Appeal Nos. 23-CV-516 & 23-CV-775

In the District of Columbia Court of Appeals

DCA CAPITOL HILL LTAC, LLC and DCA CAPITOL HILL SNF, LLC,

Appellants,

v.

CAPITOL HILL GROUP

Appellee.

On Appeal from the Superior Court
of the District of Columbia, Civil Division
Case No. 2015-CA-008166-B
(The Honorable John M. Campbell)
(The Honorable Juliet J. McKenna)

BRIEF OF APPELLANTS

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January 4, 2024

RULE 28(a)(2) DISCLOSURE

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RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

I, the undersigned, counsel of record for DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC, certify that to the best of my knowledge and belief, DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC are Delaware limited liability companies. The sole member of DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC is BridgePoint Healthcare, LLC, formerly DCA Acquisitions, LLC, a Delaware limited liability company. The sole member of BridgePoint Healthcare, LLC is BridgePoint Healthcare Holdings, LLC, a Delaware limited liability company. The three members of BridgePoint Healthcare, LLC are Silver Point Capital Fund, L.P., a Delaware limited partnership; SPCP FF Holdings, LLC, a Delaware limited liability company; and BMR Funding, Inc., a Delaware corporation that is not publicly traded. No publicly held corporation owns 10% or more of any of these entities.

These representations are made in order that judges of this Court may determine the need for recusal.

Dated: January 4, 2024 */s/ Michael J. Edney*

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INTRODUCTION

The Appellants—DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC—operate BridgePoint Continuing Care Hospital-Capitol Hill (hereinafter, "the Hospital"). The Hospital is a long-term acute care hospital and skilled nursing facility in Northeast Washington, D.C. The Hospital is a critical part of the healthcare system in the District of Columbia, representing (with its sister facility in Southwest Washington) the city's only long-term acute care hospitals and skilled nursing facilities caring for patients who depend on ventilators to live. The Hospital takes care of seriously ill patients who require around-the-clock, ever-present care for weeks or months after a stay in an acute care hospital, such as George Washington University Hospital. Without the pressure relief valve of the BridgePoint Hospitals, the District's acute care hospitals responsible for emergencies, surgeries, and the short-term care thereafter would be overrun and at significant risk of lacking space to provide quality care.

This case arises from a dispute between the Hospital and its landlord, the Capitol Hill Group (hereinafter, "the Landlord"). The Appellant-companies are the current owners of the Hospital and saved it from closure, purchasing it after it had been horribly mismanaged into bankruptcy in 2014. In those bankruptcy proceedings, the Landlord obtained from the Appellant companies purchasing the hospital a $4.5 million payment, approved by the Bankruptcy Court, associated with

exiting the bankruptcy. The Landlord's stated basis for that payment relied almost entirely on capital improvements it claimed to be making to the building. Most significantly, the Landlord represented that it was installing a brand new, "state of the art HVAC system"—which stands for heating, ventilation, and air-conditioning system—in the Hospital. It said that the new system was costing the Landlord $5 million.

Those representations were false when they were made. The system was never going to work to heat and cool the building (and the Landlord knew it). And the Landlord was under a firm contract, when it made the representation, to obtain whatever work was being performed for a fraction of the $5 million it represented, with no possibility for further costs for the Landlord. The cost representation was a straightforward lie that (successfully and dramatically) increased the amount of the ultimately $4.5 million payment to remove the case from bankruptcy.

To address the Landlord's failure to deliver the promised HVAC system, the Appellants invested millions to make it work and, to partially address these expenses, withheld $1,204,029.47 in rent. Litigation followed, and this appeal arises from the Superior Court's resolution of the claims and counterclaims therein.

The Superior Court made three categories of reversible error below. *First*, the Superior Court erred in granting summary judgment against the Appellants' fraud and misrepresentation counterclaims. The Superior Court's reasoning was never

written down, but from the bench the Court asserted that fraud and misrepresentations categorically cannot be based on statements made prior to entering into a contract with an integration clause. That holding is directly contrary to black-letter law established by this Court. Contracts, even those with integration clauses, do not immunize parties against misrepresentations of existing fact. This Court should reverse the Superior Court's judgment—including the trial judgment on other claims that were clearly affected by the erroneous entering of summary judgment—and remand the claims for trial or re-trial in the Superior Court.

Second, the Superior Court waited three-and-a-half years after a five-day bench trial to deliver a trial verdict on the remaining contractual claims in the case. In that decision, the Superior Court made several key errors of contract interpretation subject to *de novo* review in this Court. As an initial matter, the Lease obligated the Landlord to install "a new HVAC" system, which the Lease did not further define. The Superior Court, however, found dispositive a reference to work on the HVAC system in an agreement between two other parties, conceived for an entirely different purpose, that was attached to the Lease. Amidst the purchase of the Hospital from bankruptcy, the Landlord was working with a developer to transform another wing of the building into apartments. The Lease attachment was an agreement allowing that apartment developer to come back and forth into the Hospital to disconnect all sorts of systems common between the two wings. One of the systems mentioned

was the common HVAC system, and the Superior Court erroneously assumed that this mention of HVAC system work, in an agreement between other parties about an entirely separate topic, was all the work the Landlord had obligated itself to perform for the Hospital.

Next, the Superior Court erred in interpreting the Lease to hold that the Appellants provided the Landlord insufficient notice of the problems with the HVAC system. The Lease protected the Hospital by giving it 90 days after moving in to reject "the new HVAC system" and to seek funds for making it work. The Hospital provided this notice, but the Superior Court read into the Lease a requirement that the notice also provide a specific bill of particulars of the problems with the HVAC system or else all complaints about the system would be permanently waived. But that requirement appears nowhere in the Lease's text. Far from allegedly insufficient detail "waiving" any Hospital complaints about the HVAC system, the Lease provided the Landlord a period of time to object to the notice's content. The Landlord did not do so.

The Superior Court also erred in interpreting a provision in the Lease requiring the Landlord to cause the hospital building to "be served by the repair and relocation of generators" that the Landlord was required to install. The Landlord failed to do this. Instead of providing functioning "generators," the Landlord replaced one of the three existing generators, which together did not work. The Superior Court's

holding that the Landlord fulfilled its obligation by providing the single, defunct generator is contradicted by the plain terms of the Lease.

Third, the Superior Court erred in awarding the Landlord all of its attorneys' fees and costs under a fee-shifting provision in the lease agreement. The Landlord sued not just for the $1.2 million in withheld rent; it advanced a tortured reading of the Lease and claimed late fees and interest on that withheld rent, in the amount of $4.484 million at the time of trial and $62 million at the time of judgment. After initially accepting the Landlord's theory, the Superior Court reconsidered and rejected the vast majority of the Landlord's claimed damages. The Superior Court nonetheless granted the Landlord all of its attorney's fees, and never mentioned the Landlord's failure to obtain the lion's share of its claimed damages. This Court repeatedly has reversed contractual fee awards where the trial court did not address the plaintiff's failure to obtain the majority of the relief sought. This Court should follow those precedents and reverse the fee award in this matter.

ASSERTION OF JURISDICTION

The Appellants appeal from a final judgment of the Superior Court, entered on June 16, 2022, and amended on May 18, 2023, as well as all interlocutory orders that merged into the final judgment, including the Superior Court's summary judgment ruling on the first day of trial. The June 16, 2022, final judgment, as amended, disposed of all of the parties' remaining claims.

The Appellants also appeal a judgment of the Superior Court, entered on May 18, 2023, and amended on August 23, 2023, awarding attorneys' fees, expenses, and costs to the Landlord.

This Court consolidated the two appeals on September 27, 2023, and has jurisdiction over the consolidated appeal pursuant to D.C. Code § 11-721(a)(1).

STATEMENT OF THE ISSUES

I. This Court has held that fraud and misrepresentation claims about representations of current or historical fact to induce entry into a contract survive the later execution of that contract. *Drake v. McNair*, 993 A.2d 607, 624 (D.C. 2010). Did the Superior Court err in granting summary judgment against the Appellants' fraud counterclaims solely because the parties entered into a contract after the representations were made?

II. This appeal asserts that the Superior Court made multiple errors in its trial verdict, on its way to interpreting the Lease not to require the Landlord to have installed a working HVAC system and generators:

A. Did the Superior Court err in interpreting the contractual phrase "new HVAC system" by reference to a different contract between other parties, for a purpose entirely separate from defining the HVAC system the Landlord was obligated to the Hospital to install?

B. Did the Superior Court err in interpreting the provision of the Lease that authorized the Hospital to reject the HVAC system, by requiring the Hospital to provide specific details in that notice and by ignoring the contractual term that the Landlord, within 30 days, raise any claimed deficiencies in the notice?

C. Did the Superior Court err in holding that the Landlord satisfied a provision in the Lease requiring the Landlord to provide the Hospital with functioning "generators" even though the Landlord provided only a single, defunct generator that failed to consistently moderate the building's electricity for nearly a year?

D. Did the Superior Court err in its interpretations of the Lease by failing appropriately to recognize the context of the federal-court bankruptcy proceedings from which the Lease arose and by not placing the onus of candor on the Landlord given those proceedings?

III. Did the Superior Court err by failing to reduce the award for claimed attorneys' fees to account for the Superior Court's rejection of the vast majority of the Landlord's claimed damages, as required by this Court's decisions?

STATEMENT OF THE FACTS

BridgePoint Hospital-Capitol Hill is a long-term acute care and skilled nursing facility hospital at Seventh and Constitution Avenue in Northeast Washington, D.C. With BridgePoint Healthcare's companion hospital in Southwest

Washington, it is one of two long-term acute care hospitals in Washington, D.C. The District of Columbia government has been clear that these facilities are indispensable to a functioning health care system in the District. App. 2664. The Appellant-companies saved these facilities from closure by purchasing them from federal-court administered bankruptcy proceedings. The Appellants are backed by Silver Point Capital, an investment firm that has a history of investing in healthcare institutions, and led by the Hospital's CEO, Marc Ferrell. Together, they have a long track record of turning failing hospitals around and keeping them operating, through the investment of resources and sound management. App. 920-21.

I. The Landlord's Luxury Apartment Project in an Unused Wing of the Hospital Building Requires the Apartment Developer to Disconnect the Building's Systems.

Specialty Hospitals of Washington owned and operated these two hospitals until they entered bankruptcy in 2014. In 2013, the Landlord decided to convert an unoccupied wing of the building housing the Capitol Hill facility into a luxury apartment complex. App. 2561. One obstacle to converting part of the building into apartments was that the whole building shared electrical, plumbing, heating, air-conditioning, ventilation, and other systems. App. 2563. To complete the apartment project, the Landlord had to "decouple" the systems. App. 2564. The Landlord and the apartment developer signed an easement agreement—formally called the Declaration of Temporary Easements and Agreements—that allowed the apartment

developer's workers and contractors to move about both wings of the building. App. 2565.

II. The Appellants Rescue the Hospital from Bankruptcy, and the Landlord Extracts a $4.5 Million Bankruptcy Exit Payment for a New, "State of the Art" HVAC System Costing the Landlord $5 Million.

In 2014, Specialty Hospitals was forced into bankruptcy. It was in dire financial condition. App. 2561. It long had not paid even its most basic obligations, even to the point of withholding taxes from its employees' paychecks but not remitting them to the Government. The Appellant-companies were the only party willing to buy the hospitals from bankruptcy and keep them running. App. 506. Absent the Appellants' willingness to intervene and try to turn these facilities around, they would have closed. App. 506.

To save the hospitals from bankruptcy, the Appellants had to solve enormous problems the hospitals had with Medicare, Medicaid, the taxing authorities, and other creditors, which were tens of millions of dollars in magnitude. App. 921-22. The landlord of the Northeast Washington location presented another challenge. It was requiring a multi-million-dollar cash payment to permit the hospitals to emerge from bankruptcy with continued tenancy of the hospital building. By far, the Landlord's biggest demand was for the Appellants to cover the Landlord's costs to install a brand new, "state-of-the-art HVAC system" in the Hospital. App. 936.

The Landlord represented that the new HVAC system for the hospital was costing it more than $5 million, but that it was willing to share the expense with the hospital purchasers and accept $4 million for it. App. 944-45. It detailed this cost on several written spreadsheets shared with the hospital purchasers. App. 1707-08; App. 1709-10. The Landlord also repeatedly represented, orally and in writing, that the HVAC system was "state of the art." App. 944-45; App. 1714. The Landlord said it would be unfair for the purchasers to saddle the Landlord with this $5 million expense and not reimburse the Landlord for it. App. 944-45, 1022-23.

Before the Landlord made these representations, the Landlord had entered into a firm, fully executed agreement with the apartment developer to complete all work decoupling electrical, plumbing, HVAC, and other systems common between the apartment and hospital wings, which required purchasing some additional equipment, for $2.7 million in rent reductions spread over many years. App. 288-90; App. 551; App. 1182-83. That work went well beyond separating the common HVAC system—it included, among other things, disentangling the electrical, plumbing, and fire alarm systems, and inserting a fire separation wall between the two parcels. App. 1180-86. At trial, the apartment developer's testimony was clear and undisputed: If the work separating the buildings cost the developer more than $2.7 million, the developer had no recourse of any kind against the Landlord—the developer would have to cover the excess cost. App. 1189.

The Landlord did not simply forget about what the HVAC work was actually costing the Landlord; it closely tracked it. The Landlord required the developer to deposit money into an escrow account and make requests for releases upon completion of work. App. 596-97. The final draw request submitted by the apartment developer on the escrow account reflects that the developer spent just $1,020,408 in total on the HVAC work. App. 1711-13. The apartment developer testified that he never understood the HVAC work he was doing as the installation of a "new HVAC system"; rather, he understood it as the replacement of a handful of parts as necessary to pull the buildings apart. App. 1186-87. The Landlord did no other work on the Hospital's HVAC system, other than that performed by the apartment developer.

At no time did the Landlord disclose this binding deal with the apartment developer firmly capping the Landlord's costs at a fraction of the $5 million it represented them to be. *See* App. 934-50, 1015-25. Nor did the Landlord disclose that, after the installation of the represented "state of the art" heating, ventilation, and air-conditioning system, the system would not work to heat or cool the building without millions more in additional investment. *See* App. 934-50, 1015-25.

III. The Appellants Take Possession of the Hospital, Provide Notice of Objections to the HVAC Work and Generator Work, and Withhold Rent Pursuant to the Lease.

The bankruptcy sale closed, the new owners took over hospital operations in December 2014, and the Hospital entered into a lease agreement with the Landlord. *See Amended & Restated Lease Agreement* (Dec. 16, 2014) (the "Lease"), App. 1771-1812. The Lease addressed the promised HVAC work, obligating the Landlord to have installed "a new HVAC system" in the Hospital. App. 1788. As the Landlord's work on the HVAC system was not scheduled to be completed until days before the close of the sale, the Lease protected the Hospital by giving it 90 days to evaluate the HVAC system, and to then accept or reject it. App. 1788. In the event the Hospital rejected the system, the Lease authorized the Hospital to withhold rent to fund making the system work. App. 1788. The Lease also obligated the Landlord to install back-up electrical generators for the Hospital and gave the Hospital similar remedies for the Landlord's failure to do so. App. 1788.

In the first months the Appellants operated the Hospital during the winter, the HVAC system could not adequately heat the building. The Appellants suspected that when summer came, the system would fail at cooling the building as well. App. 1036, 1769. The Appellants immediately evaluated the feasibility of testing the system's ability to cool the Hospital. The facilities manager, long experienced in cooling systems, testified that the heat for the whole Hospital would have to be shut

down. Hot water would have to be drained from the system and replaced with chilled water. Doing so would risk freezing and breaking the coils in the chillers and damaging the system. The only way safely to test the cooling ability of the system, without damaging it and affecting patient safety, was to wait until the temperatures warmed. App. 1038, 1231-32.

The generators also failed. This is not a small problem for the Hospital, as critical life-sustaining equipment like ventilators must keep going during a power outage. The Landlord represented that it spent $66,100 for the repair and relocation of generators, and the Appellants reimbursed it for that amount. App. 1080. But the Landlord only provided one generator, even though the Lease refers to generators (plural), and the Hospital requires three generators. App. 728-30. Even the one used generator, however, was not operational during most of 2015. App. 1394. The Hospital was forced to rent a backup generator to protect its patients. App. 1084, 1199.

Within the 90 days provided by the Lease for doing so, the Appellants provided the Landlord notice that they were "unable to accept" the Landlord's work on the HVAC system and generators. App. 2562 (citing PX-01); App. 2573-74 (citing DX-56). While Section 8.4 of the Lease provided the Landlord with 30 days to provide written notice that it disputed the content or accuracy of the notice of non-acceptance, the Landlord did not do so. App. 1788; App. 1039. The Hospital

ultimately withheld a total of $1,204,029.47 in payments due the Landlord to address several issues with the building. App. 2593. But for $19,000 of the withheld rent (used to address other capital projects the Hospital believed the Landlord failed to complete), rent was withheld to address shortcomings with the HVAC system and generators. App. 411.

IV. The Landlord Sues to Recover Withheld Payments, and the Hospital Removes the Case to Bankruptcy Court.

The Landlord filed this lawsuit in October 2015 to recover the payments withheld by the Appellants. App. 23-223. The Hospital removed the case to Bankruptcy Court, given the close integration of the agreement to install the HVAC system with the bankruptcy exit payments ordered by the Bankruptcy Court. App. 224-26; *see also* App. 1701-06. In the Bankruptcy Court, the Hospital counterclaimed, among other things, for breach of the Lease and for misrepresentation and fraud. App. 293-333. After discovery, the Bankruptcy Court found an absence of bankruptcy jurisdiction and remanded the case to the Superior Court.

V. On Remand from the Bankruptcy Court, the Superior Court Grants Summary Judgment Against the Hospital's Fraud Counterclaims and Holds a Five-Day Trial on the Remaining Contractual Claims.

The Superior Court did not permit the Hospital's fraud and misrepresentation claims to go to trial, entering summary judgment against them. The Superior Court's

reasoning for the summary judgment was never written down. In a pretrial conference, the Superior Court forecasted a forthcoming opinion on summary judgment, explaining that "the integration clauses in the contract . . . take care of and eliminate any arguments about fraud in the inducement." App. 373.

The predicted written opinion was never issued. On the first day of trial, the Superior Court granted summary judgment against the fraud and misrepresentation claims from the bench, in a few short orally delivered sentences. App. 407-13. The Superior Court reiterated its prior rationale that the fraud counterclaims were "handled by the integration clauses in the contract." App. 411-12.[1]

VI. The Superior Court Fails to Deliver a Bench Trial Verdict for Three-and-a-Half Years.

A five-day bench trial ensued. Three-and-a-half years later, on June 16, 2022, the Superior Court rendered its verdict.

The Superior Court held that the four corners of the Lease contract defined the HVAC system that the Landlord was obligated to install, relying on the easement agreement between the Landlord and the apartment developer addressing the developer's movement between the two wings of the building to disconnect the

[1] The Superior Court also determined that the Appellants could not withhold rent for expenses other than those necessary to address the issues with the HVAC system and generators. App. 407-08. The expenses the Appellants could not withhold amounted to roughly $19,000, less than 2 percent of the rent withholdings at issue. App. 411.

systems for the apartment project. App. 2584-85. One of the exhibits to that easement agreement discussed particulars of the HVAC work the apartment developer was doing, and the Superior Court decided this was the only HVAC work the Landlord was obligated to perform for the Hospital. The Landlord omitted this critical exhibit—which it claimed defined its HVAC obligations—from the execution version of the Lease it assembled. And the Superior Court acknowledged that the versions of the Lease signed by the parties and "submitted into evidence" never contained this apparently critical exhibit as an attachment. App. 2563. But the Court found this fact "unimportant" because the easement agreement was "recorded with the District of Columbia Recorder of Deeds," and presumably it was the Hospital's burden to track it down and review it. App. 2563.

The Superior Court also concluded that the Appellants provided insufficiently detailed notice of defects to withhold payments due the Landlord under Section 8.4 of the Lease, thus "waiving" any contractual right to withhold rent or otherwise recover for defects in the system. App. 2585. The Court ultimately determined that the Hospital's withholding of rent was a breach of the Lease and entered judgment for the Landlord for $1,204,029.47 in withheld rent. App. 2557, 2590-93.

Next, the Superior Court held that the Landlord had fulfilled its obligation to perform the generator work. App. 2585-86. The Court found that the Landlord discharged its Lease obligation to install working "generators," plural, by installing

one generator in the basement of the building, even as it acknowledged that the recently-installed generator experienced problems "in early 2015," and that the other two generators that the Landlord never replaced continued to have problems throughout that year. App. 2585-86.

The Superior Court then turned to the Landlord's largest claimed pool of damages—for late fees and interest for amounts due under the Lease. That dispute concerned Section 18.6 of the Lease. The Landlord argued, and the Superior Court initially agreed, that the entire $1.2 million amount of the withheld payments and accumulated interest and prior late charges was subject to a "late charge" of 5 percent every single month, in addition to bearing interest at the "rate per annum" specified in Section 18.6. App. 2592. The Landlord's reading would have subjected any missed payment to a 96.3 percent annualized interest rate. In the two years between the November 2016 principal withholding of payments and the December 2018 trial, the Superior Court calculated this reading of the Lease to yield $4.484 million in late charges and interest on $1.2 million in withheld rent. App. 2557-58. The Superior Court then ordered the Landlord to provide a calculation for the late charges and interest accrued since the trial. App. 2557-58, 2593.

In July 2022, the Landlord submitted its calculation and asked for an award of an additional **$57,105,355** in late charges and interest, for a total late charge and interest award of **$61,589,335**, more than 50 times the amount of rent withheld. App.

2675. The Appellants opposed this dramatic demand for damages and moved the Superior Court to reconsider its ruling interpreting the late charge and interest term of the Lease and awarding $4.484 million in late charges and interest for the period before trial. App. 2675.

VII. The Superior Court Reconsiders Its Interpretation of the Lease and Rejects the Sweeping Majority of the Landlord's Damages Claim.

In May 2023, the Superior Court reversed course on the breathtaking Landlord claims for late charges and interest. App. 2674-81. The Superior Court completely rejected the Landlord's position, holding that the "only coherent reading of the text of the lease" is that a missed payment is assessed a 5 percent late charge only once and then accrues interest from that point forward. App. 2678. The result: The Landlord's claim for a total of more than $61 million in late charges and interest was rejected, and the $4.484 million already awarded was reduced by 88 percent to $1,002,943. App. 2676, 2681. This was not a close call according to the Superior Court:

> In the Court's reconsidered view, that is what the text says, clearly and unambiguously. The Court does observe that the astonishing sum for which the defendants would be liable under that earlier reading, and the fact that it represents an apparently unprecedented multiple of the rent actually withheld, certainly suggests that it is unlikely the parties would have agreed to such a provision without stating it and its implications very clearly and very plainly. Regardless, and in any event, that is not what the lease says.

App. 2680.

On the same day, the trial court ruled on the Landlord's request for attorneys' fees pursuant to a fee-shifting provision in the Lease. App. 2682-87. The trial court awarded the Landlord the full amount of the fees and expenses it sought, compensating it for every minute its lawyers spent prosecuting this dispute. That included all fees incurred by the Landlord after the trial court's June 2022 resolution of the bench trial, when the parties were primarily focused on the Landlord's unsuccessful bid for $62 million in late charges and interest. App. 2682. The total of fees and expenses awarded was $2,237,069.62. App. 2682.

The Superior Court did not mention or analyze the effect of having just rejected most of the Landlord's claimed damages. The Superior Court based its ruling, in part, on the Hospital's failure to pay to the Landlord the $1.2 million in withheld rent, immediately after the court had granted summary judgment to the Landlord that it was improperly withheld. App. 2674. That premise for the Superior Court's ruling was incorrect, however, as the Court expressly denied summary judgment as to whether the rent was properly withheld to address the HVAC and generators and held those issues over for trial. App. 407-08, 410-11; App. 372-73.

The Superior Court also awarded the Landlord prejudgment interest on the fee award. App. 2685-86.

VIII. Judge Campbell Retires, and Judge McKenna Takes Over and Grants Reconsideration in Part.

The day after delivering these rulings, the trial judge retired from judicial service. App. 2730.

The Appellant moved to amend the attorney fee judgment, noting that Judge Campbell failed to address his late rejection of the sweeping majority of the claimed damages. The Appellants also asked the Superior Court to eliminate the prejudgment interest award.

On August 23, 2023, the Superior Court (with Judge Juliet J. McKenna presiding following Judge Campbell's retirement) granted the Appellants' motion, in part, eliminating the prejudgment interest award as plainly contrary to law. App. 2729. The Superior Court left the $2.2 million attorneys' fees and costs award intact, expressly deferring to the trial judge's discretion on the award of fees and suggesting that a trial judge's ruling on such issues is not subject to meaningful review. App. 2736-37.

SUMMARY OF THE ARGUMENT

The District of Columbia has two long-term acute care hospitals, both of which were run into the ground by Specialty Hospitals of Washington. The city needs them. Without them, there is no facility in the metropolitan area to care for the gravely ill on ventilators or dialysis or in need of around-the-clock medical intervention over the long term. The Appellants saved those hospitals from closure.

They were the only operator in the bankruptcy proceedings willing to take these hospitals over, keep them open, and nurse them back to health.

The Landlord for the Hospital, however, viewed the bankruptcy sale process as an opportunity to profit through misdirection and deception. And the Superior Court, erroneously, viewed the bankruptcy sale process as a game of "hide and go seek," where the Landlord's misdirection and withholding of material information were to be rewarded rather than sanctioned. But that game is not what the parties' contracts set up, and it is not what the District's common law of torts tolerates. The Superior Court's path to exonerating the Landlord's conduct is marked by numerous legal errors.

First, before the trial began, the Superior Court erred by granting summary judgment against the Appellants' fraud and misrepresentation counterclaims. In ruling on those counterclaims from the bench on the first day of trial, the Superior Court focused solely on the fact that the claimed misrepresentations occurred before the Lease was executed, and the Lease included an integration clause. App. 411-12. But the Superior Court's decision ignored this Court's clear instruction that "an integration clause *does not provide a blanket exemption* to claims of fraud in the inducement." *Drake v. McNair*, 993 A.2d 607, 642 (D.C. 2010) (emphasis added). The *McNair* decision instead teaches—in line with extensive authority interpreting D.C. and other state laws—that integration clauses are ineffective against fraud

claims stemming from misrepresentations of then-existing fact. Here, the Landlord made several false representations about the then-existing state, nature, and cost to the Landlord of the HVAC project in 2014.

Second, the Superior Court committed several errors in interpreting the Lease. As an initial matter, to define the phrase "new HVAC system" in Section 8.4 of the Lease, the Court assigned dispositive weight to a separate agreement between the Landlord and the adjacent apartment developer that had nothing to do with the Landlord's obligations to the Hospital. This agreement allowed the developer to move around the two wings of the building to disconnect the common system necessary to finish his separate apartment project. It was not designed to, and did not, define the "new HVAC system" the Lease obligated the Landlord to install in the Hospital.

The Superior Court compounded this error by holding that the Appellants waived their contractual rights to seek redress of HVAC system defects by providing an insufficiently detailed notice to the Landlord on these issues. The Court's ruling improperly read into the Lease a specificity requirement that is absent from the Lease's text. It also ignored the Lease's process for claiming a notice was insufficient, which required the Landlord to so respond within a certain period of time.

Finally, the Superior Court erred in interpreting a provision in the Lease requiring the Landlord to provide the Hospital with functioning "generators," even though the Landlord provided only a single, defunct generator that failed to adequately moderate the electricity in the building for nearly a year. This interpretation of the Lease cannot be squared with the contract's plain language. Section 8.4 refers to "generators," not a single generator, and it charges the Landlord with the "repair" of those generators so that the building could be "served by" them.

Each of these interpretation errors is a symptom of the Superior Court's global treatment of the Lease as a high-stakes scavenger hunt always stacked against the Hospital. That approach to interpreting the Lease ignores its context: Executing a court-approved bankruptcy sale and payment to the Landlord.

Third, the Superior Court erred in granting the Landlord attorneys' fees under the Lease's fee-shifting provision. This Court requires trial courts to consider a plaintiff's partial success in its claim for damages in determining the portion of its attorneys' fees that should be awarded and to explain its reasoning in doing so. *Fleming v. Carroll Publ'g Co.*, 581 A.2d 1219, 1228-29 (D.C. 1990) ("*Fleming I*"); *Fleming v. Carroll Publ'g Co.*, 621 A.2d 829, 837 (D.C. 1993) ("*Fleming II*"). When the trial court falls short of these standards, this Court reverses. This Court also should do so here, where the trial court rejected the sweeping majority of

the Landlord's claimed damages but did not analyze the consequences on the fee award.

STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment on the Appellants' fraud and misrepresentation counterclaims *de novo*. *Cap. River Enters., LLC v. Abod*, 301 A.3d 1234, 1241 (D.C. 2023).

The Court likewise reviews questions of contract interpretation *de novo*. *Steele Founds., Inc. v. Clark Constr. Grp., Inc.*, 937 A.2d 148, 153 (D.C. 2007). And the same standard applies to determinations as to "[w]hether a contract is ambiguous." *Aziken v. District of Columbia*, 70 A.3d 213, 219 (D.C. 2013); *Sacks v. Rothberg*, 569 A.2d 150, 154 (D.C. 1990).

Whether the trial court applied the correct legal standard in granting attorneys' fees represents a question of law that this Court reviews *de novo*. *Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013). The trial court's application of the correct legal standard is reviewed for abuse of discretion. *Washington Nat'ls Stadium, LLC v. Arenas, Parks & Stadium Sols., Inc.*, 192 A.3d 581, 587 (D.C. 2018).

Finally, to the extent that the trial court's factual findings are relevant to this Court's review, Judge Campbell's handling of this case rebuts the presumption of regularity that might otherwise apply to a trial court's findings and counsels a full *de novo* review of the trial record. After presiding over a five-day bench trial, Judge

Campbell made no ruling of any kind for *three-and-a-half years*. That yawning gap of time contradicts any operating assumption that his ruling represents a close appraisal of the trial evidence, if only for natural failures in human recollection. Courts considering similar delays have subjected trial court findings to heightened levels of scrutiny. *See, e.g.*, *Keller v. United States*, 38 F.3d 16, 21 (1st Cir. 1994) (opting for "careful *de novo* scrutiny of the entire record" following a long delay between trial and decision); *Hollis v. United States*, 323 F.3d 330, 338 (5th Cir. 2003) (reviewing record "with extra care" where trial court waited nearly thirteen years to issue opinion).

ARGUMENT

I. The Superior Court Erred by Granting Summary Judgment on the Appellants' Fraud Counterclaims.

When the Appellants endeavored to save the Hospital from bankruptcy and imminent closure, Landlord officials repeatedly represented that the Landlord was installing a new HVAC system in the Hospital costing the Landlord more than $5 million. App. 944-45. The Landlord, again and again, asserted it would be grossly unfair for the Landlord to bear all of this $5 million expense, but for the Appellants as new operators of the Hospital to enjoy the expensive benefits of the new HVAC system the Landlord was paying for. App. 944-45; App. 1022-23. Consistent with the asserted expense of installing the new system, the Landlord claimed it was "state of the art." App. 944-45; App. 1714.

The Landlord's representations about the system's cost and nature were plainly false. And they principally drove the Appellants agreement to make a $4.5 million payment to the Landlord, as part of the bankruptcy proceedings that led to the sale of the Hospital to the Appellants. App. 941-43; App. 1701-06.

The Superior Court held that it *could not even consider at trial* the Hospital's fraud and misrepresentation counterclaims because they concerned statements preceding a contract with an integration clause. App. 411-12; App. 373. The Superior Court's summary judgment decision is reviewed *de novo* and should be reversed. *Cap. River Enters., LLC*, 301 A.3d at 1241.

This Court has rejected the very legal ruling the Superior Court made here and has expressly held that "an integration clause *does not provide a blanket exemption* to claims of fraud in the inducement." *McNair*, 993 A.2d 624 (emphasis added); *see also Whelan v. Abell*, 48 F.3d 1247, 1258 (D.C. Cir. 1995) (integration clauses do not "bar[] fraud-in-the-inducement claims generally or confine[] them to claims of fraud in execution"). Instead, whether an integration clause bars fraud-in-the-inducement claims depends on whether the alleged misrepresentations concerned *promises of future conduct*, on the one hand, or *then-existing facts*, on the other. While promises of future conduct "generally do not support a fraud-in-the-inducement claim," "prior representations that *conceal fraudulent conduct* . . . may provide support for such a claim." *McNair*, 993 A.2d at 624 (emphasis added).

Relying on this Court's decision in *McNair*, courts interpreting District of Columbia law repeatedly have held that integration clauses do not bar fraud claims when those claims arise from misrepresentations of existing facts. In *Jacobson v. Hofgard*, 168 F. Supp. 3d 187 (D.D.C. 2016), this jurisdiction's federal court held that an integration clause in a sales contract for a residential condominium barred the buyers' fraud claims. *Id.* at 203-04. Although the seller had advertised the property as a "stunning renovation," the buyers discovered soon after moving into the condo that it contained several defects. *Id.* at 193-94. Because the fraudulent representations and omissions in the case involved "concealment of the condition of the Property and its non-compliance with zoning requirements at the time the statements were made, with the intention of inducing Plaintiffs to purchase the Property," the court held that the sales contract's integration clause did not bar the buyers' fraud claims. *Id.* at 204-05 (citing *McNair*, 993 A.2d at 624 and *Whelan*, 48 F.3d at 1258).

The district court reached the same result in *Schwab v. MissionSide, LLC*, No. 20-2376 (JEB), 2021 WL 5138445, at *7 (D.D.C. Nov. 4, 2021), again relying on this Court's *McNair* decision. In that case, the purchaser of a website development company alleged that the seller "misrepresented information about [the company's] performance, based his projections of future revenues on contracts he knew would not go through, and failed to disclose information he was obligated to share." *Id.* at

*8. Because those misrepresentations were not "promises of future action, but rather past failures to accurately represent the state of the company for sale," the purchase agreement's integration clause did not prevent the misrepresentations "from serving as the basis of [the buyer's] fraud claim." *Id.* That was true, the Court held, even though the purchaser was "a sophisticated party with access to [the acquired company's] financials." *Id.*

Courts interpreting District of Columbia cases are not alone in recognizing the viability of fraud claims concerning misrepresentations of existing facts. *See, e.g.*, *Jones v. Village at Lake Martin, LLC*, 256 So.3d 119, 123 (Ala. Civ. App. 2018) ("[T]he law in this state renders an integration, or merger, clause ineffective to bar parol evidence of fraud in the inducement or procurement of a contract. Other courts and general authorities have acknowledged that this rule is well established." (citing 3 S. Williston, *Williston on Contracts* §§ 811-811A (3d ed. 1961); Restatement of Contracts § 573 (1932); 3 A. Corbin, *Corbin on Contracts* § 578, p. 405, n.42 (3d ed. 1960 and 1992 Supp.))); *Steak n Shake Enters. v. Globex Co., LLC*, 110 F. Supp. 3d 1057, 1082 (D. Colo. 2015) ("[T]he mere presence of a general integration clause in an agreement does not bar a claim for negligent or fraudulent misrepresentation." (collecting cases)); *MeterLogic, Inc. v. Copier Sols.*, 126 F. Supp. 2d 1346, 1362-63 (S.D. Fla. 2000) ("[I]ntegration clauses do not 'cloak defendants with immunity' from fraudulent statements. . . . [I]f a party alleges that a contract was procured by

fraud or misrepresentation as to a material fact, an integration clause will not make the contract incontestable[.]" (collecting cases)); *Gloucester Holding Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116, 125 (Del. Ch. 2003) ("The Massachusetts courts have held that 'parties to contracts, whether experienced in business or not, should deal with each other honestly, and that a party not be permitted to engage in fraud to induce the contract.' Thus, an integration clause cannot preclude a claim for fraud in the inducement." (citation omitted)).

The Superior Court did not carefully go through the alleged misrepresentations and determine whether they concerned misstatements of existing fact or promises of future performance. Instead, the Superior Court simply held that any fraud or misrepresentation claim is incompatible with a contract with an integration clause later having been entered into. App. 373; App. 411-12.

That blanket rejection of fraud and misrepresentation claims—whether or not based on misrepresentations of then-existing fact—was not harmless error.

Before the Landlord represented that the new HVAC system was costing the Landlord $5 million, the Landlord was in a binding agreement with the apartment developer to perform the work for a fraction of that sum. App. 288-90; App. 551. The agreement ensured the Landlord would never be responsible for a cost-overrun, as any additional expense in separating the HVAC and other systems between the

Hospital and the apartment complex would be the developer's responsibility. App. 1180-86; App. 585.

The Landlord's claims that it was installing a "state of the art HVAC system" were also misrepresentations of then-existing fact. When the statements were made, the Landlord knew the piecemeal HVAC work it had commissioned would leave a system that would not work. App. 292; *see also See In re Specialty Hospital of Washington, LLC, et al.*, Case No. 15-10027 (Bankr. D.D.C. 2015), ECF No. 106 at 25-29, ECF No. 120 at 25-31, 39. By December 2, 2014, the Landlord's misrepresentations were looking backwards, stating "that CHG *had installed* 'the new HVAC system' and it went off 'without a hitch' and that it was a 'state of the art HVAC system[]' as opposed to '[t]he previous system at SHW [which] was over 30 years old.'" App. 326 (emphasis added); App. 1714. These statements of existing fact were false, and the failure to disclose the material fact—at all times known to the Landlord—that the "new" system was not new and would not work to heat or cool the building was misleading.

Nor does it matter—especially for purposes of summary judgment—that the Appellants and the Landlord were sophisticated parties. In *Schwab*, for example, a federal court interpreting D.C. law refused to dismiss the counter-plaintiff's fraud claims even though the parties' contract contained an integration clause and the counter-plaintiff was a "sophisticated party with access to [the acquisition's]

financials" and "knew how to — and indeed did — protect itself from the risk of future poor performance." *Schwab*, 2021 WL 5138445, at *8. The court held that even sophisticated parties are entitled to believe what a counter-party tells them, particularly about financial information. *Id.* After all, "[t]he reasonableness of a person's reliance on an asserted false statement is a fact-intensive inquiry that is evaluated 'on a case-by-case basis based on all the surrounding circumstances'" *Id.* (quoting *Sibley v. St. Albans School*, 134 A.3d 789, 811 (D.C. 2016)). The Superior Court did not—and indeed could not—decide that issue on summary judgment.[2]

This Court should reverse the Superior Court's grant of summary judgment against the fraud and misrepresentation claims and, because of the summary judgment error, the trial judgment on the contract claims. The Superior Court's summary judgment error infected the whole trial. Without the fraud claims, the Appellants did not have a full and fair opportunity to present all of the evidence weighing on the Superior Court's interpretation of Section 8.4 of the contract. Moreover, a contract induced by fraud "is voidable by the recipient," *Steiner v. Am. Friends of Lubavitch (Chabad)*, 177 A.3d 1246, 1255 (D.C. 2018) (quoting

[2] Nor can the Superior Court salvage his summary judgment ruling by making observations regarding the sophistication of the parties after conducting the trial. App. 2590-91. Any such findings are irrelevant to whether the pre-trial summary judgment against the fraud and misrepresentation claims was error, as the summary judgment *limited the scope of the trial and barred the* fraud and misrepresentation claims, and all evidence relevant to them, from being tried in the first place.

Restatement (Second) of Contracts § 164 (1981)), and the recipient "may elect to avoid any legal obligations under the contract," *Schmidt v. Shah*, 696 F. Supp. 2d 44, 63 (D.D.C. 2010). Because the Landlord's contract claims rise and fall with the issue of fraud in the inducement, and evidence of fraud necessarily weighs on the contract claims, this Court should remand for a properly scoped trial reaching both the misrepresentation and contract aspects of the case.

II. The Superior Court's Trial Verdict Misinterpreted the Contract and Should be Reversed.

The Superior Court also erred in deciding the contract-based claims against the Hospital. Although the Superior Court's erroneous holdings were documented in its bench trial verdict, they universally concerned interpretation of the Lease contract and thus are subject to *de novo* review. *Steele Founds.* 937 A.2d at 153. In addition, the three-and-a-half years between trial and verdict rebuts any deference the trial court might receive for any factual aspects and counsels full *de novo* review of the record. *See Keller*, 38 F.3d at 21; *Hollis*, 323 F.3d at 338.

A. The Superior Court Erred in Interpreting the Term "New HVAC System" in the Lease.

The trial court determined that the phrase "new HVAC system" in the Lease referred only to "the HVAC central plant that was located in the basement (and partly on the roof) of the building," instead of the entire integrated HVAC system and all of its component parts. App. 2584-85. This narrow interpretation led the trial court

to conclude that the Landlord had not breached the Lease and that the Appellants were not entitled to withhold rent under Lease § 8.4. App. 2590. The trial court's interpretation of the contractual term requiring the Landlord to have installed a "new HVAC system" was erroneous.

First, the trial court interpreted the term "HVAC system" narrowly by relying almost exclusively on an agreement between other parties regarding a subject entirely different than the Landlord's obligations to the Hospital. App. 2584. It was an easement agreement between the Landlord and apartment developer. The agreement strictly concerned permissions for the apartment developer to move about the whole building—both the hospital and apartment wings—to disconnect scores of common systems. App. 2563. One of those common systems was the common HVAC system, but the easement agreement said not a word about the work the Landlord was performing for the Hospital. All of the easement agreement was focused on the apartment project next door, and the needs to access the whole building to execute it.

The Superior Court held that, because the easement agreement was the only other document in the orbit of the Lease mentioning work on "HVAC system," that document solely governs what installing "a new HVAC system" means in the Lease. App. 2584.

The trial court's reliance on the easement agreement was error. Reinforcing that the easement agreement governs only how the apartment developer can move about the building (including parts it does not lease), the Lease refers to the easement agreement as only governing the Hospital and apartment developer's "right of access" to the other's sections of the building. App. 1773, 1805-06. Tellingly, Section 8.4 of the Lease—the term obligating the Landlord to have installed a new HVAC system—contains no reference to the easement agreement. App. 1788.

To assign to the easement agreement the purpose of defining the HVAC system the Landlord was providing the Hospital, contrary to the text of the Lease and the easement agreement, is a straightforward misreading of the contractual documents, in the heartland of errors in contractual interpretation that this Court reverses. *See Miller & Long Co. v. John J. Kirlin, Inc.*, 908 A.2d 1158, 1160 (D.C. 2006).

Moreover, the Superior Court's laser focus was on Exhibit D to the easement agreement. App. 2565-66, 2584. That Exhibit D described what the apartment developer was doing to detach the building's common HVAC system. While the core easement agreement was attached to the executed Lease, this seemingly crucial Exhibit D was not. When counsel for the Landlord sent the exhibits to the Lease to counsel for Hospital, he removed Exhibit D to the easement agreement containing the description of the Developer's HVAC work. App. 1593-1700. Exhibit D is

simply not a part of the Lease. The Superior Court holding—that Exhibit D made the four corners of the contract unambiguous as to the scope of the HVAC work the Landlord promised the Hospital—was error.

The Superior Court excused the Landlord's having omitted this exhibit to an exhibit to the Lease that the Landlord now claims is crucial. The Superior Court explained that the easement agreement was recorded and, if the Hospital were curious about the exhibit, it could have tracked it down with the D.C. Register of Deeds. But claiming that a document, absent from the contract itself, is part of the contract and excludes all other interpretations is without precedent, whether or not several days interacting with District government might have found it.

Second, the Superior Court's erroneous focus on the easement agreement crowded out any accurate interpretation of the relevant contractual term. That appears in Section 8.4 of the Lease, where the Landlord obligated itself to install "a new HVAC system." App. 1788. "[N]ew HVAC system" is not defined or otherwise assigned any special meaning in the Lease. At a minimum, the term "new HVAC system" means a system that would work to heat, cool, and ventilate the building. That is the plain and ordinary meaning of HVAC system, which must control. *Dyer v. Bilaal*, 983 A.2d 349, 355 (D.C. 2009). "'[A] court must honor the intentions of the parties as reflected in the settled usage of the terms they accepted in the contract, and will not torture words to import ambiguity where' there is none."

Id. (citation omitted). If the Landlord wanted "new HVAC system" to mean something else, the Landlord needed to put an explicit term to the contrary in the contract.

The plain and ordinary meaning of "new HVAC system" is: a new and integrated series of equipment capable of heating, ventilating, and air-conditioning a building. The word "system" refers to a group of interacting and interdependent items forming a unified whole. *See, e.g.*, *System*, MERRIAM-WEBSTER ("[A] regularly interacting or interdependent group of items forming a unified whole"), http://tinyurl.com/2taf7kka (last visited Jan. 4, 2024); *Interstate Fire & Cas. Co. v. Wash. Hosp. Ctr. Corp.*, 758 F.3d 378, 383 (D.C. Cir. 2014) ("District of Columbia courts routinely consult dictionary definitions of disputed terms."). And "system" necessarily denotes equipment that will accomplish the functions that form part of its name—heating, ventilation, and air-conditioning. *See, e.g.*, Amanda Lutz, *What Is HVAC and How Does it Work? (2024 Guide)*, ARCHITECTURAL DIGEST (Dec. 12, 2023) (last visited Jan. 4, 2024), http://tinyurl.com/2289z5e8 (explaining that "HVAC" is a term that stands for "all the different types of cooling and heating systems homeowners use *to change the temperature and humidity indoors*" (emphasis added)). Thus, installing a "new HVAC *system*" cannot mean installing a few new parts and, importantly, leaving behind an apparatus that cannot regulate the temperature of the Hospital.

This does not necessarily mean the work must reach every nook and cranny of the building, a straw man that the Superior Court attacked when attempting to interpret the contract. App. 2583-84. But it does mean that whatever components of the system that the Landlord did replace would leave a system that would heat, cool, and ventilate the Hospital. And there is no dispute that the Landlord's work on the HVAC system did not allow it to adequately heat or cool the premises. *See* App. 2564.

This Court should reverse the trial court's erroneous interpretation of the term "new HVAC system" in the Lease, and remand for proceedings consistent with the plain meaning of the term.

B. The Superior Court Erred in Interpreting the Lease's Provisions for Non-Acceptance of the HVAC System.

To address the continuation of the HVAC work nearly until the closing of the bankruptcy sale, Section 8.4 of the Lease allowed the new Hospital owners to operate in the building for 90 days and to reject the HVAC system at the end of that period. On March 15, 2015, within the 90-day period provided by Section 8.4, the Hospital notified the Landlord that it was not accepting the system. App. 1770. That non-acceptance was stated clearly and explained that the system's ability to cool the Hospital had not yet been proven. App. 1770. Section 8.4, in turn, required the Landlord to tell the Hospital if it had any problem with the Hospital's notice of non-acceptance, within 30 days.

The Superior Court, in an erroneous and strained reading of the Lease, held the Hospital waived any objections it had to the HVAC system because its 90-day notice was insufficiently detailed. App. 2585. According to the Superior Court, Section 8.4's use of the phrases "object[]" and "any matters" required the Appellants to itemize specific issues to which the Hospital objected. App. 2585. The consequence of insufficient detail, according to the Superior Court, was full waiver of the Hospital's rights regarding the HVAC system. App. 2585.

That interpretation of the contract is error, and this question of contract interpretation should be reviewed *de novo*. *See Steele Founds.* 937 A.2d at 153. Section 8.4 did not set up a pleading game, whereby the parties were required to provide some unspecified level of specificity by the 90th day or forfeit their rights to enforce the obligation to provide a new HVAC system forever. To the contrary, Section 8.4 set up a cooperative process between tenant and landlord, where if the Landlord had concerns about the notice's adequacy, it had to raise them within 30 days and the parties would work together to address them. App. 1788. This process was right in line with the Lease's cure provisions that required notice of a shortcoming by another party and then a 30-day period in which to cure the issue. App. 1797-98.

In addition, the Superior Court's interpretation of Section 8.4 of the Lease stops too soon. If Section 8.4 is to be strictly interpreted, all of it needs to be. And

the Superior Court did not address the last sentence of Section 8.4. That sentence, when read in conjunction with the notice requirement, sets up a process that puts the onus on the Landlord to object in writing to any deficiencies in the initial notice or face rent withholding. Thus, if the Landlord believed the Hospital's notice was deficient in any way, the Landlord was required to say so in a written response, not wait to raise its objections to the notice's content at a trial years later.

In any event, even if Section 8.4 did set up a high-stakes game of providing sufficient detail in the notice of non-acceptance or forfeiting rights, the Lease itself allowed the 90-day period to be extended. Section 24.18 of the Lease expressly extends the time to comply with any contractual obligation if a delay in doing so results from a cause beyond the party's reasonable control, such as weather. *See* App. 1810 ("In the event either party is in any way delayed, interrupted or prevented from performing any of its obligations under this Lease . . . and such delay, interruption or prevention is due to . . . any . . . cause beyond such party's reasonable control . . . then such party shall be excused from performing the affected obligations for the period of such delay, interruption or prevention."). This term is routine in leases, and weather is a paradigmatic event that triggers it. Here, as the notice explained, the Appellants could not determine the working condition of all of the components of the HVAC system "due to cold weather." App. 1770. Section 24.18 expressly was raised by the Hospital at trial and in post-trial briefing (*see* App. 1557-

58), but the Superior Court never mentioned its effect on Section 8.4. Its failure to address extensions pursuant to Section 24.18, an express part of the Lease, was error.

C. The Superior Court Erred in Interpreting the Lease's Requirement that the Landlord Provide Working Generators.

The Superior Court also erred in interpreting the Lease's provision requiring the Landlord to install functioning back-up electrical generators in the Hospital. App. 2585-86.

Section 8.4 of the Lease required the Landlord to cause the building to "be *served by* the repair and relocation of *generators* that [the Landlord] caused to be installed, in the Building." App. 1788 (emphasis added).

The Hospital's generators did not work when the Appellants took possession of the property in 2014 and were not fully functioning until almost a year later. App. 1082-83. The Landlord installed just one used generator, App. 728-30, and that ancient piece of equipment failed to operate correctly for most of 2015, App. 1394. Moreover, the Hospital requires three working generators at all times: Two to handle the electrical load of the Hospital's system, and one redundant generator for use if one of the other two does not start. App. 1079. The consequences of having inadequate electric power at the Hospital are dire—without sufficient backup generator power, the Hospital's ventilators would fail and many of its patients would not survive. App. 1079-80. To protect against that catastrophic outcome, when the

generator provided by the Landlord failed, the Appellants had to expend $131,122.10 to rent a backup generator. App. 1084-85, 1199.

The Superior Court held that the Landlord "fulfilled [its] obligation" to perform generator work under Section 8.4 by installing the single generator. App. 2585-86. But Section 8.4 plainly refers to "generators," not a single generator. And it charges the Landlord with the "repair" of those generators so that the building could be "served by" them. The Landlord did not do this. Based on the plain meaning of the language used in the Lease, the Landlord's provision of a single generator that failed to meet the Hospital's electrical needs did not satisfy the Landlord's obligation under Section 8.4. *Dyer*, 983 A.2d at 355.

This Court should reverse the Superior Court's erroneous interpretation of the generator provision and remand for proceedings consistent with the proper reading of Section 8.4.

D. The Superior Court Failed Appropriately to Address the Bankruptcy Proceedings from which the Lease Arose.

The Superior Court also erred by failing appropriately to address the Lease's context: The federal-court-administered bankruptcy sale proceedings that saved the Hospital from closure. In May 2014, the Appellants reached the point of no return in purchasing the Hospital, as the Appellants were committing to provide Specialty Hospitals with a court-approved, debtor-in-possession financing facility until the sale closed. App. 946-53, 1701-06. There was no going back, as the Appellants

would be investing $30 million in keeping the Specialty Hospitals open and would lose all of it if the sale did not ultimately close. So the Appellants entered into a bankruptcy sale support agreement with the Landlord, outside the bankruptcy courtroom, minutes before the hearing approving the financing facility. App. 946-53. That agreement committed the Appellants to paying the $4.5 million bankruptcy exit payment over a period of time, committed the Landlord to install the new HVAC system the parties had been discussing, and committed the parties to enter into a Lease that did not deviate from the bankruptcy sale support agreement. App. 1701-02, 1704-05.

Because May 2014 was the point of no return, the Superior Court erred by faulting the Appellants for not finding out what the Landlord was not disclosing in the ensuing months. The Landlord omitted an exhibit to the Lease in the executed version that the Landlord now believes defines its most important obligation; the Superior Court held that the Hospital should have gone down to the District's Recorder of Deeds and found the recorded document. App. 2563, 2584. Even though Section 8.4 of the Lease was entirely consistent with the state-of-the art HVAC system costing $5 million the Landlord said it was installing to obtain the commitment to a $4.5 million bankruptcy exit payment in May 2014, the Superior Court chided the Hospital for not demanding additional details in the contract to enforce those representations. App. 2570-71. The Superior Court, improperly given

the context, subordinated what the Landlord said about the HVAC system in the weeks leading up to the May 2014 agreement and elevated the importance of later opportunities to detect deviations from those representations after the die was fully cast.

Moreover, given that this Lease sprang from bankruptcy court proceedings, the Superior Court erred in interpreting the contract to set up a game of hide and go seek, where the Landlord can make misleading statements, fail to disclose material facts, and it is always the Hospital's burden to figure them out.

The Landlord came to those bankruptcy proceedings objecting to the debtor's continued operations in Northeast Washington until it was paid multiple millions of dollars. The Landlord was making a claim on scarce resources to fund the Hospital's continued operations and pay other creditors, including the United States Government. App. 909, 921-22, 931. But those participating in bankruptcy proceedings must be particularly transparent and come in with their cards up. *In re Seasons Partners, LLC*, 439 B.R. 505, 512 (Bankr. D. Ariz. 2010) ("It is essential that bankruptcy proceedings be transparent, candid and always operate in that spirit."). Bankruptcy proceedings are no place for ambiguous, half-true assertions of why payments are required or for less than full candor. The Appellants were entitled to trust what the Landlord was representing amidst these federal bankruptcy

court proceedings, and the Superior Court erred by not sufficiently taking this context into account when interpreting the Lease.

This Court should undertake a searching review of the Superior Court's failure to account for the full context of the contract's formation, and its misplaced efforts to magnify technicalities on issue after issue decided against the Appellants. This Court cannot assume that these judgments were based on a close appraisal of evidence, as the Court waited three and a half years to publish its findings and conclusions on a trial conducted in 2018. *See, e.g.*, *Keller*, 38 F.3d at 21; *Hollis*, 323 F.3d at 338.

III. The Superior Court Erred by Awarding the Landlord All of Its Attorneys' Fees Without Accounting for the Landlord's Loss on the Sweeping Majority of its Claimed Damages.

Pursuant to a fee-shifting provision in the Lease, Section 24.22, the Superior Court awarded the Landlord all of its $2.2 million in fees and expenses incurred in this litigation. In light of the errors discussed above, the fee award should be reversed and remanded pending further proceedings in the Superior Court. *See Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n*, 913 A.2d 1260, 1265 (D.C. 2006); *see also Psaromatis v. Eng. Holdings I, L.L.C.*, 944 A.2d 472, 490 (D.C. 2008) (altering the merits outcome removes "the legal predicate . . . underlying the trial court's award of counsel fees").

Even absent reversal of the merits decisions, the Superior Court erred by not reducing the attorneys' fees award because it rejected the vast majority of the damages claimed by the Landlord. The Landlord sought $1.204 million in withheld Lease payments and $4.484 million in late fees and interest up until trial. Pursuing the same theory, the Landlord sought $61 million in late charges and interest through judgment. As his last act as a sitting Superior Court judge, Judge Campbell rejected that bid for dozens of millions of dollars and reduced the existing late judgment and interest award by more than $3.482 million to $1,002,943. But the Superior Court's fee order never mentioned this rejection of most of the Landlord's claimed damages and awarded the Landlord every penny that it sought in fees.

This Court consistently has reversed when the trial court does not reduce fee awards to account for a plaintiff's failure to obtain a large percentage of its claimed damages. In *Fleming v. Carroll Publ'g Co.*, 581 A.2d 1219, 1228-29 (D.C. 1990) ("*Fleming I*"), for example, this Court held that the Superior Court erred in awarding the full amount of the attorneys' fees sought when the plaintiff was only partially successful in the relief he was seeking. *Id.* As a result, the Court remanded the fee award for further consideration, noting that "the degree of success in litigation is a relevant factor in the award of attorney's fees." *Id.* at 1228-29. Attorneys' fees awarded under "contractually based provisions" are no exception—they "are subject to reduction where the defendant has successfully asserted defenses or

counterclaims." *Fleming v. Carroll Publ'g Co.*, 621 A.2d 829, 837 (D.C. 1993) ("*Fleming II*"); *see also FDIC v. Bender*, 182 F.3d 1, 6 (D.C. Cir. 1999) ("Although [prior precedent] dealt with [a] statutory fee award provision[], we see no reason (absent contractual language to the contrary) why the same commonsense standard should not apply to fees awarded by agreement of the parties.").

This Court followed the same approach in *Fred A. Smith Management Co. v. Cerpe*, 957 A.2d 907, 919 (D.C. 2008). There, the Court vacated a fee award because the trial court did not "consider whether [the plaintiff's] overall degree of success" justified granting him the full amount of fees expended on the case and remanded for the trial court to "determine a percentage reduction that reflects [the plaintiff's] overall success." *Id.*

This Court also has affirmed fee awards that significantly reduced the fees sought because the plaintiff had not prevailed on all its claims, as correctly implementing this rule of law. *See Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 993 (D.C. 2007).[3]

[3] This Court's decisions are right in line with the principle that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)); *see also Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) ("[T]he *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee[.]"); *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 599 (D.C. Cir. 1996) ("If the prevailing party achieved less than complete success, we must reduce that base to reflect the degree of success achieved."); *see also Washington Nat'ls Stadium*, 192 A.3d at 587-88 ("[W]here a

The Superior Court, therefore, erred by applying the wrong legal standard to determine the appropriate award of fees. A trial court must reduce a fee award for partial success. And the Superior Court here introduced another layer of error by not even recognizing or providing any indication that it had considered this legal principle. For this reason, this Court should reverse the fee award and remand for further proceedings.

Beyond the failure to reduce fees, the Superior Court erroneously justified the fee award on grounds that the court had granted summary judgment that $1.2 million in rent was improperly withheld, and the Hospital should have paid this sum over to the Landlord before trial. *See* App. 2674. But that summary judgment ruling did not happen. Minutes before opening statements at trial, the Superior Court made clear that it was only entering summary judgment regarding the withholding of rent for a patient loading ramp. App. 410-11. That was a "$19,000" issue. App. 411. Whether the contract permitted the Hospital to withhold sums regarding the HVAC system—nearly all of the $1.2 million in withheld rent at issue—would be tried. App. 407, 410-11.

Superior Court Judge McKenna also erred in failing to reconsider the fee award on grounds that the presiding trial judge is owed "substantial deference."

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plaintiff has achieved only partial or limited success, the judge may adjust the fee to reflect the level of success.").

App. 2731. A trial judge's fee award is not an untouchable exercise of discretion, as this Court has made clear by reversing fee awards that do not account for failing to obtain a large percentage of the claimed damages. *See*, *e.g.*, *Fleming I*, 581 A.2d at 1221, 1228-29; *Fleming II*, 621 A.2d at 837 ("[I]n determining an appropriate award the trial court *must* . . . *take into consideration* the fact that [a litigant's] suit was only partially successful." (emphasis added)). In addition, by not addressing the rejection of the majority of the Landlord's claimed damages, Judge Campbell's error was in applying the wrong legal standard.[4] That defect is always reviewed *de novo* and should always be corrected on reconsideration.

In addition, Judge Campbell's nearly half-decade delay in deciding the merits and the fees issues rebuts any assumption that the fee award represented a close appraisal of what happened at trial. *See, e.g.*, *Keller*, 38 F.3d at 21; *Hollis*, 323 F.3d at 338.

Finally, the late fee issue was not a sideshow that "consumed a relatively insignificant amount of attorney time." *See* App. 2734. At trial, the Landlord devoted substantial time in its opening and closing statements to this issue. App.

[4] A footnote in Judge Campbell's order reversing course and rejecting the late fee and interest damages stated that a separate order coming out that day would resolve the attorneys' fee issue. App. 2675. Contrary to Judge McKenna's reasoning, that passing, cross-reference footnote is far from the consideration of partial success required by this Court's precedents. App. 2733.

443-46; App. 1499-1503. The parties also spent substantial time questioning and cross-examining trial witnesses extensively about it. App. 620-32; App. 823-38.

Importantly, the Landlord's demand for millions in inflated late fees and interest was the principal impediment to settlement. App. 478-80. It was the reason pre-trial mediation and the costs of trial occurred. And this record demonstrates why the courts must reduce fee awards for claiming and not obtaining large amounts of damages. Absent such reductions, a plaintiff will have little incentive to tailor its damages claims, believing its contractual counter-party will end up paying for an effort to achieve a big award even if the plaintiff achieves only a small victory. The legal question at issue here will directly affect the congestion of this jurisdiction's courts.

CONCLUSION

The Superior Court should reverse the Superior Court's summary judgment against the Hospital's fraud and misrepresentation claims. As a remedy, the Court should overturn the judgment in favor of the Plaintiff and remand for a trial with a proper scope of claims, including as to what the contract means and whether it can be enforced. The Superior Court also erred in its trial judgment on the contract claims, which should be reversed and the case remanded for proceedings consistent with a correct interpretation of the contractual terms at issue. Finally, this Court

should reverse the fee order for failure of the Superior Court to consider the Plaintiff's failure to obtain the sweeping majority of its claimed damages.

Dated: January 4, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January 2024, a true and correct copy of the foregoing was served, via electronic filing, on Appellee's counsel in these matters through the D.C. Court of Appeals electronic filing system.

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Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
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2. Any information revealing the identity of an individual receiving mental-health services.

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4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ *Michael J. Edney*	23-CV-516 & 23-CV-775
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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, a true and correct copy of the foregoing Redaction Certificate Disclosure Form was filed and served via the Court's electronic filing system on:

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