the

Superior Court stated that by using the word "may" rather than "shall," "the Handbook implies that circumstances exist under which the students would be liable but fails to expressly list those situations." See Appellant's Addendum to Brief at 61; Cf. Town of Nottingham v. Harvey, 120 N.H. 889 (1980) (where the Supreme Court stated that, "[t]he general rule of statutory construction, subject to exception, is that the word "may" makes enforcement of a statute permissive and that the word "shall" requires mandatory enforcement."); see also "MAY", BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. To be permitted to; 2. To be a possibility; Cf. 'CAN'."). The Superior Court therefore found that there was no "explicit agreement" between Mr. Lim and Dartmouth College that he will "be excluded from . . . Dartmouth's fire insurance policy . . . . " See Appellant's Addendum to Brief at 61.

In addition, the sort of language the Open Flame Policy used to allocate liability for property damage to the resident for the resident's negligence was similar to the language of the lease agreement that this Court analyzed in Crete and found insufficient to defeat the co-insurance presumption. See Crete, 150 N.H. at 676. In Crete, the relevant part of the tenant's lease agreement stated that the, "[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." Id. at 676. The Crete court, however, specifically found that this lease language was insufficient to defeat the *Sutton* doctrine. See Id. The Court stated that the above language, "does not explicitly state that the tenant is not considered a coinsured of the landlord under any fire insurance policy obtained by the landlord," and found the tenant to be coinsured under the landlord's fire policy. See Id. (emphasis added).

If Dartmouth College had desired to allocate all liability to Mr. Lim for his "own negligence in causing a fire . . . ", Id. at 676, Dartmouth could have applied the method set forth in Crete for doing so. To accomplish this, the policies, "could require the [dormitory resident] to carry fire insurance to insure against the [dormitory resident's] own negligence or specify that the [Dartmouth's] insurance would not cover the tenant in the event of a fire caused by the tenant's negligence." Id.; citing Sutton, 532 P.2d at 482. However, Dartmouth College did not add such a clause to the Open Flame Policy or any other student policy for that matter. Therefore, Mr. Lim reasonably believed that he would not be liable for fire damage to the Dartmouth College dormitory.

Nonetheless, appellant argues that the Mr. Lim could not reasonably believe that they would not be responsible for the cost of the fire damage caused by violating the Open Flame Policy. However, and in contrast to this assertion, the Crete court stated that, "a reasonable tenant expects that the landlord has fire insurance to protect the rental property." Crete, 150 N.H. at 675. Moreover, in this case, Dartmouth College's Risk Policy as discussed above specifically addresses fire insurance coverage in a manner that directly supports a belief on the part of a dormitory student such as Mr. Lim that Dartmouth has assumed responsibility for obtaining fire insurance. In other words, based on Dartmouth's Risk Policy explicitly stating that Dartmouth provided insurance coverage for a fire loss such as the one at issue here, a student-tenant would reasonably believe he had no need to purchase additional fire insurance on their dormitory.

The Appellant argues that other Handbook policies make it clear that the Appellee could be responsible for other types of damage resulting from violating the Handbook rules. While generally true, none of those policies addressed below in any way negate Mr. Lim's status as a coinsured under the Dartmouth fire insurance policy in the manner required under Crete.

Dartmouth's Damage Policy states that the student-tenants "[a]re expected to provide adequate insurance coverage for all personal property." (emphasis added) Appellant's App. Vol. IV at 148. The Damage Policy also stated that student-tenants "assume any and all liability for damage or claims that result from their own negligence . . ." and "are liable for any damage and/or loss to a room, its furnishings, or any other part of the residence hall or its environs", and "[w]henever possible, repair, or replacement costs will be assessed to the individual(s) responsible;" Id. at 148-49. Dartmouth's Insurance Policy addresses insurance coverage for personal property, automobile liability, and foreign travel, but does not touch upon fire. See gen. Appellant's App. Vol. IV at 155. Dartmouth's Residential Behavior Policy provides that if the student-tenants engaged in certain activities that may be considered endangering behavior, such as fire safety violations, "may lead to . . . removal from College residence halls, disciplinary action (including costs of repair and/or cleaning), and/or criminal charges" and result fines. See Appellant Appendix Volume IV at 160. Fourth, the Judicial Process and Sanctions policy (hereinafter "Sanctions Policy") listed sanctions that may be imposed in response to student violations. These sanctions can include "restitution",

where the student-tenant would be "expected to pay restitution" for "caus[ing] damage or vandaliz[ing] College property" and "fines" which "will be imposed for some violations as deemed appropriate based upon circumstances." See Appellant's Appendix Volume IV at 164.

However, all of these Policies contain almost identical language to that found in the lease agreement in Crete – a lease agreement in which this Supreme Court held to be insufficient to defeat he *Sutton* doctrine and permit an insurer to subrogate against an individual in the position of Mr. Lim. These cited polices read in part or in whole do not contain provisions explicitly stating that the tenant is not a coinsured under the landlord's fire insurance policy nor do they contain provisions which require Mr. Lim to purchase fire insurance for the dormitory itself as opposed to merely personal property insurance. As such, the school policies and Handbook do not rise to the level of 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." Crete 150 N.H. at 675.

In summation, none of the Handbook Policies explicitly required the student-tenant to obtain fire insurance for the

dormitory nor explicitly stated that a student is not deemed a coinsured under Dartmouth's policy. Because the Student Handbook or the policies within it did not expressly state as such, the Appellee is a coinsured under Dartmouth College fire insurance policy under the *Sutton* Doctrine as adopted by this Supreme Court in Crete, and the Superior Court order should be affirmed.

II. THE EQUITABLE CONSIDERATIONS DISCUSSED IN CRETE EXTENDS IN EQUAL FORCE TO RESIDENTIAL STUDENTS LIVING IN COLLEGE IN CAMPUS HOUSING.

Mr. Lim's status as a student-tenant bars subrogation action against him for fire damage resulting from negligence because of the same equitable considerations that Crete adopted for the non-student tenants. As the court discussed in Crete, reasonable tenants expect that the landlord will insure his or her own rental property for a fire loss and a reasonable fire insurance company knows that when it insures a rental property, it may need to cover fire damage caused by the tenants. See Id. Knowing this, the fire insurance company can account for the fact that tenants can negligently start fires and "adjust their rates accordingly." See Id. Meanwhile, by residing in the rental property and paying rent, a portion of the rent inevitably

goes to paying the insurance company policy premium. See Id.

The Crete court recognized that if the tenants were responsible for purchasing their own fire insurance for the entire property, they would be forced to insure the entire building regardless of the extent of their possessory interest or their knowledge in "procur[ing] adequate coverage." See Id. The same equitable considerations apply equally to Mr. Lim. The Appellant is in the best position to assess the nature of the risk incurred insuring the Dartmouth residence halls and adjusting its premiums to reflect the nature of that risk. Additionally, the Crete court noted that rejecting the Sutton doctrine would in essence require each tenant to buy fire insurance on the same building, resulting in multiple duplicative insurance policies which translates into massive economic waste. See Id. Meanwhile, as previously noted, this Supreme Court did not outright prohibit subrogation against tenants – this Supreme Court prescribed a way for landlords to hold tenants responsible for fire damage. See Supra at 23.

Just as with any tenant, Mr. Lim had every reason to expect that Dartmouth College would obtain adequate fire insurance to cover a negligently caused fire and resulting damage to his dormitory room as well as the entire

dormitory building. See Id.; See Appellant's Appendix Volume IV pg. 46. Factory Mutual, the College's insurer against fire losses, would reasonably expect to pay for negligently caused fire and to take into account the insured property was to be occupied by college students and to adjust their insurance rates accordingly. See Crete, 150 N.H. at 675. Moreover, it would not be economically practical or feasible to require each individual student carry fire insurance for the entire multi-million-dollar dormitory building in which they pay to reside. See Id. At 675, 677. Further to place the burden of procuring such insurance on each and every dormitory student would result in "economic waste and duplicative insurance policies." See Id. at 677. Moreover, as this Court recognized in Crete, a student tenant such as Mr. Lim, would likely lack sufficient knowledge about the College's real and personal property to even attempt to purchase such insurance. See Id. at 677.

In its brief, Appellant argues that that principles of equity require Mr. Lim be held financially responsible for his alleged misconduct. First, this is exactly opposite to the equitable analysis in Crete. Second, his only support for this equitable proposition is to cite the New York case of Phoenix Ins. Co. v. Stamwell, 796 N.Y.S.2d 772 (2005). However, the Phoenix case is clearly distinguishable. New

York, unlike New Hampshire, has explicitly rejected the *Sutton* Doctrine. Indeed, the plain reading of the Phoenix case is that the result would have been different if New York had followed the *Sutton* Doctrine.

In Phoenix, the court recognized that the "majority of other states have adopted the result in Sutton which is that, absent an express provisions in a lease establishing a tenant's liability for loss from a negligently started fire, the landlord's insurance is deemed held for the mutual benefit of both parties." Phoenix Ins. Co. 796 N.Y.S.2d at 778 (internal citations and quotations omitted). The Phoenix Court, however, concluded that under the law and public policy of New York, which does not recognize the *Sutton* Doctrine, there must be "clear and unequivocal language" in the student handbook to apply anti-subrogation rules. See Id. This, however, is exactly the opposite of what is required under the *Sutton* doctrine as set out in Crete. That is, under Crete, it is the college's burden to institute policies that explicitly inform students that they are not co-insureds under the college's fire insurance policy and that they are required to purchase their own fire insurance covering the dormitory building itself.

The Appellant also argues that Crete was not intended to cover possible violations of College Policies, such as

when the Appellee intentionally brought the charcoal grill into Morton Hall and attempted to cook with it. See Appellant's Brief at 47-48. The Appellant alleges that Crete only covers what they call "unintentional acts", such as "improperly disposing of smoking material or failing to monitor food cooking on a stove." See Appellant Brief at 47. However, this argument disregards the facts under which Crete was decided, as well as the facts in this case. In this case, the allegations are that the fire at Morton Hall was caused by negligent acts of Mr. Lim. Appellee is unaware of any allegation from any source including Factory Mutual that the fire was intentionally set or was the product of arson.

The New Hampshire Fire Marshal's office investigated the fire and determined that the fire was the result of an unattended charcoal grill/tower that was placed on a membrane covered flat roof. See Appellant's App. Vol. IV at 27. Indeed, Appellee's had poured water multiple times on the charcoal prior to leaving it unattended on the roof. See Id. at 33. In making their "unintentional acts" argument, Appellant states that Crete applies to situations similar to a tenant's failure to monitor food cooking on a stove, which is directly analogous to what the Fire Marshal

found as the cause of the Morton Hall fire here – an unattended charcoal grill.

In conclusion, the equitable considerations that motivated this Supreme Court in Crete to adopt the Sutton doctrine extend in equal force to students living in college on campus housing and affirm the findings of the Superior Court.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellee, Sebastian Lim, requests 15 minutes of oral argument, to be made by his counsel, John B. Schulte, before the whole Court.

CONCLUSION

In conclusion, Plaintiff-Appellee, Sebastian Lim, respectfully requests that the New Hampshire Supreme Court AFFIRM the Merrimack Superior Court order.

Respectfully Submitted,
SEBASTIAN LIM

By and through his attorneys,

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CERTIFICATION OF SERVICE

I hereby certify that two copies of the foregoing document have been sent to Matthew R. Passeri, Esquire and Debbie Lorusso Makris, Esquire via first class mail.

/s/ John B. Schulte

John B. Schulte, Esquire

/s/ Brandon F. Chase

Brandon F. Chase, Esquire