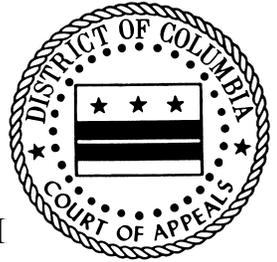


APPEAL NUMBER 23-CV-278

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUM



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LAUREN SZYMKOWICZ and JOHN PAUL SZYMKOWICZ,

Appellants-Plaintiffs,

vs.

**THE PRESIDENT AND DIRECTORS OF
THE COLLEGE OF GEORGETOWN,
WITHIN THE DISTRICT OF COLUMBIA
(a/k/a/ "Georgetown University")**

Appellee-Defendant.

**On appeal from the Superior Court of the District of Columbia
(Judge Maurice A. Ross)
2022-CA-003391-B**

**LAUREN SZYMKOWICZ'S AND J.P. SZYMKOWICZ'S
BRIEF**

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**LAUREN SZYMKOWICZ and JOHN PAUL SZYMKOWICZ,
Plaintiffs-Appellants,**

vs.

**THE PRESIDENT AND DIRECTORS
OF THE COLLEGE OF GEORGETOWN,
WITHIN THE DISTRICT OF COLUMBIA
(a/k/a/ “Georgetown University”),
Defendant-Appellee.**

Appeal Number: 23-CV-278

Superior Court Case Number: 2022-CA-003391-B

LAUREN SZYMKOWICZ’S AND J.P. SZYMKOWICZ’S BRIEF

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JURISDICTION¹

This appeal is from the final order dated March 23, 2023 that granted Georgetown University's motion to dismiss Lauren's and J.P. Szymkowicz's complaint in its entirety. The notice of appeal was filed on March 31, 2023.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court err in granting Georgetown University's motion to dismiss Lauren's and J.P.'s complaint on the basis that marijuana is legal and cannot support claims of negligence, nuisance and breach of contract where secondhand smoke from one of its students migrated into Lauren's and J.P.'s rowhouse next-door and caused them to suffer significant damage?
2. Did the Superior Court fail to consider D.C. Code §6-642.09(a) which allows neighbors to sue those whose zoning violations cause them harm when it dismissed Lauren's and J.P.'s complaint?
3. Did the Superior Court err in holding that the Zoning Commission (rather than the Superior Court) was the proper forum in which to bring their claims against Georgetown University where Lauren and J.P. were damaged as a result of the University's failure to prevent its student from smoking marijuana in violation of the Code of Student Conduct?

¹ The numbers inside brackets indicate the page number of the Joint Appendix that relate to the statement immediately preceding the brackets.

4. Did the Superior Court err when it held that Lauren and J.P. were not intended beneficiaries of the contract between the District of Columbia and Georgetown University that was incorporated into the Zoning Order?
5. Did the Superior Court err when it held that Georgetown University did not have the duty to protect Lauren and J.P. from the secondhand smoke that migrated into their home from the student's home next-door?
6. Did the Superior Court err when it held that Georgetown University eventually took action to stop the migration of secondhand smoke migrating into Lauren's and J.P.'s home from the student's rowhouse next-door?

STATEMENT OF THE CASE

This case involves the actions of an undergraduate student at Georgetown University whose marijuana smoking in her off-campus housing resulted in the migration of secondhand smoke from her home into the rowhouse next door in which Lauren and J.P. reside. In their complaint in the Superior Court, Lauren and J.P. presented claims of private nuisance, public nuisance, negligence, breach of contract, and negligent infliction of emotional distress against Georgetown University due to its failure to adhere to the terms of a Zoning Order that incorporated a Campus Plan and Code of Student Conduct. [1-66]. Specifically, Georgetown University failed to enforce those portions of its Code of Student Conduct that ban students from smoking marijuana or otherwise causing harm to

the student’s neighbors. [24-37]. The Campus Plan also requires Georgetown University to remove students from off-campus housing if their actions cause harm to their neighbors. [24-37]. The Superior Court held a 30-minute hearing via WebEx on Georgetown University’s motion to dismiss. [333-367]. During this hearing, the judge ruled that that the use of marijuana is legal, and therefore, cannot support a claim for nuisance or negligence.” [335, 338-339]. The judge also found that Lauren and J.P. should have brought their claims before the Zoning Commission as opposed to the Superior Court. [335-336, 344-346, 349, 354-357, 360]. The judge also found that Lauren and J.P. were not intended beneficiaries of the Zoning Order that incorporated the Code of Student Conduct and Campus Plan. [337, 350-351]. The judge shockingly remarked that the remedy for a neighbor involuntarily exposed to secondhand smoke is to move. [337]. In a one-page order, the Superior Court dismissed Lauren’s and J.P.’s complaint for the reasons stated during in the WebEx hearing. [370].

STATEMENT OF FACTS

Parties

Lauren Szymkowicz and her husband, J.P. Szymkowicz,² were Plaintiffs in the Superior Court and are Appellants in this Court. They live in a rowhouse near

² Lauren Szymkowicz is hereinafter referred to as “Lauren.” J.P. Szymkowicz is hereinafter referred to as “J.P.” As a married couple, Lauren and J.P. are hereinafter jointly referred to as “Lauren and J.P.”].

the main campus of Georgetown University. [2-3]. They work from home. [2]. The President and Directors of the College of Georgetown, within the District of Columbia, was the Defendant in the Superior Court and is the Appellee in the Court of Appeals.³ [3].

The Georgetown University Student at Issue

In July 2006, Lauren and J.P. moved into the rowhouse where they currently reside. [4]. In or around mid-September 2021, a student⁴ in her senior year at Georgetown University moved into the basement of the rowhouse next-door which is physically attached to Lauren's and J.P.'s rowhouse next-door. [4]. The rowhouses have a common wall that separates Lauren's and J.P.'s rowhouse from the student's rowhouse; the wall is semi-porous in places, particularly in the basement and attic, permitting air to pass between the rowhouses. [4]. The student habitually and frequently smoked marijuana in the basement of her rowhouse, and secondhand smoke regularly migrated through the common wall into Lauren's and J.P.'s rowhouse, causing the air in Lauren's and J.P.'s rowhouse to become toxic and malodorous. [4-5].

³ The President and Directors of the College of Georgetown, within the District of Columbia, is hereinafter referred to as "Georgetown University."

⁴ This student is hereinafter referred to as "the student."

The Migration of Secondhand Smoke into Lauren's and J.P.'s Home Prior to their Complaints to Georgetown University

At the time the student moved into the rowhouse, there were two other unrelated individuals living on the third floor of the rowhouse – a male and a female student at Georgetown University. [6]. Neither of these upstairs housemates smoked marijuana in or around the rowhouse. [6]. The only time that either Lauren or J.P. ever met the student was in mid-September 2021, while she was moving boxes from a car at the rear of the rowhouse into the basement of the rowhouse. [6]. This meeting occurred when the male housemate and J.P. were talking to each other on their respective balconies. The student and a friend drove up in a car, unloaded the boxes, and had a brief conversation during which the student commented that she planned to graduate in December 2021 and return to the state where her family lived. [6].

On September 18, 2021, Lauren and J.P. went on vacation and did not return home until late on the evening of September 28, 2021. [6]. Upon information and belief, the student had not yet fully moved into the rowhouse by the time that Lauren and J.P. left for vacation. [6]. Upon Lauren's and J.P.'s return home on the evening of September 28-29, 2021, they were hit by what felt and smelled like a wall of secondhand marijuana smoke as they entered their home. [7]. This secondhand marijuana smoke was worse in the basement, but also permeated the air on the second floor where Lauren's and J.P.'s kitchen, dining room, and two

living rooms are located, and on the third floor where Lauren's and J.P.'s bedroom and office are located. [7].

On September 29, 2021, J.P. emailed the male housemate about the migration of marijuana smoke, and on September 30, 2021, the male housemate replied that he would "do [his] best to resolve things gently but satisfactorily" (even though he did not have a legal duty to do so, as he was not responsible for the actions of a housemate that he had just met). [7]. On October 7, 2021, J.P. emailed the male housemate again and said "The pot smoke is really bad. Can you please ask [the student] to stop smoking in your house? It is keeping us up and giving us headaches and coughs. Thanks." [7]. There was secondhand marijuana smoke present in Lauren's and J.P.'s home on many days between October 7-21, 2021, when the migration of secondhand smoke stopped abruptly, because, as they learned from the male housemate, the student went to a conference on marijuana issues in Las Vegas and was not home. [7]. Upon the student's return on October 28, 2021, the secondhand smoke in Lauren's and J.P.'s house became worse than it had ever been, which caused J.P. to send a text message to the male housemate that stated "Our house smells like a pot den. It is hard to breathe. Can you please have [the student] call [Lauren]? Thanks and sorry to involve you." [7]. Upon information and belief, the student told her male housemate that she was mad that

Lauren and J.P. asked him to be the “middleperson” and instructed him not to give out her phone number or email address to Lauren and J.P. [8].

On October 29, 2021, Lauren saw the student arrive at her home, and immediately went to the student’s basement door and told the student that marijuana smoke was coming into her house, that she has asthma, and that the secondhand smoke was giving her headaches and making it hard to breathe. The student said, “I am on a Zoom call [even though she had just arrived at her house] and I can’t help you,” at which point Lauren went back home. [8].

Lauren’s and J.P.’s Initial Complaints to Georgetown University

After Lauren’s request to the student was rebuffed, J.P. made the decision, on October 29, 2021, to call the Director of Georgetown University’s Office of Neighborhood Life, Corey Peterson,⁵ to complaint about the student’s smoking. [8]. Director Peterson was not available, so J.P. left a voicemail. [8]. There was no migration of secondhand smoke into Lauren’s and J.P.’s home from November 1-4, 2021. [8]. J.P. learned from the male housemate that the student’s mother was visiting from out of town, and thus, there was no reason for him to follow up with Director Peterson. [8]. On or about November 5, 2021, secondhand smoke again migrated into Lauren’s and J.P.’s home. [9]. On the evening of November 7, 2021,

⁵ The Director of the Office of Neighborhood Life is hereinafter referred to as “Director Peterson.”

Lauren, J.P. and the male housemate who lived next door went to the movies and a restaurant. [9]. Upon their return, Lauren and J.P. noticed the presence of a moderate amount of secondhand smoke in the basement of their home. [9]. Sometime after Lauren and J.P. went to bed, the secondhand smoke appeared to get worse and began to migrate from the basement into the upstairs floors of the house; it was so pungent that it forced them out of bed. [9]. That night, November 7-8, 2021, J.P. called Georgetown University's Student Neighborhood Assistance Program [hereinafter referred to as "SNAP"] and made a complaint about the migration of secondhand smoke. [9]. In response to the complaint, the SNAP dispatcher sent an officer of the Georgetown University Police Department to the house, but the officer never left his or her vehicle or spoke to the student. [9]. When J.P. called the Georgetown University Police Department back that night to let them know that the officer had failed to knock on the door, the dispatcher said, "marijuana is legal so we cannot do anything," to which J.P. said, "it does not matter if marijuana is legal or not, because the use of marijuana violates the Code of Student Conduct." [9-10]. The dispatcher then transferred the call to a senior officer, who claimed that officers are not permitted to knock on the doors of off-campus students' houses. [9-10]. The dispatcher promised to call Director Peterson, but since this was late at night, J.P. said that such a call was not necessary and that he would call Director Peterson the next day. [9-10].

On November 8, 2021, J.P. called Director Peterson to make a formal complaint about the marijuana smoke. [10]. Director Peterson was busy at that moment, and the parties missed each other again when he called back later that day. [10]. That night, marijuana smoke again migrated into Lauren's and J.P.'s house, leading J.P. to call SNAP to make a report, but, to his knowledge, no officer was dispatched to the student's house. [10]. On November 9, 2021, J.P. and Director Peterson finally spoke at length about the marijuana smoke and J.P. told him that the secondhand smoke was causing Lauren and J.P. serious health problems and was unpleasant to them, to which Director Peterson responded that he would speak to the student. [10]. That night, November 9, 2021, secondhand smoke again migrated into Lauren's and J.P.'s house. [10]. The next night, November 10, 2021, secondhand smoke again migrated into Lauren's and J.P.'s home, which resulted in another report to SNAP, but this time, the SNAP dispatcher sent a pair of off-duty officers from the District of Columbia's Metropolitan Police Department to Lauren's and J.P.'s home. [10-11]. One of these officers said, "We are sorry!," but stated that they could not go to the student's house since department policy does not permit officers to investigate claims of marijuana smoking in private homes. [10-11]. J.P. emailed Director Peterson about the latest complaint, but there was no resolution to the problem. [11].

From November 11-22, 2021, Lauren and J.P. were traveling. [11]. Upon their return on the evening of November 22, 2021, there was a smell of stale marijuana in their home. [11]. Around 3:45 p.m. on November 23, 2021, secondhand smoke again migrated into Lauren's and J.P.'s home, and was so bad that they could barely breathe, so J.P. called Director Peterson, who came over to their house, smelled how bad the marijuana smell was inside the home, learned that Lauren has asthma and had trouble breathing due to the secondhand smoke, went to the student's home, knocked at the door of the student's home, was permitted to enter by the male housemate and attempted to speak to the student, but the student refused to discuss the matter. [11]. Upon information and belief, the student was mad at the male housemate for letting Director Peterson into their rowhouse. [11].

On November 24, 2022, in the late-morning and early-afternoon, secondhand smoke again migrated into Lauren's and J.P.'s home and was so bad that Lauren had trouble breathing and needed to evacuate the home and take refuge elsewhere, even though she had a significant amount of work to do in her home office before leaving for an out-of-town trip the next day. [11]. After Lauren left the home on November 24, 2022, J.P. called SNAP and then texted Director Peterson to complain about the secondhand smoke; this prompted Director Peterson to visit Lauren's and J.P.'s home, where he said, as he entered the front door, "I can smell it here – it is bad" (even though he was wearing a face mask due

to COVID-19 protocols). [12]. While Director Peterson was at Lauren's and J.P.'s home on November 24, 2022, J.P. called Lauren to ask her to return to the house so that she could tell Director Peterson directly how the secondhand smoke aggravated her asthma and prevented her from breathing properly, and the Director said, "I am so sorry that you are going through this." [12]. A short while after Director Peterson left Lauren's and J.P.'s home on November 24, 2022, Lauren also left (because she was having trouble breathing) and went to a family member's home to avoid exposure to the secondhand smoke. [12].

Lauren and J.P. were out of town for the Thanksgiving holiday from November 24-27, 2021, so they do not know if there was secondhand smoke in their home during that time. [12]. Upon their return, they did not smell any secondhand smoke until the night of November 30 to December 1, 2021, when J.P. saw the student return to her home around 11:15 p.m. [12]. By around 12:40 a.m., an overwhelming wave of secondhand marijuana smoke jolted Lauren and J.P. out of bed. [13]. J.P. called SNAP and asked them to send an officer over to smell the secondhand smoke inside Lauren's and J.P.'s home, but the dispatcher said that they could not because that complaint was outside their jurisdiction. [13]. J.P. then texted Director Peterson and said, "[The student] came back from break at 11:15 pm tonight. We had no smoke in our house since we arrived back this past Saturday (because she was not at home). Now at 12:40 am tonight, our house is

filled with marijuana smoke. Can you please come over and ask her to stop?” [13].

Around 1:10 a.m. that night, Officer Sylvester Davis of the Metropolitan Police Department (Badge #2250) arrived at Lauren’s and J.P.’s home after being dispatched by SNAP. [13]. Upon entering the home, Officer Davis indicated that he could smell the secondhand marijuana smoke but could not take any action against the student due to department policy. [13]. After Officer Davis left Lauren’s and J.P.’s home that night, J.P. called SNAP and asked them to call Director Peterson about this issue. [13]. The dispatcher said that they would leave a message for Director Peterson, but he never called J.P. back that night. [13].

Lauren and J.P. had trouble getting back to sleep that night and were forced to sleep with the windows open due to the presence of secondhand smoke, but even then, their sleep was restless due to the secondhand smoke and cold air. [13-14].

The next morning, December 1, 2021, both Lauren and J.P. woke up with horrible headaches and trouble breathing due to their disrupted sleep and exposure to secondhand smoke and cold air during the night, which made them exhausted the entire day. [14].

On December 1, 2021, Lauren was working away from home in order to avoid exposure to the secondhand smoke, while J.P. was working at home because he had no other comfortable option where he could work. [14]. At approximately 5:10 p.m., the smell of secondhand marijuana entered Lauren’s and J.P.’s home

through the basement, even though the door from the basement to the main level was closed. [14]. Upon being struck by the secondhand smoke, J.P. called SNAP to complain about the secondhand smoke. [14]. The dispatcher took a report over the telephone, and J.P. texted Director Peterson: “The smoke started again around 5:10 p.m. today. Can you please come over and ask [the student] to stop smoking in the house? I have no choice but to work from home and this is killing me.” [14]. Upon receiving the text, Director Peterson sent an employee of the Office of Neighborhood Life to knock on the student’s door. [14-15]. When the employee was unable to gain entry, the employee came to Lauren’s and J.P.’s home and commented that she could smell the secondhand smoke from the front doorway, and, after she went to Lauren’s and J.P.’s basement, said that the secondhand smoke was “really bad” even though she was wearing a mask due to COVID protocols. [14-15]. After the Office of Neighborhood Life employee left, J.P. called a woman who lived across the street for her independent opinion about how bad the secondhand smoke was. [15]. The woman said that she could smell the secondhand smoke as soon as J.P. opened the door, and, after she walked through the home, stated how bad she thought the secondhand smoke was. [15]. After the neighbor left, J.P. was forced to leave in order to avoid exposure to the secondhand smoke. [15]. Upon his return to his home around 9:00 p.m., he found that the secondhand smoke was still present, and although the intensity had dissipated

somewhat, the cumulative effect of the exposure to the secondhand smoke left him with a massive headache and burning sinuses. [15].

On December 3, 2022, J.P. sent an email to Director Peterson and to Georgetown University's Vice-President for Government Relations and Community Relations, Christopher Murphy,⁶ complaining about the secondhand smoke problem. [15]. In response, Vice-President Murphy sent an email that stated, in part, that this is a "very complex situation and we are trying to work our way through it internally," and "we have asked our colleagues at student affairs to reach out to the student and see what progress they can make with her" and "[w]e are hopeful that appealing to her as a person – and not having to threaten conduct issues – will be more effective." [15].

Upon information and belief, the student was out of town from December 2-6, 2021, and thus, Lauren and J.P., but on December 7, 2021, Lauren and J.P. returned from a long day away from the house to find that the house had a stale smell of secondhand smoke, which meant that the smoking was done hours before, so J.P. called SNAP to make another report. [16].

On the night of December 7-8, 2021, Lauren and J.P. were in bed and were awakened to the smell of secondhand smoke around 12:30 a.m., leading Lauren to

⁶ The Vice-President for Government Relations and Community Relations is hereinafter referred to as "Vice-President Murphy."

call Director Peterson to report the intrusion. [16]. A few minutes after Lauren placed this call to Director Peterson, two SNAP officials came to Lauren's and J.P.'s house and said that they could smell the marijuana in the front doorway and proceeded to the student's door at the rear of the home. [16]. From the inside of his home, J.P. could hear the student angrily and loudly complain to the SNAP officials that the Lauren and J.P. were "white privilege" people, that it was not her fault that the "architecture was not good," and that it was Lauren's and J.P.'s fault that the student had a meeting with the "head of students." [16]. The student's comments to the SNAP officials appeared to show a racial animus toward Lauren and J.P. and suggested that she was retaliating against them by continuing to smoke marijuana with knowledge of the migration of secondhand smoke; racial animus and retaliation are themselves violations of the Code of Student Conduct. [16-17]. After the SNAP officials left Lauren's and J.P.'s house, Lauren called Director Peterson and told him that the problem was intolerable, to which he responded, "What can I do?" [17]. Lauren and J.P. went to bed after this call, but needed to sleep with their windows open and their ceiling fan on to help to dissipate the secondhand smoke which entered their room despite their door from their bedroom to the hallway being closed. [17]. It was difficult for them to get to sleep, and once they were able to get to sleep, they would periodically wake up due to the cold temperature in the room, which required them to turn the ceiling fan off

and re-close the windows. [17]. Around 3:55 a.m. that night, J.P. left his bed because there was still a smell of secondhand smoke in the bedroom, even though the door was closed. [17-18]. He found that the main floor of the home smelled heavily of secondhand smoke, which indicated that the student had kept smoking after the SNAP officials left a few hours before. [17-18]. Since he could not get back to sleep, J.P. composed and sent an email to Director Peterson and Vice-President Murphy a short time after 5:00 a.m. that morning detailing his frustration with Georgetown University's response to the problem. [17-18]. In an email dated December 8, 2021, Vice-President Murphy responded to J.P.'s email by stating in part, "I cannot tell you how sorry that I am that you are continuing to experience this and even more so that it's a Georgetown student apparently driving it. . . . As I think you know, our Student Affairs colleagues are speaking to the student tomorrow and we are really hoping for a potential breakthrough there that would result in a change in behavior. To be completely honest, I'm not completely hopeful given our team's prior interactions with the student." [18].

On December 9, 2021 at approximately 10:30 p.m., Lauren and J.P. returned home and immediately smelled marijuana when they opened their front door. [18]. Lauren and J.P. called SNAP which sent two officials to their home. [18]. Upon arriving, the officials indicated that they could smell the secondhand smoke at the front door and did not need to investigate further, but they did go to the student's

door at the rear of her house. [18]. After they knocked for a long period of time, the student answered the door and said that “this is annoying” and denied that she knew what the SNAP program was (even though SNAP officials spoken to her a few days before). [18]. One of the SNAP officials who spoke to the student told J.P. a short time after leaving the student’s home that the student was “belligerent” and shut the door in her face. [18-19]. In order to avoid another night of exposure to secondhand smoke and the resulting restless night of sleep during the night of December 9-10, 2021, Lauren and J.P. left their home and slept elsewhere, and J.P. sent an email that detailed the events of the past few hours to Director Peterson and to Vice-President Murphy. [19]. Around 9:30 a.m. the next morning, Lauren and J.P. returned to their home and upon opening their front door found the lingering stale smell of secondhand smoke. [19]. Lauren left the home to teach a class; there she experienced an adverse reaction to the secondhand smoke, which caused her to have trouble breathing and to sneeze, which in turn caused her students discomfort since the COVID pandemic was still raging. [19]. J.P. worked from his home on December 10, 2021, but had to open the windows in his home office periodically to allow the home to air out. [19]. Upon returning from her class that evening, Lauren was still coughing and sneezing due to her exposure to the secondhand smoke the evening before. [19]. Lauren decided to go to bed after canceling a dinner with a beloved client who was retiring after working with her for many

years. [19]. From December 10-13, 2021, Lauren was in bed suffering from a respiratory infection resulting from her exposure to secondhand smoke brought, but fortunately, no new secondhand smoke entered Lauren's and J.P.'s home during this time. [19].

On or about December 12, 2021, J.P. sent a formal complaint to Rick Murphy, the Chairperson of Advisory Neighborhood Commission 2E, about Georgetown University's failure to enforce its Code of Student Conduct against the student. [20]. Unfortunately, the secondhand smoke returned the night of December 13-14, 2021, awakening Lauren and J.P. even though they were sleeping with their bedroom door closed. [20]. Both Lauren and J.P. were so tired that they simply opened the window a small amount, turned on the ceiling fan, and tried as best they could to get back to sleep. [20]. After a restless night, both Lauren and J.P. woke up on the morning with massive headaches, lightheadedness, coughs, sore throats, and respiratory congestion. [20]. Lauren's breathing was so labored that she needed to use the inhaler that she was prescribed to treat her asthma. [20]. When J.P. went downstairs to the main floor of his home that morning, he could still smell a faint odor of secondhand marijuana smoke on the main floor and in the basement, despite the door from the main floor to the basement being closed throughout the night. [20]. Since Lauren's and J.P.'s home still smelled of secondhand smoke that morning, Lauren was forced to leave the home and relocate

to a relatives' house to get some sleep. [21]. J.P. worked from home that day with the windows partially and periodically open despite the cold weather. [21]. J.P. made a report with SNAP related to the prior night's smoke and left the home to join Lauren for lunch at the relatives' house. [21]. After lunch on December 14, 2021, Lauren and J.P. returned home to get Lauren's heavy desktop computer to take to back to her relatives' house, since there was still a faint smell of secondhand smoke present in their home. [21]. After Lauren left to return to her relatives' house to work for the day, J.P. asked a male neighbor who lived across the street for his opinion on how bad the secondhand smoke was, and when this neighbor entered Lauren's and J.P.'s front doorway and stopped to talk to J.P. for a minute or two, he said, "I have to leave, I am having trouble breathing;" a few days later, this neighbor told J.P. that he had trouble breathing for the rest of the day due to the fact that his brief exposure to the secondhand smoke had exacerbated his own asthma. [21].

On December 14, 2021, the student left her home due to the end of the Fall 2021 Semester and returned to her family's home out of state for the Winter Break. [21-22]. On December 17, 2021, J.P. received a call from Director Peterson who informed him that Georgetown University's Office of Student Conduct would attempt to schedule a meeting with the student "before she comes back in January" in order to address the secondhand smoke problem, and J.P. responded that this

would be insufficient because Georgetown University had the power and duty to move the student out of the home next door to Lauren's and J.P.'s home due to her repeated violations of the Code of Student Conduct and because the student could "run out the clock" on her career at Georgetown University, which would leave Lauren and J.P. living next door to a neighbor with no university to whom they could complain. [22].

On Monday December 20, 2021, J.P. received a call from Vice-President Murphy, who also had Director Peterson on the line. [23-24]. Vice-President Murphy said that Georgetown University finally had a plan to address the problem by "having someone from the Office of Student Conduct have a meeting with [the student] and let her know that if the problem happens again, she will be brought before the Office of Student Conduct." [23-24]. J.P. responded, "this is not good enough – we want Georgetown to move her back on campus," to which Vice-President Murphy said that "we cannot do that." [23-24]. When J.P. responded that "[Georgetown University's] own Code of Student Conduct allows [Georgetown University] to do this," Vice-President Murphy said, "no it does not," and added the "Fourth Amendment gives her Constitutional rights to avoid a search and seizure," and that [the student] says that she "smokes hemp." [23-24]. J.P. responded, "test her urine [for marijuana] then," to which Vice-President Murphy said "[Georgetown University] will not do that," and "we are not going to send

‘jackbooted Nazi thugs’ down her chimney and take a urine sample from her.” [23-24]. He expressed his opinion that J.P.’s complaints were “drivel,” “fanciful,” and “not in the real world.” [23-24]. Vice-President Murphy ended his call to J.P. on December 20, 2021 by stating that it is a “hard no” that Georgetown University will enforce its Code of Student Conduct by requiring the student to move back into on-campus dormitories and implied that nothing would be done by Georgetown University over the Winter Break. [24].

Georgetown University’s Failure to Investigate Lauren’s and J.P.’s Complaints

Upon information and belief, Georgetown University never investigated whether the student at issue smoked marijuana in her home, for example, by asking her housemates or former housemates if they knew if she smoked marijuana in their presence. [24].

Lauren’s and J.P.’s Damages

Paragraphs 150 to 157 of Lauren’s and J.P.’s complaint in the Superior Court state the damages that Lauren and J.P. suffered as a direct and proximate result of Georgetown University’s failure to take action against the student whose smoking practices resulted in the migration of secondhand smoke into Lauren’s and J.P.’s home. [46-49].

**Georgetown University’s “Community Agreement”
that all Off-Campus Students are Required to Sign
as a Condition of Living Off-Campus in Private Residences**

All Georgetown University students who live off-campus in private residences are required to sign a “Community Agreement” that states that “living off-campus is a privilege, and that as a condition of living off-campus, I have obligations and responsibilities both as a student and as a member of the community.” This requires the student to abide by the Code of Student Conduct and acknowledge that they are “subject, through the adjudication process, to sanctions for any violations of the University Code of Student Conduct and may be moved on campus for repeated violations of the University Code of Student Conduct.” [24-25].

The Goals of the Georgetown University Code of Student Conduct

The Code of Student Conduct [96-144] includes a section entitled, “Goals” that authorizes the removal of the student “from the University community” so that the University may “reestablish order” and “repair the harm for those impacted by the [student].” [129].

“Prohibited Conduct” in Georgetown University’s Code of Student Conduct

The Code of Student Conduct states that “University policy strictly forbids the illegal/unauthorized possession, use, transfer, and/or sale of drugs or controlled substances.” [106]. In fact, a large graphical box entitled “Marijuana Laws &

Policies” in the Code of Student Conduct clearly informs students that the use of marijuana is prohibited:

Initiative 71 in the District of Columbia allows for adults over 21 years old to possess and cultivate a specified amount of marijuana. However, the possession, use, and distribution of marijuana are still considered offenses under Federal Law. **As such, possession, use, manufacture, or distribution of marijuana, *including medical marijuana*, is prohibited under the Code of Student Conduct.** [bold and italics in original]. [106].

In addition to prohibiting marijuana, the Code of Student Conduct prohibits “Disorderly Conduct,” which is defined as “Actions that disturb others and/or interfere with or could result in harm to others or the University community.” [105]. Under the Code of Student Conduct, a violation that results in “significant injury, trauma, and/or harm to another person, property, and/or the University community” is an “Aggravating Factor.” [130].

Complaint Procedures within the Code of Student Conduct

The Code of Student Conduct provides for complaints against students and procedures to resolve these complaints. [121-26].

Disciplinary Sanctions Under the Code of Student Conduct

The Code of Student Conduct also provides for an “Interim Suspension” of a student who “appears to pose a risk of significant danger or disruption to the community or any individual.” [124-25]. The Code of Student Conduct also provides for “Housing Probation: an official warning that further violations would

constitute grounds for loss of the privilege of living in any University housing or off-campus residency for a specified period of time or until a specific condition or conditions are met” and “Housing Relocation: loss of the privilege of remaining in current housing and required to relocate to other housing on campus. This may include requiring a student to move from off-campus housing to residential housing on campus.” [132].

The “Standard Adjudication Process” Flowchart

The Code of Student Conduct provides a “Standard Adjudication Process Flowchart” that graphically shows the path that the Disciplinary Process should take and the first step of this “Flowchart” requires the student to meet with the Conduct Officer – something that did not happen in the case at issue (if it has happened at all) until several weeks had passed after J.P. first contacted the University about this problem. [139].

Georgetown University’s “Campus Plan 2017-2036”

The District of Columbia Municipal Regulations and District of Columbia Code govern the operation of universities located in the District of Columbia, including Georgetown University, and require that the District of Columbia approve any university’s campus plan in order for such university to operate or continue to operate its university. [32]. D.C. Code § 6-641.02 states the purpose of zoning law:

Zoning maps and regulations, and amendments thereto, shall not be inconsistent with the comprehensive plan for the national capital, and zoning regulations shall be designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein.

Section 11-X 100.2 of the District of Columbia Municipal Regulations states:

The intent of regulating campus facilities is to: (a) Promote well planned and designed educational campuses; (b) Encourage long-term facilities planning for these uses; (c) Minimize negative impacts of campuses on surrounding residential areas; and (d) Provide consistency and transparency to the campus planning process.

Section 11-X 101.2 of the District of Columbia Municipal Regulations states:

The uses shall be located so that they are not likely to become objectionable to neighboring property because of noise, traffic, parking, number of students, or other objectionable conditions.

Section 11-X 101.14 of the District of Columbia Municipal Regulations states:

Approval of a campus plan shall be based on the determination by the Zoning Commission that the application will be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps, and will not tend to affect adversely the use of neighboring property, in accordance with the Zoning Regulations and Zoning Maps, subject to the special conditions specified in this section.

On September 1, 2016, in accordance with the requirements of the District of Columbia Municipal Regulations governing the operation of universities located within the District of Columbia, Georgetown University filed its “Campus Plan 2017-2036” [146-265] in order to continue to operate its university. This Campus Plan provides for the operation of Georgetown University over a twenty-year period, and states in the Forward to this document:

The Georgetown University Campus Plan 2017 – 2036 (“Campus Plan” or “Plan”) represents the collective and collaborative work of University administrators, faculty and staff, student representatives, and community leadership to arrive at a twenty-year consensus plan for Georgetown’s historic main campus.

The twenty-year term of this Campus Plan is unprecedented for Georgetown University. The consensus nature of a Campus Plan of this magnitude for any university in the District of Columbia is likely unprecedented as well. Yet while the Plan may be groundbreaking in many respects, its fundamental principles are well-established and reflect the substance and goals set forth in the 2010 Campus Plan, and its foundation is built upon the successful and dedicated work that has been undertaken by the Georgetown Community Partnership since the current Plan’s approval in 2012.

The twenty-year term allows the University to think more broadly in terms of envisioning the future of the campus, and provides members of the community with additional certainty and understanding of the University’s key priorities and commitments. To this end, the 2017 Campus Plan sets forth a predictable yet flexible framework that acknowledges the positive effects that have been realized on campus and in the surrounding neighborhoods through the implementation of the 2010 Campus Plan, and carries forward many of its fundamental elements – including maintaining all existing student enrollment caps – in order to continue the meaningful and results-oriented progress that has been achieved in addressing campus impacts. At the same time, the 2017 Campus Plan sets forth a long-term vision for the

campus that embodies Georgetown’s core mission, responds to academic and health-care imperatives, supports the needs of faculty and staff, and provides an environment for students that fosters their personal, intellectual, and spiritual growth – all within the broader context of a harmonious relationship with the surrounding community. [150].

Section 3.5 of Georgetown University’s “Campus Plan 2017-2036” provides that “the 2017 Campus Plan maintains the fundamental commitment set forth in the 2010 Campus Plan to operate a comprehensive and expansive program to educate students about the responsibilities associated with off-campus living, and to address – proactively where possible – neighborhood concerns regarding noise, trash, and other impacts.” [177]. Section 3.5 of Georgetown University’s “Campus Plan 2017-2036” further provides that:

The University has taken a robust, multi-faceted approach to addressing neighborhood life issues since the adoption of the current Campus Plan in 2012. Students are educated on the rules and expectations for off-campus behavior, and the University provides a significant administrative presence on neighborhood streets to monitor student behavior, promote safety, and deter disruptive student behavior. The goal of these efforts is to directly address student activity – in student homes and on the public streets – in a proactive manner. These efforts also serve as privately funded operations that increase neighborhood security and supplement police, trash, and transportation services provided by the District government. Significantly, the University’s efforts in this regard are results oriented, with appropriate attention to inputs and activities. Success in mitigating and managing off-campus impacts in accordance with the 2017 Campus Plan will be, consistent with the 2010 Campus Plan, largely measured by results.

Georgetown University will continue to implement meaningful programs and measures to support its robust neighborhood life program. These initiatives and enhancements include:

- The coordination and funding of off-duty, University paid MPD officers to patrol the neighborhoods surrounding campus during nighttime hours
- Continued implementation of the Student Neighborhood Assistance Program (“SNAP”), which permits the University to proactively address, and respond to, issues of student safety, student behavior, and street noise during nighttime weekend hours
- . . .
- Commitment to residential presence of University professional staff in the neighborhoods, to serve as liaisons between students and the community and provide educational and policy enforcement support

The University will continue to commit sufficient financial, personnel, and programmatic resources to these quality of life initiatives during the term of the 2017 Campus Plan in order to support a safe community, educate students to be good neighbors, and successfully mitigate the impacts of trash, noise, and student behavior. The University may modify these programs only as necessary or appropriate to increase efficacy, focusing on results. Through the GCP, the University will continue to evaluate and collegially develop meaningful ways to enhance the efficacy of these programs based on suggestions and feedback received from neighbors, students, and other stakeholders, and will also continue to engage city agencies to give vigorous attention to housing code, basic business license, trash, and public safety issues. [177-78].

Section 4.2 of Georgetown University’s “Campus Plan 2017-2036,” entitled “The Uses Shall Be Located so They Are Not Likely to Become Objectionable to Neighboring Property,” provides:

The proposed University uses and their locations as fully described in this consensus Campus Plan were developed in collaboration with the GCP, and are not likely to become objectionable to neighboring property due to noise, traffic, number of students, or other objectionable conditions. The Campus Plan includes a series of ongoing commitments, memorialized in the proposed conditions of approval attached as Exhibit FF, which will be implemented over the term of the Plan through collaborative discussions with the GCP to ensure their efficacy. [179].

**The Zoning Commission’s Order Approving
Georgetown University’s “Campus Plan 2017-2036”**

On December 1, 2016, the District of Columbia Zoning Commission entered Order 16-18 [267-284] which approved Georgetown University’s “Campus Plan 2017-2036.” The Campus Plan provides that:

All of the University’s long-range planning initiatives that undergird and support this twenty-year Campus Plan have sought to more fully understand the campus and its potential in the context of its surrounding community. **To that end, residents of the neighborhoods surrounding the campus are not only stakeholders but critical partners in this effort – partners who share a strong interest in the continued vitality of the University as well as in ensuring that its impacts are appropriately and effectively minimized and managed.** [emphasis added]. [155-56].

In approving Georgetown University’s “Campus Plan 2017-2036,” the Zoning Commission found that “[t]he 2017 Campus Plan is in harmony with the general purpose and intent of the Zoning Regulations and Map, and it will not tend

to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.” [270]. The Zoning Commission’s Order further states that “[t]he University shall commit sufficient resources (financial, personnel, intellectual capital, etc.) to the University’s Quality of Life Initiative to support a safe community, educate students to be good neighbors, and successfully mitigate the impacts of trash, noise and student behavior.” [275]. Paragraph 15 (a) on Page 10 of the Zoning Commission’s Order requires the University to “[m]aintain a policy that states that living off-campus is a privilege, not a right, taking into account conduct and seniority; students who have engaged in serious or repeated misconduct shall not be permitted to live off-campus.” [276]. Paragraph 15 (d) on Page 11 of the Zoning Commission’s Order states that “[t]he University shall investigate reports of improper off-campus student conduct and respond to behavior found to violate the Student Code of Conduct promptly with appropriate sanctions. Egregious or repeat violations of the Code of Conduct shall be subject to serious sanctions up to and including separation from the University.” [277].

The Superior Court’s Order Dismissing the Case

On March 20, 2023, the Superior Court held a hearing via WebEx on Georgetown University’s motion to dismiss that lasted for approximately 30 minutes. [333-367]. During this hearing, the judge wondered, “how can something [smoking marijuana] that’s perfectly legal be a nuisance?” [335, 338-339]. The

judge also found that Lauren and J.P. should have brought their claims before the Zoning Commission as opposed to the Superior Court (even though the Zoning Commission has no authority to order the monetary damages sought by Lauren and J.P.). [335-336, 344-346, 349, 354-357, 360]. The judge also found that Lauren and J.P. were not intended beneficiaries of the Code of Student Conduct, the Campus Plan or the Zoning Order that incorporated the Code of Student Conduct and Campus Plan. [337, 350-351]. After remarking that the remedy for a neighbor involuntarily exposed to secondhand smoke is to move, [337], the judge concluded:

I found that all their claims fail as a matter of law. If you put the facts together in the light – looking at them in the light most favorable to your client, can you find a violation of law? And I find that you can't because one, to be an - it has to – you have to be a particular – one, the campus plan is not a contract. Two, even if it were a contract, the potential under your theory, every resident of Georgetown or most of the residents of Georgetown who live in proximity to the campus would have a remedy. Three – even if they had an obligation under the campus plan, it's discretionary how they respond to it. And it's undisputed that they responded to it. [361].

In a one-page order, the Superior Court dismissed Lauren's and J.P.'s complaint for the reasons stated during in the March 20, 2023 hearing. [370].

SUMMARY OF THE ARGUMENT

The Superior Court dismissed Lauren's and J.P.'s Complaint in its entirety based on several findings that were in error: (a) marijuana is legal and cannot support claims of negligence, nuisance, and breach of contract; (b) Lauren and J.P.

should have brought their claims before the Zoning Commission (as opposed to the Superior Court); (c) Lauren and J.P. were not intended beneficiaries of the Zoning Order and Campus Plan entered into between the District of Columbia and Georgetown University; (d) that Georgetown University did not owe Lauren and J.P. any duty of care to protect them from the tortious actions of its off-campus student; and (e) Georgetown University eventually (albeit after several months) took action to move the student away from Lauren's and J.P.'s neighborhood.

First, the use of marijuana is not legal anywhere in the United States of America due to its illegality under Federal law, and the migration of secondhand marijuana smoke into a neighbor's home, under *Ippolito-Shepherd v. Farserotu*, can support the non-smoker's claims of nuisance and negligence. Second, the Zoning Commission has no authority to award monetary damages to plaintiffs suing defendants for violations of zoning orders – only the Superior Court has that power. Third, the Zoning Order clearly contemplated that neighbors of Georgetown University students may directly sue the University where the student's conduct causes the neighbors harm and the University fails to take action against the student to abate the harm, and D.C. Code §6-642.09(a) permits neighbors harmed by entities subject to zoning orders to sue those entities for monetary damages in the Superior Court based on violations of the zoning orders. Fourth, Georgetown University assumed a common law duty of care (under both

nuisance and negligence theories) and a contractual duty of care to protect Lauren and J.P. from harm caused by the actions of its off-campus student where those actions were in violation of the Code of Student Conduct and harmed Lauren and J.P.; and finally, while Georgetown University did eventually take action to remove the student from Lauren's and J.P.'s neighborhood, it took them several months to do so, and it is the province of the jury after trial rather than the Superior Court on a motion to dismiss to determine whether this delay was reasonable or not.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING GEORGETOWN UNIVERSITY'S MOTION TO DISMISS LAUREN'S AND J.P.'S COMPLAINT.

The Superior Court erred in granting Georgetown University's motion to dismiss Lauren's and J.P.'s complaint in its entirety. In *Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1266 (D.C. 2015), the court found that the Court of Appeals "review[s] dismissals under Super. Ct. Civ. R. 12(b)(6) *de novo*, as questions of law." To survive a motion to dismiss, a complaint must set forth sufficient facts to establish the elements of a legally cognizable claim. *Id.* In considering a motion to dismiss a complaint for failure to state a claim, the court shall construe the facts on the face of the complaint in the light most favorable to the non-moving party and accept as true the allegations in the complaint. *Fred*

Ezra Co. v. Pedas, 682 A.2d 173, 174 (D.C. 1996). When considering a motion to dismiss, the reviewing court must construe all facts and inferences in favor of the non-moving party. *Greenpeace, Inc. v. Dow Chemical Co.*, 97 A.3d 1053, 1059 (D.C. 2014). Dismissal for failure to state a claim on which relief can be granted is impermissible unless it appears beyond doubt that the plaintiff can prove no set of facts in support of their claim which would entitle them to relief. *Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 316 (D.C. 2008). Furthermore, a complaint should not be dismissed because a court does not believe that a plaintiff will prevail on their claim. *Id.*

A. The Superior Court erred in basing its dismissal of Lauren’s and J.P.’s complaint on the theory that smoking marijuana is “legal” and therefore, cannot support of claims of nuisance or negligence where secondhand smoke from the defendant’s home enters the plaintiff’s home.

The Superior Court erred in basing its dismissal of Lauren’s and J.P.’s complaint on the theory that smoking marijuana is “legal” and therefore, cannot support of claims of nuisance or negligence where secondhand smoke from the defendant’s home enters the plaintiff’s home.

1. The use and possession of marijuana is not legal.

The Supremacy Clause of the United States Constitution, found at Article VI, Clause 2, unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. While D.C. Code § 48-1201 states that “the

possession or transfer without remuneration of marijuana weighing one ounce or less shall constitute a civil violation” that “shall not constitute a criminal offense or a delinquent act as defined in D.C. Code § 16-2301 (7), because marijuana remains classified under “Schedule I” of the Controlled Substances Act, its possession in, or transfer to or from, the District of Columbia remains unlawful.

2. Even if legal, the use of marijuana where secondhand smoke from the smoker’s home migrates into an adjoining home may provide the foundation for claims arising in tort or contract.

Even if legal, the use of marijuana where secondhand smoke from the smoker’s home migrates into an adjoining home may provide the foundation for claims arising in tort or contract. In a memorandum opinion in *Ippolito-Shepherd v. Farserotu*, D.C. Ct. of App. No. 21-CV-172 (December 23, 2021) at *1, a case that involved the migration of secondhand smoke from one home into the neighboring home, the court stated:

The trial court granted appellees’ motion to dismiss appellant’s complaint for failure to state a claim on the sole ground that the alleged tortious conduct – smoking marijuana in one’s own home – is legal in the District of Columbia and therefore cannot constitute an actionable private nuisance based on its deleterious impact on a neighbor’s enjoyment of her property.

In reversing the dismissal of the plaintiff’s complaint, the court found that:

conduct resulting in interference with the plaintiff’s use and enjoyment of her own property can amount to an actionable private nuisance even if the conduct is confined to the property of the plaintiff’s neighbor and is lawful in itself. *Id.* at *4.

B. D.C. Code §6-642.09(a) provides the basis for Lauren’s and J.P.’s standing with regard to Georgetown University’s violations of the Campus Plan and Zoning Order.

D.C. Code §6-642.09(a) provides the basis for Lauren’s and J.P.’s standing with regard to Georgetown University’s violations of the Campus Plan and Zoning Order. D.C. Code § 6-641.09(a) provides, in relevant part, that:

It shall be unlawful to erect, construct, reconstruct, convert, or alter any building or structure or part thereof within the District of Columbia without obtaining a building permit from [the Department of Consumer and Regulatory Affairs]. ... It shall be unlawful to erect, construct, reconstruct, alter, convert, or maintain or to use any building, structure, or part thereof or any land within the District of Columbia in violation of the provisions of said sections or of any of the provisions of the regulations adopted under said sections. ... The Attorney General for the District of Columbia **or any neighboring property owner or occupant who would be specially damaged by any such violation** may, **in addition to all other remedies provided by law**, institute injunction, mandamus, or other appropriate action or proceeding to prevent such unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate such violation or to prevent the occupancy of such building, structure, or land. [emphasis added].

In addition, in *Northeast Neighbors for Responsible Growth, Inc. v.*

Appletree Institute for Education Innovation, Inc., 92 A.3d 1114, 1123 n.17 (D.C. 2014), the court found that “[t]here are other remedies available outside D.C. Code § 6-641.09(a). **A neighboring property owner may, for example, sue for damages under a common law public nuisance theory, based on violation of the zoning regulations.**” [emphasis added]. *Id.* at 1123 n.17. *See also Williams v. District of Columbia*, 2020 U.S. Dist. LEXIS 49615, *1-2 (D. D.C. March 23,

2020). Therefore, Lauren and J.P. had standing to sue Georgetown University for its failure to enforce its Code of Student Conduct against the student whose secondhand smoke entered Lauren's and J.P.'s home, since the Campus Plan required the University to enforce the Code of Student Conduct and since the Zoning Order incorporated the Campus Plan.

C. The Superior Court erred in holding that Lauren and J.P. should have pursued their claims before the Zoning Commission (as opposed to filing a civil action in the Superior Court).

The Superior Court erred in holding that Lauren and J.P. should have pursued their claims before the Zoning Commission (as opposed to filing a civil action in the Superior Court). The Zoning Commission cannot grant the monetary award that Lauren and J.P. seek against Georgetown University – the Superior Court is the only adjudicative body that can grant them such relief.

D. The Superior Court erred in holding that Lauren and J.P. were not intended beneficiaries of the contract between the District of Columbia and Georgetown University as evidenced by the Zoning Order that incorporated the Campus Plan that required the University to enforce its Code of Student Conduct.

1. The Campus Plan and Zoning Commission's order represented a valid contract between the University and the District of Columbia.

Georgetown University's Campus Plan 2017-2036, and the District of Columbia Zoning Commission order dated December 1, 2016 that approved that campus plan, represented a valid contract between Georgetown University and the

Government of the District of Columbia in which Georgetown University agreed to do certain things (commit resources to mitigate the impacts of student behavior on the surrounding neighborhood, which includes the responsibility to investigate complaints against students and to take action against students accused of violations under procedures set forth in the Code of Student Conduct) in exchange for the license to continue to operate its university in the District of Columbia. In *United House of Prayer for All People v. Therrien Waddell, Inc.*, 112 A.3d 330, 337-38 (D.C. 2015), the court found that “[f]or an enforceable contract to exist, there must be both (1) agreement as to all material terms; and (2) intention of the parties to be bound.” “The determination of what the parties consider to be the material terms of their agreement is a question of fact” that courts may reject “only if they are clearly and manifestly wrong or without evidence to support them.” *Id.* at 338. The Campus Plan and resulting order of the Zoning Commission formed a contract between the University and the District of Columbia that required the University to take the actions set forth in the previous paragraph of this opposition. The Campus Plan “represent[ed] the collective and collaborative work of University administrators, faculty and staff, student representatives, and community leadership.” Without this community “buy in” to minimize the effect of students living in the neighborhoods surrounding the University, the Zoning Commission might not have extended the University’s license to operate. The

University agreed to all material terms of this contract and intended to be bound by this contract.

In *Caesar v. Westchester Corp.*, 2022 D.C. App. LEXIS 283, *10 (D.C. August 18, 2022), the court found that “[a] successful breach of contract claim requires: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach.” In *Murray v. Wells Fargo Home Mortgage*, 953 A.2d 308, 321 (D.C. 2008), the court found that “all contracts contain an implied duty of good faith and fair dealing” and “[t]his duty means that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” Furthermore, “a party to a contract may be liable for a breach of the duty of good faith and fair dealing if the party evades the spirit of the contract.” *Id.*

In the instant case, the contract formed by the Campus Plan and Zoning Commission’s order approving that plan bound the University to mitigate the impacts of student behavior on the surrounding neighborhood in exchange for the license to continue to operate its university in the District of Columbia, and the University’s failure to thoroughly investigate Lauren’s and J.P.’s complaints and promptly respond to these complaints by bringing the smoker into the disciplinary process as set forth in the Code of Student Conduct caused Lauren and J.P. to

suffer special damages not suffered by other residents of 44th Street. Thus, Lauren's and J.P.'s breach of contract claim must survive dismissal.

2. Lauren and J.P. were intended beneficiaries of the contract between the University and the District of Columbia.

The Superior Court erred by holding that Lauren and J.P. were not intended beneficiaries of the contract between the District of Columbia and Georgetown University as evidenced by the Zoning Order that incorporated the Campus Plan that required the University to enforce its Code of Student Conduct. Lauren and J.P. were intended beneficiaries of the contract between the University and the District of Columbia. In *Fort Lincoln Civic Association, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008), the court found that “[i]n order to sue for damages on a contract claim, a plaintiff must have either direct privity or third-party beneficiary status.” In *Fort Lincoln*, the court found that “[t]hird-party beneficiary status requires that the contracting parties had an express or implied intention to benefit directly the party claiming such status.” *Id.* Section 302 (1) of the Restatement (as quoted in *Fort Lincoln*) sets forth the circumstances under which an entity or individual will be recognized as an intended beneficiary:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation to pay money to the beneficiary; or

(b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.”

Id.

Thus, “a promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.” *Id.* In the instant case, the contract between the University and the District of Columbia clearly accorded intended beneficiary status upon the University’s neighbors who are adversely impacted by the actions of the University’s students since the Zoning Commission’s order approving the Campus Plan finds that **“residents of the neighborhoods surrounding the campus are not only stakeholders but critical partners in this effort – partners who share a strong interest in the continued vitality of the University as well as in ensuring that its impacts are appropriately and effectively minimized and managed.”**

[emphasis added]. As residents of the neighborhood surrounding the University, Lauren and J.P. are “stakeholders” and “partners” with the University under the Campus Plan and Zoning Commission’s order. Thus, Lauren and J.P. were intended beneficiaries of the Zoning Commission’s order, and thus, the Superior Court’s dismissal was not proper.

E. Georgetown University had the duty to protect Lauren and J.P. from the dangers of secondhand smoke migrating from the student's home into Lauren's and J.P.'s home, and thus, the Superior Court erred in dismissing Lauren's and J.P.'s claims for nuisance, negligence and negligent infliction of emotional distress.

Upon receiving Lauren's and J.P.'s complaint against the student, Georgetown University had the duty under its Campus Plan 2017-2036 to initiate procedures for the "Resolution of Complaints," to determine if the student admits or denies committing offenses that violate the Code of Student Conduct, to determine whether the allegations are of sufficient seriousness as to warrant the imposition of interim measures such as an interim suspension or temporary removal from off-campus housing, and finally to resolve Lauren's and J.P.'s complaint via "Administrative Action taken by a Conduct Officer" or referral to a Hearing Board consisting of two (2) faculty/administrators and three (3) students." [45]. *See also* Pages 26-30 of the Code of Student Conduct. [121-125]; "Standard Adjudication Process Flowchart." [139]. Rather than resolve Lauren's and J.P.'s complaint against the student via "Administrative Action taken by a Conduct Officer" or referral to a Hearing Board consisting of two (2) faculty/administrators and three (3) students," Georgetown University dragged its feet in investigating the facts surrounding Lauren's and J.P.'s complaint, which had the effect of prolonging the unhealthy and toxic environment that the student's secondhand smoke caused within Lauren's and J.P.'s home. Moreover, Georgetown University

failed to ascertain whether the student smoked a substance classified under the federal Controlled Substance Act, 21 U.S.C. § 812 and 21 U.S.C. § 844, which would violate the Code of Student Conduct’s prohibition against the “illegal/unauthorized possession, use, transfer and/or sale of drugs or controlled substances” or alternatively, smoked a substance that is not classified under the Controlled Substance Act, but nevertheless results in a violation of the Code of Student Conduct’s prohibition against “disorderly conduct” which is defined as “[a]ctions that disturb others and/or interfere with or could result in harm to others or the University community.”

Georgetown University’s failure to determine what exactly the student smoked led directly to the result that Georgetown University failed to resolve Lauren’s and J.P.’s complaint in a timely manner, which in turn caused them to continue to breathe harmful secondhand smoke – no matter how the substance producing the secondhand smoke is classified under the federal Controlled Substance Act. In any event, Georgetown University’s failure to follow the procedures in its Code of Student Conduct for resolving complaints against students resulted in prolonging Lauren’s and J.P.’s exposure to toxic and malodorous secondhand smoke migrating from the student’s home into Lauren’s and J.P.’s home, which caused them significant damages.

1. Lauren’s and J.P.’s claims of negligence and negligent infliction of emotional distress should survive dismissal.

The legal basis for a negligence claim is found in *Sullivan v. AboveNet Communications, Inc.*, 112 A.3d 347, 354 (D.C. 2015), which stated that “[i]n order to prove negligence, [the plaintiff] must provide evidence that: (1) [the defendant] owed a duty of care to [the plaintiff], (2) [the defendant] breached that duty, and (3) the breach of duty proximately caused damages to [the plaintiff].” In negligence actions, the standard of care by which a defendant’s conduct is measured is often stated as “that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances.” *Morrison v. MacNamara*, 407 A.2d 555, 560 (D.C. 1979).

In the instant case, the University owed Lauren and J.P. the duty to protect them against the migration of secondhand smoke from its student’s home, and the University assumed this duty when it entered into the Campus Plan that the Zoning Commission approved in its order. The University breached that duty when it failed to thoroughly investigate Lauren’s and J.P.’s complaints and promptly respond to these complaints by bringing the smoker into the disciplinary process as set forth in the Code of Student Conduct, and this failure caused Lauren and J.P. to suffer special damages not suffered by other residents of 44th Street, including injury, damage, hurt, inconvenience, annoyance, and discomfort to them in the legitimate enjoyment of their reasonable rights of their person or property” and

“that which renders the ordinary use and occupation by them of their property uncomfortable to them.”

In *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 793 (D.C. 2011), the court found that:

The court’s threshold determination – namely, the existence of a duty – is ‘essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.’ Stated another way: ‘The statement that there is or is not a duty begs the essential question – whether the plaintiff’s interests are entitled to legal protection against the defendant’s conduct.’

The *Hedgepeth* court also found that:

In general, courts rely on the concept of ‘foreseeability’ to determine whether the defendant owed a duty to the claimant in a negligence action and examine whether the risk to the claimant was ‘reasonably foreseeable’ to the defendant. If the injury that befell the plaintiff was ‘reasonably foreseeable’ to the defendant, then courts will usually conclude that the defendant owed the plaintiff a duty to avoid causing that injury; if the injury was not ‘reasonably foreseeable,’ then there was no duty. *Id.*

In the instant case, the University assumed duties to Lauren and J.P. (and other neighbors) to mitigate the effects of student behavior on the neighborhoods surrounding the University when it undertook to work “collaboratively” with neighbors to protect the neighbors from the ill effects which occasionally go along with living amongst college students.

In *Board of Trustees v. DiSalvo*, 974 A.2d 868, 870 (D.C. 2009), the court found that

in order to hold a defendant liable for injury resulting from intervening criminal acts, this court has repeatedly held that liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent. ... Specifically, heightened foreseeability factors directly into the duty analysis because a defendant is only liable for the intervening criminal acts of another if the criminal act is so foreseeable that a duty arises to guard against it.” *Id.*

In the instant case, the University knew that the smoker had previously caused the migration of secondhand marijuana smoke into Lauren’s and J.P.’s home, and also knew, from her failure to cooperate with University officials and her interactions with Lauren and J.P., that she did not intend to stop smoking, and thus, that she would continue to endanger Lauren and J.P. Therefore, it was entirely foreseeable that Lauren and J.P. would continue to suffer damages if the University did not take action against the smoker.

a. Whether a defendant is liable for the tortious actions of a third party is dependent on an analysis of the facts of that particular case.

That that there is no absolute rule preventing a defendant from being held liable for the tortious actions of a third party is well-established. In *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 478-79 (D.C. Cir. 1970), the plaintiff was attacked in the hallway of an apartment building. At the time of the attack, the building owner had actual knowledge that crimes were an “almost daily occurrence” in the building yet left the front desk unattended much of the time, reduced security in the garage, and often left a side door unlocked all night long.

Id. at 479. The *1500 Massachusetts Ave.* court found that landlords have a duty to residents to “use ordinary care and diligence to maintain [the property] in a reasonably safe condition.” *Id.* at 480. “The duty is the landlord’s because by his control of the areas of common use and common danger he is the only party who has the power to make the necessary repairs or to provide the necessary protection.” *Id.* Additionally, the *1500 Massachusetts Ave.* court found that the

landlord is no insurer of his tenants’ safety, but he certainly is no bystander. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.” *Id.*

In *Doe v. Georgetown Center II, Inc.*, 708 A.2d 255, 258 n.8 (D.C. 1998), the court found that a condominium association was liable for a third party’s criminal attack on a resident since the association owed the resident a duty of care to maintain security in the building and the attack was foreseeable.

2. Lauren’s and J.P.’s nuisance counts should survive dismissal.

In *Reese v. Wells*, 73 A.2d 899, 900 n.6 (D.C. 1950), the court found that a “nuisance is anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable

rights of person or property” or “that which renders the ordinary use and occupation by a person of his property uncomfortable to him.”

a. Public nuisance

In *B&W Management v. Tasea Inv. Co.*, 451 A.2d 879, 881-82 (1982), the court stated that “[a] public nuisance is an unreasonable interference with a right common to the general public. At common law, the term ‘public nuisance’ covered a variety of minor criminal offenses that interfered, for example, with the public health, safety, morals, peace, or convenience.” “As applied to land use, therefore, **public nuisance theory provides the common law underpinning (subject to statutory modification) for injunctive and damage actions based on zoning violations.**” [emphasis added]. *Id.*

b. Private nuisance

A “‘private nuisance’ is a substantial and unreasonable interference with private use and enjoyment of one's land -- for example, by interfering with the physical condition of the land, disturbing the comfort of its occupants, or threatening future injury or disturbance.” *Id.*

c. Analysis of public nuisance vs. private nuisance

While a private nuisance claim is inherently a private right of action, as a general proposition only governmental authorities or other representatives of the general public have standing to attack a public nuisance in court (absent statutory

authorization). *Id.* There is, however, a traditional exception: a private party may sustain an action to enjoin or recover damages for a public nuisance if that party can allege and prove special damage, distinct from that common to the public. *Id.*

In the instant case, the University owed Lauren and J.P. the duty to protect them against the migration of secondhand smoke from its student's home, and the University assumed this duty when it entered into its Campus Plan, which the Zoning Commission approved in its order. The University breached that duty when it failed to thoroughly investigate Lauren's and J.P.'s complaints and promptly respond to those complaints by bringing the smoker into the disciplinary process, as set forth in the Code of Student Conduct and required by the Campus Plan and Zoning Commission's order. The secondhand smoke that migrated into Lauren's and J.P.'s home as a result of the University's breach of its duties was "a substantial and unreasonable interference with private use and enjoyment of one's land," and also an "unreasonable interference with a right common to the general public" that caused Lauren and J.P. to suffer "special damages" not suffered by other residents of 44th Street. Thus, the Plaintiffs' nuisance claims (both public and private) must survive dismissal.

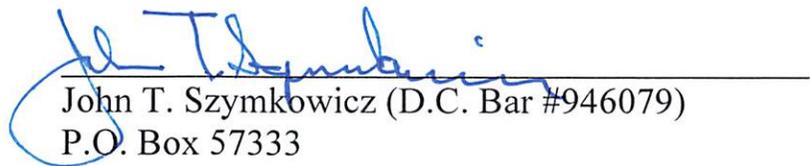
F. The Superior Court erred in dismissing Lauren's and J.P.'s complaint on the grounds that Georgetown University did, in fact, eventually take action against the student.

The Superior Court found that Georgetown University eventually took action against the student and dismissed Lauren's and J.P.'s claims on that basis, but this finding is in error since Lauren and J.P. were forced to endure the student's secondhand marijuana smoke for several months before the University took action. Thus, it should be a question for the jury whether the University's action was reasonable, or, whether the University should have acted more promptly.

CONCLUSION

Appellants-Plaintiffs Lauren Szymkowicz and J.P. Szymkowicz respectfully request that this Honorable Court reverse the Superior Court's order dismissing this case in its entirety and remand for further proceedings.

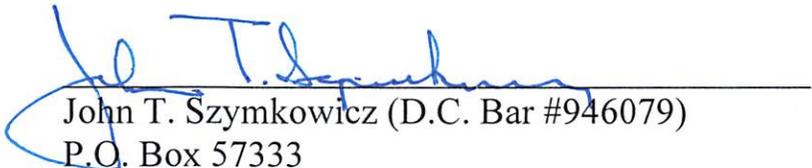
Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2024, I delivered (via the Court's electronic filing system) a copy of the foregoing Brief of Lauren Szymkowicz and J.P, Szymkowicz to Bruce M. Berman, Esquire, and Jeremy W. Brinster, Esquire, WILMER CUTLER PICKERING HALE AND DORR LLP, 2100 Pennsylvania Avenue, N.W., Washington, DC 20037 (202) 663-6000, bruce.berman@wilmerhale.com, jeremy.brinster@wilmerhale.com.


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